

Sentencing Council

Sentencing Council meeting: 23 October 2015
Paper number: SC(15)OCT07 – Allocation
Lead officials: Ruth Pope
Lead Council member: Heather Hallett

1 ISSUE

1.1 The Council agreed to amend the Allocation Guideline and, in light of the level of consultation and consensus already achieved on this matter, undertook a short, targeted, consultation with stakeholders in June and July 2015.

1.2 48 responses were received from individuals and stakeholder groups which were largely supportive of the proposals.

1.3 At the September meeting, the Council discussed paragraph two of the guidance relating to a court retaining jurisdiction in straightforward cases where the likely sentence could exceed its powers, and agreed to retain this guidance with some amendments.

1.4 The aim at this month's meeting is to:

- discuss the remaining issues arising from the consultation;
- agree the content of the definitive guideline; and
- agree a timetable for publication and coming into force.

2 RECOMMENDATION

2.1 The Council is asked to consider the suggested amendments to the guideline at **Annex A** and agree the definitive version for publication (on-line only with paper copies available on request) on 26 November 2015.

2.2 A consultation response document explaining any changes to the consultation version will be circulated to members after the meeting for comments to enable this to be published alongside the revised guideline in November.

3 CONSIDERATION

3.1 A version of the guideline with suggested amendments is attached at **Annex A**. Deletions are struck through and additions are underlined.

Responses to the consultation

Consultation question 1: Do you agree with the proposed changes to the Applicability of guideline and Statutory framework sections? Please give your reasons if you do not agree.

3.2 The new layout was welcomed by respondents and all approved of quoting the legislation in the Statutory Framework section. Some respondents pointed out errors in the Statutory Framework section – these have been corrected in the version at Annex A.

3.3 The Justice Committee pointed out that the allocation guideline also applies in the Crown Court (when making decisions in cases sent for trial under s51 Crime and Disorder Act 1998 where no indictable only offence remains) as specified in CDA 1998 Schedule 3 para 9(3). A suggested addition (underlined) to the Applicability of guideline section is shown below:

Applicability of guideline

In accordance with section 122(2) of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all defendants in the magistrates' court (including youths jointly charged with adults) whose cases are dealt with on or after [tbc].

It also applies to allocation decisions made in the Crown Court pursuant to Schedule 3 of the Crime and Disorder Act 1988.

It will not be applicable in the youth court where a separate statutory procedure applies.

Question 1: Does the Council agree to amend the applicability of guideline section to include the Crown Court?

3.4 The Justice Committee also queried why the four factors listed in the existing guideline to which the court should have regard (see below) have been omitted in the draft guideline, noting that whilst these factors are no longer enshrined in s19 MCA 1980, the Criminal Practice Directions (CPD) (at para 9A.2) 'treat these factors as part of the guideline and therefore of freestanding force.'

The court must also have regard to:

- a) the nature of the case;
- b) whether the circumstances make the offence one of a serious character;
- c) whether the punishment which a magistrates' court would have the power to inflict for the offence would be adequate; and
- d) any other circumstances which appear to the court to make the offence more suitable for it to be tried in one way rather than the other.

3.5 As we understand it, the Lord Chief Justice's intention is that once a revised Allocation guideline is in force, the CPD will be amended to simply refer to the revised guideline.

Question 2: Is the Council satisfied that the relevant factors in this list are covered by the guideline?

Consultation question 2: Do you agree with the proposed wording at paragraph 1 of the Guidance section? Please give your reasons if you do not agree.

Guidance

It is important to ensure that all cases are tried at the appropriate level.

1. In general, either way offences should be tried summarily unless:

- the outcome would result in a sentence in excess of the court's powers for a single offence after taking into account personal mitigation and any reduction for a guilty plea; or
- the case involves complex questions of fact or difficult questions of law, including difficult issues of disclosure of sensitive material, in which case the court should consider sending for trial notwithstanding that its powers may be sufficient.

3.6 Approximately half of respondents agreed without further comment. Of the rest, a significant number (including the Justice Committee, the Law Society and the National Bench Chairs' Forum) queried in the first bullet point whether it was appropriate to consider personal mitigation and/or a reduction for a guilty plea in an allocation decision as the defendant will have pleaded not guilty (or not indicated a plea). Others suggested that consideration of these factors at this stage would pose practical difficulties and could cause delays.

3.7 The Justices' Clerks Society and the Magistrates' Association supported the principle behind the first bullet point. Council members will recall that the reason for including a reference to mitigation and guilty plea reductions is to encourage magistrates to consider that the final sentence for an offence may be lower than the starting point in the relevant offence specific guideline.

