

Sentencing Council

Sentencing Council meeting: 25 September 2015
Paper number: SC(15)SEP05– 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.

1.3 The consultation responses were largely supportive of the aims of the revised guideline, which were to provide clear guidance to enable and encourage magistrates' courts to retain more cases for summary trial.

1.4 However, a significant minority raised important questions regarding:

- the principle of there being no expectation that by accepting summary jurisdiction a defendant would be sentenced within magistrates' courts powers; and
- the practical effects of the guideline namely, whether it would, in fact, achieve the desired outcome of fewer cases being sent to the Crown Court for trial.

1.5 Michael Caplan and Tim Holroyde are holding a meeting with representatives from the defence community on 24 September and will report on the matters raised.

2 RECOMMENDATION

2.1 The Council is asked to consider;

- issues of principle at paragraphs 3.2 to 3.10 below and decide on the aims of the guideline;
- whether the guideline as drafted is likely to achieve the aim of retaining more cases in magistrates' courts (see paragraphs 3.11 to 3.16 below); and
- if not, whether any of the proposed amendments at paragraphs 3.27 – 3.30 would assist, or whether it can identify other solutions.

3 CONSIDERATION

3.1 The draft guideline is attached at **Annex A**. This paper is focussing on the aspects of the draft guideline which caused the most controversy.

The 'expectation principle'

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.

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.

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.

3.2 23 respondents agreed to question 3 without further comment. The National Council of District Judges, the National Bench Chairs Forum (NBCF) and the Magistrates' Association (MA) welcomed the change and felt that it would lead to more cases being tried in magistrates' courts. Professor Hungerford-Welch agreed with the proposal which he felt was consistent with the recommendation made by the PQBD in his Review.

3.3 Others disagreed. Anthony Edwards states "this straight forward application of the expectation principle in sentencing is overlooked by the Chief Magistrate in his interim guidance and belittled by the President in his report. If it is thought no longer to apply then clients will inevitably elect trial." The Criminal Law Solicitors Association felt that it was better for a defendant to be sentenced by the trial court and were concerned that unrepresented defendants would not understand the risk of committal after trial. The Law Society also felt it was preferable for a defendant to be sentenced by the trial court and if it was considered that the defendant was at risk of a sentence in excess of magistrates' courts powers the case should be sent to the Crown Court.

3.4 The Justices' Clerks Society (JCS) agreed that potentially more cases should be kept in the magistrates' court and committed for sentence where appropriate but suggest that the guideline goes further than envisaged by the Review and that legislative change may be required (this point is also made by the Justice Select Committee see 3.9 below). The JCS think further clarification is required and suggested it might be better to focus on borderline cases where for lack of information (either about the offence or the offender) the court is unsure whether its powers would be sufficient.

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

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.

<p>Consultation Question 6: Do you agree with the proposed final paragraph of the Guidance section? Please give your reasons if you do not agree.</p>
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3.5 26 respondents agreed to question 6 without further comment. Of the rest the majority supported the proposed wording which was considered vital.

3.6 There was a consensus that a clear warning should be given if the guideline provides for no restriction on committal for sentence; what was controversial was whether or not there should be an expectation that in at least some cases once jurisdiction has been accepted, the case would be sentenced within magistrates' court powers.

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

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.

3.7 34 respondents agreed to question 8 without further comment. Anthony Edwards suggests that the Council must decide whether the expectation principle is to be abandoned; if so defendants must be advised of the likelihood for committal for sentence with the risk of more committals for trial. Professor Hungerford-Welch suggests the inclusion of 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.

3.8 In response to consultation question 9 which asked for any additional comments or suggestions, many sentencers welcomed the proposals and felt that they would encourage the retention of jurisdiction by magistrates. The NCBF suggested incorporating the following wording from the PQBD's review into the guideline:

The Sentencing Guideline on Allocation should be construed such that, in cases where Magistrates are uncertain about the adequacy of their powers (short of it being likely that they are not [adequate]), they can retain the case and commit for sentence if they later take the view that the case falls outside their sentencing powers. This possibility needs to be made clear to the accused.

3.9 The Justice Committee "note that the overall effect of the draft guideline appears to be that straightforward cases should be tried summarily, regardless of likely sentence (paragraphs 2 and 3 of the section "Guidance"). The only factor prescribed by statute (apart from taking into account representations and allocation guidelines) is the sentencing power of a magistrates' court. We consider that it is not

clear that the approach in the draft guideline is consistent with the statutory emphasis on sentencing power.”

