

Sentencing Council meeting:
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SC(23)MAR07 – Environmental offences
n/a
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1 ISSUE

1.1 In 2021 and 2022 the Council discussed requests from the Herts Fly Tipping Group to make changes to the Environmental offences guideline specifically in relation to the way it operates in sentencing fly tipping cases.

1.2 The Council rejected the bulk of their arguments but did think that the way in which the guideline emphasises fines over community orders might be worth reconsidering. This paper considers whether and how this should be done.

2 RECOMMENDATION

2.1 That the Council agrees to consider some minor changes to the Environmental offences guideline for individuals as part of the next miscellaneous amendments consultation.

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 the Environmental Protection Act 1990, s.33; the Environmental Permitting (England and Wales) Regulations 2010, regulations 12 and 38(1), (2) and (3); and the Environmental Permitting (England and Wales) Regulations 2016, regulations 12 and 38(1), (2) and (3). 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 The one aspect of the guideline for individuals that we thought could be usefully revisited is the extent to which it steers sentencers away from community sentences in favour of fines.

3.5 In a response to the Herts Fly tipping group in July last year we said:

The Council has looked again at the references to community orders in the guideline and recognises that while community sentences are available, the guideline does emphasise fines over community orders. While it is not possible to know whether an increased use of community orders would be more effective than financial penalties in deterring offending, the Council felt that there could be some merit in reconsidering this point as part of some wider work it is undertaking into guidance given to courts on the use of community orders.

3.6 The 'wider work' referred to above is the revision of the Imposition guideline.

Currently the [Imposition guideline](#) contains the following statements in the general principles section on community orders:

A community order must not be imposed unless the offence is 'serious enough to warrant the making of such an order'.

Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.

3.7 This aspect of the Imposition guideline has not yet been discussed by the Council but there are no proposals to make significant changes. The issue is with the wording in the Environmental guideline which goes further:

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.

3.8 This was a deliberate policy by the Council when the guideline was developed – the idea being that the offending was often financially motivated and so financial penalties were most appropriate.

3.9 What is contemplated is a modest change to bring it into closer alignment with the Imposition guideline and to give less emphasis to fines over community orders, such as:

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

- a community order must not be imposed unless the offence is serious enough to warrant the making of such an order (section 204 of the Sentencing Code)

Where the community order threshold has been passed, a fine may still 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.

3.10 Also in the sentence tables where a fine and community order are listed as alternatives, the order could be reversed and where a fine is given as a starting point this could be changed to a community order, so that rather than as currently:

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

It could say:

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	High level community order	Medium level community order or band E fine – 26 weeks' custody
Category 4	Medium level community order	Low level community order or band D fine – Band E fine

3.11 Any such changes would not greatly alter the sentencing severity, but are sufficiently significant to require consultation. The suggestion is, therefore, that proposals could be included in this year's miscellaneous amendments consultation.

Question 1: Does the Council agree to include consideration of proposals for minor changes to the Environmental guideline for individuals in the next miscellaneous amendments consultation?

4 IMPACT AND RISKS

4.1 The number of adult offenders sentenced for offences under s 33 EPA 1990 (which would include fly-tipping):

Court	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Magistrates	662	560	545	538	637	598	671	752	641	311	527
Crown	41	22	27	30	25	26	32	26	53	10	23
Total	703	582	572	568	662	624	703	778	694	321	550

4.2 Not all of these offences will be fly-tipping, but what the figures show is (with the exception of 2020) volumes of prosecutions have been fairly stable for many years. Figures from 2020 onwards may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, so should be treated with caution.

4.3 Sentence outcomes for adult offenders sentenced for offences under s 33 EPA 1990:

Outcome	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Discharge	147	141	111	95	86	76	49	65	47	26	37
Fine	468	377	380	411	484	463	503	572	497	233	418
Fines as a proportion	67%	65%	66%	72%	73%	74%	72%	74%	72%	73%	76%
CO	54	43	43	40	48	46	55	62	57	28	38
SSO	9	10	15	8	22	15	37	20	53	6	21
Immd custody	17	4	12	5	11	7	26	10	18	4	5
Other	8	7	11	9	11	17	33	49	22	24	31
Total	703	582	572	568	662	624	703	778	694	321	550

4.4 Fines appear to 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 (although due to a data processing issue, offenders sentenced to a fine of over £10,000 in magistrates' courts during the period 2011 to 2015 may have been excluded from the data and therefore volumes shown for this period may be lower than the actual number sentenced; however, it is likely that the number of missing records is low).

4.5 Median fine amounts received by adult offenders sentenced for offences under s 33 EPA 1990:

	2015	2016	2017	2018	2019	2020	2021
Median fine amount	£250	£300	£320	£300	£320	£320	£320

4.6 As the guideline applies not only to offences under s 33 EPA 1990 but also to offences under the Environmental Permitting (England and Wales) Regulations there is a possibility that any changes to the guideline could have an effect on sentencing for those offences as well. Fines represent a lower proportion of sentences for these offences (around 58% on average for the years 2011-2021) and community orders a slightly higher proportion compared to s.33 EPA 1990. The volumes of offenders sentenced under the regulations are much lower (55 cases in 2021). We would need to consult with the Environment Agency to clarify if there is a likelihood of unintended consequences from any change, but none are apparent at this stage.

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