3.8 The reference to a 'single offence' was questioned and there was a suggestion that the guideline should refer to the courts' powers to sentence to up to

12 months for more than one either-way offence. For example the Law Society suggested:

‘.. a sentence in excess of the court’s powers for a single offence (or the combination of either-way offences)..’

3.9 Several respondents suggested alternative wording for clarification and some of these are reflected in the minor amendments below. Other suggestions include explicitly stating that if magistrates are uncertain as to whether their powers are adequate, they should accept jurisdiction.

3.10 Regarding the second bullet point, many respondents stated that the purpose of this factor as explained in the consultation document was not apparent from the wording in the draft guideline. It is therefore proposed to reword this factor to state clearly the circumstances in which it is likely to apply.

Guidance

It is important to ensure that all cases are tried at the appropriate level.

1. In general, either way offences should be tried summarily unless:

- the outcome would ~~result in~~ be a sentence in excess of the court’s powers for a single offence after taking into account personal mitigation and any potential reduction for a guilty plea; or
- for reasons of very unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a very substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific; the court will rely on the submissions of the parties to identify relevant cases. ~~the case is serious or grave involves complex questions of fact or difficult questions of law, including difficult issues of disclosure of sensitive material, in which case the court should consider sending for trial notwithstanding that its powers may be sufficient.~~

Question 3: Does the Council agree to retain the references to personal mitigation and guilty plea reductions at paragraph 1?

Question 4: Does the Council agree to the proposed amendments to paragraph 1?

Question 5: Does the Council wish to include any other amendments as suggested by respondents?

Consultation question 3: Do you agree with the proposed change of practice as set out at paragraph 2? Is the wording clear? Please give your reasons if you do not agree.

2. However, in **straightforward cases** the court should bear in mind its **power to commit for sentence after a trial** and may **retain jurisdiction** notwithstanding that the likely sentence would exceed its powers.

3.11 The Council discussed the responses to this question at the September meeting. The agreed amendments are shown below:

2. However, In **straightforward cases with no factual or legal complications** the court should bear in mind its **power to commit for sentence after a trial** and may **retain jurisdiction** notwithstanding that the likely sentence ~~would~~ might exceed its powers.

Question 6: Is the Council content with the amended wording of paragraph 2?

Consultation question 4: Do you agree with the proposed guidance at paragraph 3? Please give your reasons if you do not agree.

3. In addition, straightforward cases should be tried summarily even when it is apparent from the list of previous convictions that the defendant is subject to a Crown Court Suspended Sentence Order or Community Order.¹

¹ The power to commit the case to the Crown Court to be dealt with under para 11(1) of Schedule 12 or para 22 of Schedule 8 to the Criminal Justice Act 2003 can be exercised if the defendant is convicted.

3.12 The majority of respondents agreed with paragraph 3 without further comment. Several of those who commented appeared to misunderstand the guidance. This may be a training issue and will be drawn to the attention of the Judicial College and the Legal Trainer Network who will deliver training on the revised guideline. The Criminal Law Solicitors' Association disagreed with this factor stating that if the Crown Court is ultimately going to sentence, then the case should be dealt with in the Crown Court. This is an argument that the Council considered and discounted in relation to paragraph 2 at the September meeting. The remainder of those who commented (including the Law Society, HM Council of Circuit Judges and the Justices' Clerks Society) supported the guidance. One respondent suggested removing the words 'in addition' at the start of the sentence.

3.13 The following minor change is proposed:

3. ~~In addition,~~ Cases should be tried summarily even when it is apparent from the list of previous convictions that the defendant is subject to a Crown Court Suspended Sentence Order or Community Order.

Question 7: Does the Council agree to retain paragraph 3 subject to the minor amendment to the wording?

Consultation question 5: Do you agree with the proposed guidance at paragraph 4? Please give your reasons if you do not agree.

4. All parties should be asked by the court to make representations as to whether the case is suitable for summary trial. The court should refer to definitive guidelines to assess the likely sentence for the offence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence to include personal mitigation.

3.14 The majority of respondents agreed with paragraph 4 without further comment. Several respondents welcomed the emphasis on engaging the defence at this stage. There was some doubt as to whether this factor would make any practical difference as the defence will not make representations if they would prefer Crown Court trial. Others again queried whether it was appropriate to seek personal mitigation at this stage. Concerns were also raised that additional representations would cause delays.