3.10 The Council of HM Circuit Judges state:

We can see obvious advantages in the magistrates accepting jurisdiction subject to their power to commit for sentence. We are concerned however that cases that cross the custody threshold and merit a sentence (be it immediate or suspended) in the 6 to 12 month range will be under-sentenced. If the real aim is to keep more cases in the magistrates’ court then consideration should be given to bringing into force the provisions of the 2003 Act that increase their sentencing powers. In saying this we are not necessarily endorsing an increase in the magistrates’ powers but stating what appears to be the logical position. We appreciate however that this may lie outside the Sentencing Council’s terms of reference and involve wider issues of policy.

We do not think that the proposed guidelines make it sufficiently clear whether they are intended to embody a fundamental change from the previous practice. If so this should be spelt out clearly; otherwise it will be taken to be simply a change of presentation rather than substance. Those who have to apply these guidelines are entitled to know what they represent.

The practical effects of the proposals

3.11 As stated above, the majority of respondents welcomed the proposals and (subject to some drafting changes and relatively minor issues which will be discussed at the October Council meeting) consider that the draft guideline would result in more cases being retained in magistrates’ courts.

3.12 The CLSA, however, stated that as the effect of the proposals would be to “increase the workload of the magistrates’ courts and place an even greater strain on CPS resources [] it is only worth considering if the resources available to the Crown are increased to allow the work to be carried out in a efficient, timely and professional manner.” Further they state that “the provision of criminal defence services is currently finely balanced. Justice in the Crown Court costs more ...the resource devoted to serious cases in the Crown Court is greater, both by the defence and the Crown. If the current model is adjusted to bring more cases into the magistrates’ court funding regime then (1) practitioners’ top line will be dramatically affected and (2) the model on which firms have tendered for two tier contracting will no longer be accurate” running “the risk of placing firms, already teetering on the edge, into insolvency.” At the same time, they suggest that the guideline is likely to lead to more defendants electing Crown Court trial. This will affect the fee paid to the solicitor/advocate if the defendant subsequently pleads guilty and will put the solicitor in a dilemma of an ‘own interest’ conflict.

3.13 Anthony Edwards states that the proposal that magistrates courts should accept jurisdiction for straightforward cases even if their powers of sentence are insufficient creates considerable practical difficulties against the background of the Criminal Courts Charge, which is only £200 more for an either way trial in the Crown Court than magistrates' courts. Many defendants consider that they would rather face trial by jury as the chances of acquittal are greater. If accepting summary trial does not mean that sentence will be limited to magistrates' court powers then many more may elect Crown Court trial.

3.14 Andrew Turnbull, a barrister, suggests that the blanket warning that where a magistrates' court accepts jurisdiction all sentencing options, including committal for sentence remain open contradicts the desire to "sell" the idea of summary trial by not giving anything as a reward. He asserts that most defendants would consent to summary trial if they were offered a guarantee that the sentence would not exceed six months. He notes the consequences for fees if a defendant elects Crown Court trial.

3.15 He comments: "if the idea behind this is that by making a few subtle changes in the wording, more cases will be dealt with summarily, then you are mistaken. Defence lawyers will still advise their clients to elect in appropriate cases, if there is going to be a trial, and savvy defendants will still want the Crown Court. Defendants who want the Crown Court don't tend to mind how they arrive there." To retain more cases he suggests:

- that where magistrates accept jurisdiction and summary trial is consented to, a guarantee be given that the sentence passed will **not** exceed 6 months' custody (or 12 months for two or more either way offences);
- that there should be a loss of credit immediately at the point Crown Court trial is elected;
- for magistrates to make more use of the option to adjourn for a PSR keeping all options open – if the PSR is positive a community order may result; and
- the CPS be prepared to agree bases of plea at magistrates' courts.

3.16 A legal adviser in the magistrates' courts suggests that it would assist the retention of cases in magistrates' courts if they were able to assure defendants that if they consent to summary trial they will receive a sentence within magistrates' courts powers. He notes that a warning that committal for sentence remains an option is often given in cases where there is absolutely no likelihood of it applying, but this

may not be apparent to the defendant. He suggests a compromise: if magistrates allocate a case for summary trial, the accused consents, is convicted and committed for sentence, the Crown Court's sentencing powers instead of being the same as on conviction on indictment could be limited to (for example) double those of the magistrates' powers. That may still give the magistrates the confidence to retain jurisdiction in borderline cases while enabling the accused in such cases to be assured of a limitation of the severity of their sentence if convicted, if they consent to summary trial.

