

# Sentencing Council

## **Allocation**

### **Response to consultation**

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## Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on the 2015 revisions to the allocation guideline. The Council was particularly grateful to receive such a comprehensive range of responses from key stakeholders to this shorter than usual consultation.

This guideline is unusual for the Sentencing Council in that it is concerned with issues beyond sentencing and is of a technical nature. It is also noteworthy in that it is the first time the Council has issued a revised version of one of its own guidelines.

As with all Sentencing Council consultations, the views put forward by all consultees were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline.

As a result of the consultation revisions have been made to the consultation version of the guideline, whilst maintaining the Council's stated aims of producing an up-to-date and clear guideline to assist in ensuring that cases are dealt with in the appropriate court. The Council hopes that this guideline will play a role in the drive to improve efficiency in criminal courts.

Lord Justice Treacy  
Chairman, Sentencing Council

## **Introduction**

The Sentencing Council sought feedback from sentencers, justices' clerks, legal advisers, prosecutors, defence representatives and other court users on proposals to update the definitive Allocation guideline in a six week consultation from 19 June 2015 to 31 July 2015. This was a shorter period than is customary for Sentencing Council consultations. The reasons for this were:

- the consultation related to a concise, technical guideline likely to be of interest only to those directly concerned with criminal proceedings;
- key stakeholders had already been consulted on the issue of allocation as part of Sir Brian Leveson's Review of Efficiency in Criminal Proceedings; and
- the Council wanted to deliver improvements as soon as possible.

The consultation was published on the Council's website and was circulated through key stakeholder groups. The consultation could either be completed online or respondents were invited to respond by email. In addition, Council members held a meeting with representatives of the defence community at the end of the consultation period, better to understand their views.

## **Background**

In 2012 the Sentencing Council issued a definitive Allocation Guideline effective from 11 June 2012; it formed part of the Magistrates' Courts Sentencing Guidelines (MCSG). The guideline is used by magistrates' courts to determine whether cases should be dealt with in the magistrates' court or in the Crown Court.

Subsequent to the 2012 definitive Allocation Guideline, additional guidance was provided in the Criminal Practice Directions and in the form of joint interim guidance issued by the Justices' Clerks' Society and the Senior District Judge (Magistrates' Court), which was issued in response to the recommendations in Sir Brian Leveson's Review of Efficiency in Criminal Proceedings ('the Review').

The Review included the following recommendations to the Sentencing Council at paragraphs 80 and 81:

The Sentencing Council should reconsider the Allocation Guideline and the Magistrates' Courts Sentencing Guidelines in the light of the amendments brought about by the implementation of Schedule 3 of the Criminal Justice Act 2003 (bringing committals to an end) and further to encourage the retention of jurisdiction in cases where a combination of lack of complexity and gravity point to the conclusion that summary trial is justified and does not satisfy the test that it is likely that the court's sentencing powers will be insufficient even if, after full examination of the circumstances, it then becomes appropriate to commit for sentence.

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.

The Council received requests from the Lord Chief Justice and the Lord Chancellor in March 2015 to consider revising the Allocation guideline in line with these recommendations.

## The Council's response

The Sentencing Council decided to amend the Allocation guideline to bring it up-to-date, to improve clarity and to include all the guidance in one document. The proposals, the response from consultees and the changes made as a result of the consultation are explained in the following pages.

### Summary of responses

Category of respondent	Number of responses
Prosecutors	<b>6</b> (2 individual & 4 organisations)
Magistrates	<b>28</b> (26 individual or local benches, 2 organisations)
Defence practitioners	<b>4</b> (1 solicitor, 1 barrister, 2 representative bodies)
Law Officers Department, States of Jersey	<b>1</b>
District Judges	<b>2</b> (1 organisation and 1 individual)
Youth stakeholders	<b>2</b>
Justices' Clerks	<b>2</b> (1 individual and 1 organisation)
Academic	<b>1</b>
Council of H.M. Circuit Judges	<b>1</b>
Justice Committee	<b>1</b>
Total	<b>48</b>

The consultation closed on 31 July 2015, although a few responses were received after that date and were also considered.

Council members held a meeting with respondents from the defence community on 24 September 2015 to discuss issues that they had raised and also invited the Bar Council, which had not responded, to attend and make representations.

The Council discussed the results of the consultation at its meetings in September and October 2015 before arriving at the definitive version of the guideline.

### **Applicability of guideline and Statutory framework sections**

The Council consulted on its proposals to amend the layout and content of these sections.

#### Response

All respondents agreed with the new layout and approved of quoting the legislation. Some errors in the statutory framework section were pointed out; these have been corrected in the definitive guideline.

The Justice Committee of the House of Commons pointed out that the allocation guideline also applies in the Crown Court (when making decisions in cases sent for trial under section 51 Crime and Disorder Act 1998 where no indictable only offence remains) as specified in CDA 1998 Schedule 3 paragraph 9(3).