3.15 Alternative wording was suggested by some respondents:

“All parties should be asked by the court to make representations as to whether the case is suitable for summary trial. The court should refer to definitive guidelines (if any) to assess the likely sentence for the offence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case, including those advanced by the defence (both as regards the seriousness of the alleged offence and any personal mitigation) that would be relevant to the sentence to be imposed in the event of conviction.” (Professor Hungerford-Welch)

“All parties should be asked by the court to make representations as to whether the case is suitable for summary trial, if they so wish. The court should refer to the definitive guidelines to assess the likely sentence for the offence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including any if advanced by the defence.” (the Law Society)

3.16 The following minor amendment is proposed:

4. All parties should be asked by the court to make representations as to whether the case is suitable for summary trial. The court should refer to definitive guidelines (if any) to assess the likely sentence for the offence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence to include personal mitigation.

Question 8: Is the Council content with the proposed amendment to paragraph 4?

Consultation question 6: Do you agree with the proposed final paragraph of the Guidance section? Please give your reasons if you do not agree.

Where the court decides that the case is suitable to be dealt with in the magistrates' court, it must warn the defendant that all sentencing options remain open and, that if the defendant consents to summary trial and is convicted by the court, the defendant may be committed to the Crown Court for sentence.

3.17 The majority of respondents agreed with this paragraph without further comment. The remainder of respondents agreed that a clear warning to defendants is important and most agreed with the proposed wording. Some respondents pointed out that by giving this warning in all cases, no distinction is made between those cases where committal for sentence is a real possibility and those where the defendant will certainly be sentenced in the magistrates' court. Some defence representatives suggested that this paragraph (and the guidance that precedes it) will lead to an increase in elections for trial.

3.18 The Council discussed some of these concerns at the September meeting and took the view that an unfettered power to commit for sentence was necessary to enable the retention of more cases in magistrates' court. It follows therefore that a clear warning of this must be given. A very similar paragraph appears in the current guideline, the main change has been to the emphasis given to it. It is not proposed to amend this paragraph.

Question 9: Does the Council agree to retain this paragraph without amendment ?

Consultation question 7: Do you agree that the Linked cases section should be unchanged? Please give your reasons if you do not agree.

Linked Cases

Where a youth and an adult are jointly charged, the youth must be tried summarily unless the court considers it to be in the interests of justice for both the youth and the adult to be sent to the Crown Court for trial. Examples of factors that should be considered when deciding whether to separate the youth and adult defendants include:

- whether separate trials can take place without causing undue inconvenience to witnesses or injustice to the case as a whole;
- the age of the youth, particularly where the age gap between the youth and adult defendant is substantial;
- the immaturity of the youth;
- the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor; and the lack of previous convictions on the part of the youth.

3.19 There were a number of helpful responses to this question several of which suggested that the guidance was an over-simplification and could be improved. Just for Kids Youth Justice Legal Centre and William Davies J suggested amended wording. The proposed wording below incorporates those suggestions and has been endorsed by William Davis J. It is compatible with the guidance in the draft youth guideline. The suggested change to the title of this section is to aid clarity.

Youths jointly charged with adults

The proper venue for the trial of any youth is normally the youth court. That remains the case where a youth is charged jointly with an adult. Where the decision as to the proper venue first must be taken in relation to the adult, the court then will consider where the youth should be tried. The youth must be tried separately in the youth court unless the adult is being sent for trial to the Crown Court and it is in the interests of justice for the youth and the adult to be tried jointly.

Examples of factors that should be considered when deciding whether to send the youth to the Crown Court (rather than having a trial in the youth court) include:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999).
- the age of the youth. The younger the youth, the greater the desirability that the youth be tried in the youth court.
- the age gap between the youth and the adult. A substantial gap in age militates in favour of the youth being tried in the youth court.
- the lack of maturity of the youth.
- the relative culpability of the youth compared with the adult and whether the alleged role played by the youth was minor.
- the lack of previous convictions on the part of the youth.

The court should bear in mind that a youth court now has a general power to commit for sentence following conviction pursuant to Section 3B of the Powers of Criminal Courts (Sentencing) Act 2000 (as amended). In appropriate cases this will permit sentence to be imposed by the same court on adults and youths who have been tried separately.

Question 10: Is the Council content with the title and content of this section?

Consultation question 8: Do you agree with the proposed guidance in the Committal for sentence section? Please give your reasons if you do not agree.