Summary of issues

3.17 There are a number of issues of law, principle, and practical effect raised by the above responses which are interlinked. These can be summarised as follows:

3.18 **Law:** section 19 of the Magistrates' Courts Act 1980 (MCA) 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.

3.19 Council members have previously raised concerns as to whether paragraph 2 of the draft guideline (which states that in straightforward cases a magistrates' court may retain jurisdiction notwithstanding that the likely sentence would exceed its powers) goes beyond what is permitted, or at least envisaged, by the legislation. Members will recall that the Council was previously satisfied that the reference at 19(3) to having regard to allocation guidelines sanctioned the inclusion of any additional considerations which the Council saw fit to include.

3.20 Concerns have been raised by some respondents (see paragraph 3.4 and 3.9 above) that this approach is not consistent with the statutory emphasis on sentencing power.

Question 1: Is the Council satisfied that the retention of straight forward cases in magistrates' courts notwithstanding the likely sentence is compatible with section 19(3) MCA 1980?

3.21 **Principle:** the draft guideline adopted the guidance given by the Chief Magistrate and the JCS (at page 15 of Annex A) that there is an unfettered discretion after conviction to commit for sentence not limited to cases where information is received showing the offence to be more serious than it was originally thought to be. The majority of respondents supported the idea that the guideline should make it clear that there was no expectation of being sentenced in a magistrates' court if the trial takes place there, but a few suggested that this could lead to unfairness especially for unrepresented defendants.

3.22 Several respondents expressed concern for unrepresented defendants who may not understand the significance of the warning about committal for sentence especially if the warning is given in all cases regardless of whether committal is a possibility.

3.23 There is also a concern that it is undesirable for the sentencing court and the trial court to be different.

Question 2: Is the Council satisfied that provided the appropriate warnings are given, there is no inherent unfairness in an unfettered discretion to commit for sentence?

3.24 **Practical effect:** the stated aim of the revised guideline is to enable and encourage magistrates to retain more cases for summary trial but the suggestion from some respondents is that the effect of the proposals will be an increase in defendants electing Crown Court trial. Removing any legitimate expectation that by agreeing to a trial in the magistrates' court a defendant will be sentenced within magistrates' courts powers also removes the incentive for the defendant to consent to summary trial.

3.25 Respondents from the defence community state that there is a belief that there is a higher chance of acquittal by a jury than by magistrates and that there is a perception that a Crown Court judge is likely to sentence a borderline case more leniently than a magistrates' court. Both of these factors will tend to incentivise

defendants to elect Crown Court trial. In addition the small differential in the Criminal Courts charge between an either way trial in the Crown Court (£1200) or magistrates' courts (£1000) does little to discourage election.

3.26 In contrast it is in the publicly funded defence representative's financial interest for the defendant not to elect in cases where a change of plea is likely, leading to a concern that either defence firms will struggle financially or that defendants will be given advice which is not in their best interests.

Question 3: Does the Council agree that the draft guideline may have the unintended effect of increasing elections to the Crown Court for trial?

Suggested amendments

3.27 Several modifications have been suggested by respondents, in order to address these concerns. Some (including the JCS) feel that committal for sentence after a trial should apply only in borderline cases and that the option to keep straightforward cases notwithstanding the likely sentence should be removed.

3.28 Others have suggested that where cases are committed for sentence after a trial there should be a limit to the length of sentence they could receive. This would require legislative change.

3.29 A further suggestion is that magistrates should clearly indicate whether a case is either:

- one where there is no likelihood of committal for sentence (unless there is new information about the offence showing that it is more serious than thought); or
- one where there is a possibility of committal for sentence on the basis of the facts known to the court.

3.30 In the first case there would be a legitimate expectation of being sentenced within magistrates' courts powers (and hence less likelihood of election for trial) and in the second the defendant would be clearly warned of the possibility of committal.

Question 4: Does the Council wish to incorporate any of the above suggestions into the draft guideline?

4 IMPACT

4.1 The impact assessment issued with the consultation did not envisage any impact on correctional resources. 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 need to be considered.

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 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.

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.

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. 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

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.

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.

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.

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 guideline which is 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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