The Council considered that this was a helpful addition to the guideline and has included the following wording: *'It also applies to allocation decisions made in the Crown Court pursuant to Schedule 3 of the Crime and Disorder Act 1998.'*

The Justice Committee also queried why the four factors listed in the existing guideline to which the court should have regard<sup>1</sup> had been omitted from the draft guideline, noting that whilst these factors are no longer enshrined in section 19 of the Magistrates' Courts Act 1980, the Criminal Practice Directions (at paragraph 9A.2) 'treat these factors as part of the guideline and therefore of freestanding force.'

The Council did not agree that the factors were of freestanding force and was satisfied that the relevant factors in this list were covered by the guideline. The Council understands that when the definitive guideline comes into force, the Criminal Practice Directions will be amended to refer to the guideline.

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<sup>1</sup> '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.'

## **The Venue for trial section** (previously the Guidance section)

The Council sought the views of consultees on the guidance that should be given to sentencers when deciding whether an either way case should be tried in the Crown Court or retained by a magistrates' court.

Consultation questions 2 to 6 related to this section.

### Response

In general the responses to questions 2 to 6 were positive with around 90 per cent of those who answered the questions agreeing with the general approach, although many respondents offered suggestions for improvements. A small number of respondents disagreed fundamentally with the approach.

The Criminal Law Solicitors' Association (CLSA) and the Law Society both expressed concerns about magistrates' courts retaining some cases for trial with a view for committing for sentence if there is a conviction. They considered that in cases where a magistrates' court retains jurisdiction and the defendant consents to summary trial there should be an expectation that any sentence would be within magistrates' courts' powers. Without such an expectation they anticipated that more defendants would elect Crown Court trial, which would be counter to the stated aims of the guideline. They also felt that it was generally undesirable for a defendant to be sentenced by a different court to that which heard the trial.

Some respondents queried whether the guidance stating that a magistrates' court may retain jurisdiction in straightforward cases, even where the likely sentence would exceed its powers was compatible with the statute. Others welcomed this guidance and considered that it was compatible with the recommendations of the Review.<sup>2</sup>

Several respondents questioned reference to *'taking into account personal mitigation and any reduction for a guilty plea'* when deciding whether jurisdiction should be retained, although others supported this approach. The objections related to the fact that the allocation decision is made at a time when a defendant has indicated a not guilty plea (or has made no indication) and the court is deciding the appropriate venue for trial. The CLSA suggested that the proposed wording implies that all who are charged are guilty and was concerned that unrepresented defendants would be disadvantaged by being less able to present personal mitigation. Others considered that it would be impractical to take into account a guilty plea reduction or personal mitigation at this stage. The Justice Committee suggested the inclusion of the word *'potential'* to clarify the reference to a guilty plea. All but one of those who responded to the question agreed that defendants must be warned that if

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<sup>2</sup> see page 4 above

they consent to summary trial and are convicted, they may be committed to the Crown Court for sentence.

The Council carefully considered the views put forward and noted that the vast majority of respondents supported the proposals. The Council was satisfied that the principle that either way cases should be dealt with in magistrates' courts unless there were particular reasons not to, went no further than reinforcing current good practice. The retention of more cases in magistrates' courts where appropriate is of benefit to all those involved in the criminal justice system, including victims and witnesses who would see cases resolved more quickly. The Council noted that there was nothing in the proposals that would deprive a defendant of the right to elect Crown Court trial and that any potential effects of the guideline on practitioners and defendants were fair and proportionate. However, the Council noted that improvements could be made to this section and the definitive guideline incorporates some of the helpful suggestions made by respondents.

Several respondents suggested that the guideline should explicitly state that where magistrates' courts are uncertain as to whether or not their powers are adequate they should accept jurisdiction. Various forms of wording were suggested. The Council decided to add the word '*clearly*' to the first bullet point at paragraph 1 so that the definitive guideline now directs that either way offences should be tried summarily unless the outcome would *clearly* be a sentence in excess of the court's powers. The Council has retained the references to personal mitigation and reductions for a guilty plea in paragraph 1, as it considered that when assessing whether magistrates' courts' powers are sufficient it is important that the court takes into account more than just the facts as advanced by the prosecution. However, the Council has adopted the suggestion of several respondents to add the word '*potential*' to describe reductions for a guilty plea. The second bullet point has been reworded to make it clear that it applies where a very large fine is the likely sentence.

Paragraph 2 has been retained, but with clearer wording to describe the type of case to which it would apply. The Council noted the concerns of some respondents and has slightly changed the emphasis by changing '*the likely sentence would exceed its powers*' to '*the likely sentence might exceed its powers*'. The Council anticipates that this factor will most usefully apply in cases that are on the borderline between magistrates' court and Crown Court sentencing powers.

At paragraph 4 the addition of the phrase '*to which the defence wish to refer*' with reference to taking into account personal mitigation, acknowledges the fact that the defence may, or may not, be in a position to advance personal mitigation at this stage of proceedings. The

Council is clear that in order for the court to make an informed decision about the most appropriate venue for trial both parties should make realistic representations.

### **The Committal for sentence section**

This section had been updated to reflect the correct statutory test but was otherwise unchanged from the previous guideline.

Consultation question 8 related to this section.

### Response

This section has been moved to follow directly on from the Venue for trial section.