Committal for sentence

There is ordinarily no statutory restriction on committing an either way case for sentence following conviction. The general power of the magistrates' court to commit to the Crown Court for sentence after a finding that a case is suitable for summary trial and/or conviction continues to be available where the court is of the opinion 'that the offence or the combination of offence and one or more offences associated with it was so serious that the Crown Court, should in the court's opinion, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment'.²

However, where the court proceeds to the summary trial of certain offences relating to criminal damage, upon conviction there is no power to commit to Crown Court for sentence.³

2. Powers of Criminal Courts (Sentencing) Act 2000, s.3.

3. Magistrates' Courts Act 1980, s.3(4) and s.22.

3.20 The majority of respondents agreed with the committal for sentence section. Any objections to this section repeated the concerns about the lack of an incentive to consent to summary trial where there is an unfettered power to commit for sentence. Some respondents suggested the inclusion an explicit statement to the effect that the fact that the magistrates' court has accepted jurisdiction does not fetter the court's jurisdiction to commit for sentence and that there does not have to be any additional information to justify this.

3.21 The committal for sentence section is largely unchanged from the current guideline except that it now reflects the correct statutory test. No changes are proposed to the version consulted on; there is a danger that any attempts to reinforce the message would be repetitive and detract from clarity.

Question 11: Is the Council content with the proposed Committal for sentence section?

Consultation question 9: Please provide any additional comments or suggestions that you have about the proposals.

3.22 Those comments that raised objections or proposed radical amendments were discussed at the Council meeting in September. Most of the other comments were either supportive of the proposals or repeated points made earlier. Some suggested that training (of magistrates and also of CPS) would be needed to bring about change. Mention was made of how the success of the guideline would depend on the implementation of the Transforming Summary Justice and Better Case Management initiatives.

3.23 The original plan had been to implement the guideline almost immediately after publication, on the basis that it represents a change of emphasis rather than a

change of policy and the maximum benefits would be achieved by early implementation. However, the Judicial College have asked for the usual three month period between publication and coming into force to allow them to deliver effective training. They argue that this will have a greater impact than a training programme after the guideline is in force.

3.24 If the Council is able to sign off the guideline at this meeting (with the formatted version circulated to members by email for final checks) it is proposed that the definitive guideline could be published on 26 November 2015 and come into force on 1 March 2016. This would allow time for training and for stakeholder engagement.

Question 12: Subject to any amendments agreed, is the Council content sign off the definitive guideline?

Question 13: Does the Council agree to the proposed timetable?

4 IMPACT

4.1 The impact assessment does not envisage any impact on correctional resources as the guideline does not affect sentence levels. The impact of any change to the definitive guideline will be very difficult to quantify, given the range of other factors that influence allocation decisions and the retention of the option of election for Crown Court trial.

4.2 Due to the complexities of the issues involved it has not been possible to monitor the effects of the current guideline and for the same reasons, there are no plans to monitor in any detailed way the effects of any revisions. However, it will be possible to obtain descriptive statistics on sendings for trial and committal for sentence over time.

4.3 However, an increase in the number of defendants electing trial on the Crown Court would have an impact on caseload and resources. While this is not something the Council has a duty to monitor and nor, for the reasons above, would it be possible to do so, it is something that the Council must bear in mind.

5 RISKS

5.1 There is an expectation that the Council will provide an updated allocation guideline which will result in fewer cases being sent for trial. Allocation decisions are influenced by a number of factors and the guideline is only one part of that wider picture. Publicity and training would ensure that a new guideline had the maximum

impact, but at the same time the Council would want to ensure that unrealistic expectations are not raised as to what a revised guideline can achieve in isolation.

5.2 As outlined above, respondents have suggested a risk of unintended consequences, with a greater number of defendants electing Crown Court trial, which needs to be considered.

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Allocation Guideline

Determining whether cases should be dealt with by a magistrates' court or the Crown Court

Applicability of guideline

In accordance with section 122(2) of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all defendants in the magistrates' court (including youths jointly charged with adults) whose cases are dealt with on or after [tbc]. It also applies to allocation decisions made in the Crown Court pursuant to Schedule 3 of the Crime and Disorder Act 1988. It will not be applicable in the youth court where a separate statutory procedure applies.

Guidance

It is important to ensure that all cases are tried at the appropriate level.

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- the outcome would ~~result in~~ be a sentence in excess of the court's powers for a single offence after taking into account personal mitigation and any potential reduction for a guilty plea; or
 - for reasons of very unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a very substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific; the court will rely on the submissions of the parties to identify relevant cases. ~~the case is serious or grave involves complex questions of fact or difficult questions of law, including difficult issues of disclosure of sensitive material, in which case the court should consider sending for trial notwithstanding that its powers may be sufficient.~~
2. ~~However,~~ In **straightforward** cases with no factual or legal complications the court should bear in mind its **power to commit for sentence after a trial** and may **retain jurisdiction** notwithstanding that the likely sentence ~~would~~ might exceed its powers.
 3. ~~In addition,~~ Cases should be tried summarily even when it is apparent from the list of previous convictions that the defendant is subject to a Crown Court Suspended Sentence Order or Community Order.¹
 4. All parties should be asked by the court to make representations as to whether the case is suitable for summary trial. The court should refer to definitive guidelines to assess the likely sentence for the offence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence to include personal mitigation.

Where the court decides that the case is suitable to be dealt with in the magistrates' court, it must warn the defendant that all sentencing options remain open and, that if the defendant consents to summary trial and is convicted by the court, the defendant may be committed to the Crown Court for sentence.

¹ The power to commit the case to the Crown Court to be dealt with under para 11(1) of Schedule 12 or para 22 of Schedule 8 to the Criminal Justice Act 2003 can be exercised if the defendant is convicted.

Youths jointly charged with adults

Where a youth and an adult are jointly charged, the youth must be tried summarily unless the court considers it to be in the interests of justice for both the youth and the adult to be committed to the Crown Court for trial. Examples of factors that should be considered when deciding whether to separate the youth and adult defendants include:

- whether separate trials can take place without causing undue inconvenience to witnesses or injustice to the case as a whole;
- the age of the youth, particularly where the age gap between the youth and adult defendant is substantial;
- the immaturity of the youth;
- the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor; and
- the lack of previous convictions on the part of the youth.

The proper venue for the trial of any youth is normally the youth court. That remains the case where a youth is charged jointly with an adult. Where the decision as to the proper venue first must be taken in relation to the adult, the court then will consider where the youth should be tried. The youth must be tried separately in the youth court unless the adult is being sent for trial to the Crown Court and it is in the interests of justice for the youth and the adult to be tried jointly.

Examples of factors that should be considered when deciding whether to send the youth to the Crown Court (rather than having a trial in the youth court) include:

- whether separate trials will cause injustice to witnesses or to the case as a whole (consideration should be given to the provisions of sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999).
- the age of the youth. The younger the youth, the greater the desirability that the youth be tried in the youth court.
- the age gap between the youth and the adult. A substantial gap in age militates in favour of the youth being tried in the youth court.
- the lack of maturity of the youth.
- the relative culpability of the youth compared with the adult and whether the alleged role played by the youth was minor.
- the lack of previous convictions on the part of the youth.

The court should bear in mind that a youth court now has a general power to commit for sentence following conviction pursuant to Section 3B of the Powers of Criminal Courts (Sentencing) Act 2000 (as amended). In appropriate cases this will permit sentence to be imposed by the same court on adults and youths who have been tried separately.

Committal for sentence

There is ordinarily no statutory restriction on committing an either way case for sentence following conviction. The general power of the magistrates' court to commit to the Crown Court for sentence after a finding that a case is suitable for summary trial and/or conviction continues to be available where the court is of the opinion 'that the offence or the combination of the offence and one or more offences associated with it was so serious that the Crown Court should, in the court's opinion, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment'.²

However, where the court proceeds to the summary trial of certain offences relating to criminal damage, upon conviction there is no power to commit to Crown Court for sentence.³

² Powers of Criminal Courts (Sentencing) Act 2000, s.3

³ Magistrates' Courts Act 1980, s.3(4) and s.22

Statutory Framework

Section 19 of the Magistrates' Courts Act 1980 provides that:

- (1) "The court shall decide whether the offence appears to it more suitable for summary trial or for trial on indictment.
- (2) Before making a decision under this section, the court—
 - (a) shall give the prosecution an opportunity to inform the court of the accused's previous convictions (if any); and
 - (b) shall give the prosecution and the accused an opportunity to make representations as to whether summary trial or trial on indictment would be more suitable.
- (3) In making a decision under this section, the court shall consider—
 - (a) whether the sentence which a magistrates' court would have power to impose for the offence would be adequate; and
 - (b) any representations made by the prosecution or the accused under subsection (2)(b) above,

and shall have regard to any allocation guidelines (or revised allocation guidelines) issued as definitive guidelines under section 122 of the Coroners and Justice Act 2009.
- (4) Where—
 - (a) the accused is charged with two or more offences; and
 - (b) it appears to the court that the charges for the offences could be joined in the same indictment or that the offences arise out of the same or connected circumstances,

subsection (3)(a) above shall have effect as if references to the sentence which a magistrates' court would have power to impose for the offence were a reference to the maximum aggregate sentence which a magistrates' court would have power to impose for all of the offences taken together."

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

"Every court -

- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

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