The majority of respondents agreed with the content of this section; those who expressed reservations repeated concerns that they had raised in response to earlier questions.

The Council is satisfied that the guidance consulted on is an accurate statement of the law on committal for sentence and in response to some suggestions from respondents, has provided some additional guidance in the definitive guideline.

The guideline suggests that a pre-sentence report may be useful in borderline cases before deciding whether to commit for sentence. Such a report could be a full written report, a shorter form report or an oral report.

The final paragraph of this section has been added to cover a situation where, for example, a court is sentencing an offender and is considering committal for sentence because of the seriousness of the offending and antecedents of the offender, but the pre-sentence report suggests that a high level community order might be the appropriate sentence. In such circumstances, the guidance suggests that committal for sentence would be appropriate to enable to the Crown Court to deal with the offender in the event of a breach of any order. This is because if a magistrates' court sentences to a community order which is breached and the court wishes to revoke and re-sentence, committal for sentence will not be available at that point.<sup>3</sup>

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<sup>3</sup> R v Andrews (Barrie Lee) [2007] 1 Cr. App. R. (S.) 81

**The Youths jointly charged with adults – interests of justice test section** (previously the Linked cases section)

The consultation did not propose to change this section.

Consultation question 7 related to this section.

Response

The majority of respondents agreed that this section should remain unchanged from the previous guideline; however a number of respondents made suggestions for improvements.

There was a general consensus that the guidance should be strengthened to ensure that youths are only committed for trial where it is essential in the interests of justice. It was also pointed out that the guidance was an over-simplification of the procedural situation when a youth appears in an adult court.

The Judicial Youth Justice Committee suggested text to emphasise that the youth court should be the usual venue of the trial of any youth and to reflect that the guidance relates to those cases where the allocation of the adult's case falls to be considered first. Just for Kids Youth Justice Legal Centre also suggested text to emphasise that a youth should be tried in the youth court wherever possible.

The Council adopted much of the suggested text and added further wording to clarify that the guidance does not purport to be a complete guide to the complex statutory provisions dealing with a youth jointly charged with an adult; it applies only to those situations where the court is required to apply the interests of justice test.

**General comments**

The consultation invited general comments on the revised guideline. The majority of comments were supportive of the proposals, although some repeated concerns that the guideline could lead to an increase in elections for trial.

Consultation question 9 related to this section.

A magistrate commented that the proposed guideline represented 'a great improvement on existing guidance which will encourage a change from "if in doubt send it up"'.

Another magistrate said: 'this increased emphasis on summary justice is welcomed; as is the improved opportunity to retain cases in the Magistrates' Court. In addition, taking the opportunity to make things clearer is well taken.'

The Magistrates' Association said: 'Overall the MA warmly welcomes the proposed amendments to the allocation guidance... The Sentencing Council's proposals, in line with Leveson LJ's recommendations, represent real progress and should help to give magistrates greater confidence in retaining cases.'

## **Next steps**

The consultation has been a vital part of the Council's consideration of the guideline. Responses received from a variety of organisations and individuals have informed the changes made to the definitive guideline.

The definitive guideline will apply to all defendants in magistrates' courts (including youths jointly charged with adults) whose cases are dealt with on or after 1 March 2016, regardless of the date of the offence. The guideline will be available online from the date of publication in the 'MCSG updates' section. The online version of the Magistrates' Court Sentencing Guidelines and downloadable PDF will be updated on 1 March 2016. Black and white hard copies will be available on request.

Following the implementation of the definitive guideline, the Council will monitor the impact of the guideline.

## **Annex A: consultation questions**

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.

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.

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.

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

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

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

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

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

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

Question 10: What is your name?

Question 12: What is your organisation?

## **Annex B: list of respondents**

Anton Allera

District Judge Arnold

Black Country Bench

Peter Bowes, JP

Paul Broomhead, JP

Stephen Butterworth, JP

The Council of H.M. Circuit Judges

Criminal Law Solicitors' Association

Crown Prosecution Service

Mr Justice William Davis

Department for Business, Innovation and Skills Criminal Enforcement (BISCE)

Janet Dowdle, JP

Anthony Edwards

Carl J Fitch

David Gravells, JP

The Health and Safety Executive

Peter Hipkin, JP

Christine Holmes, JP

Professor Peter Hungerford-Welch

Just for Kids Law & Youth Justice Legal Centre

Justice Committee of the House of Commons

Justices' Clerks' Society

Anthony Kaye, JP

Tim Knight, JP

The Law Society

Edward Leniston, JP

Clive Lewisohn JP

John Low, JP

Magistrates' Association

Simon Massarella, JP

Rod Mayall, JP

Mid & South East Northumberland Magistrates

Julian Morgan, JP

The National Bench Chairmen's Forum

Legal Committee, National Council of District Judges (Magistrates' Courts)

Ian Neal, JP

Peter Nicol, JP

John Norris, JP  
North East Bench Chairs Forum  
Office of Rail and Road  
Katharine Rainsford, JP  
Ann Reddrop  
Derek W. Richards, JP  
South East London Bench  
Mrs Judith Alison Street, JP  
Richard Taylor  
Andrew Turnbull  
Eric Windsor, JP