

# ALLOCATION GUIDELINES

## THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

### FOREWORD BY THE CHAIRMAN

In this advice the Sentencing Advisory Panel proposes guidelines for the new allocation procedure and associated legislative changes that are expected to be implemented in the autumn of 2006. The advice covers the legislative and other factors that should influence the decision as to whether an either-way offence is retained for trial in a magistrates' court or sent to the Crown Court to be dealt with.

Allocation guidelines have been in existence for a number of years and can currently be found in the Consolidated Criminal Practice Direction. It is within the remit of the Sentencing Guidelines Council to produce guidelines to support the allocation decision. Given the forthcoming changes to the allocation procedure, which are expected to be introduced along with other statutory provisions which will change the maximum sentencing powers of magistrates' courts and provide a new type of custodial sentence for cases deserving of less than twelve months, the Panel regards it as important that clear principles be set out to guide those making the decision in order to promote consistency of approach.

One objective of the reforms is to increase the volume of cases involving either-way offences being retained for trial and sentence in magistrates' courts. The general power to commit for sentence after a case has been allocated will be abolished, save for cases where an offender comes within the dangerous offender provisions. The importance of new guidelines is therefore clear.

The new allocation procedure has the added dimension of a sentence indication being given by a court once it has decided that a case could be retained in the lower court. Whilst this option is only available after the main part of the allocation decision has been made, the Panel decided that guidance to courts was critical if consistency of approach was to be achieved. The Panel's proposals are consistent with the principles laid down in *R v Goodyear*<sup>1</sup> for a sentence indication procedure in the Crown Court.

Professor Martin Wasik  
Chairman of the Sentencing Advisory Panel

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<sup>1</sup> [2005] EWCA Crim 888

# ALLOCATION GUIDELINES

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### *Introduction*

1. The Sentencing Advisory Panel proposes to the Sentencing Guidelines Council that guidelines should be issued in relation to the allocation procedures as amended by section 41 and schedule 3 to the Criminal Justice Act 2003 (the 2003 Act). This advice concentrates on those aspects of the provisions that are expected to be brought into force in autumn 2006.

2. The Council has responsibility for framing allocation guidelines which are defined as guidelines relating to decisions by a magistrates' court under section 19 of the Magistrates' Courts Act 1980.<sup>2</sup> In framing those guidelines the Council must have regard to the need to promote consistency in decisions under section 19.<sup>3</sup>

3. The Panel has consulted in accordance with section 171(3) of the Act. The consultation was conducted through a series of seminars and a list of those who attended is at Annex B. Delegates took part in the discussion groups on guidelines for allocation were also invited to submit written comments during the week following the seminars. Copies of the discussion paper were sent to all of the Panel's regular consultees, whether or not they had been able to take part in the seminars, with an invitation to submit written responses by the same deadline. The discussion paper was also published on the Panel's website. We are satisfied that all those who wished to contribute their views on this subject have had opportunity to do so.

4. The consultation dealt primarily with cases involving adults. However, it also considered the approach to allocation where an adult and a youth are charged together. A summary of the Panel's recommendations is at Annex A.

5. The allocation procedures apply where an adult<sup>4</sup> is charged with an offence that can be tried in a magistrates' court or the Crown Court (an 'either-way' offence). The decision as to the appropriate venue for trial or sentence is made through the procedures set out in the Magistrates' Courts Act 1980 (MCA1980), the Crime and Disorder Act 1998 (CDA1998) and the Powers of Criminal Courts (Sentencing) Act 2000 (PCC(S)A2000).<sup>5</sup> Where the decision is that a case should be tried in or sentenced at the Crown Court, sending or committal proceedings<sup>6</sup> are the method by which the case is transferred to that Court.

6. Since 1991, magistrates' courts and practitioners have been assisted by National Mode of Trial Guidelines. These were revised and re-issued in 1995 by the Criminal Justice Consultative Council (CJCC) and subsequently incorporated in the Consolidated Criminal Practice Direction.<sup>7</sup> However, they preceded the introduction of

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<sup>2</sup> 2003Act, s.170(1)

<sup>3</sup> 2003Act, s.170(6)

<sup>4</sup> In this paper, an adult is a person aged 18 or over

<sup>5</sup> MCA1980, ss.18-23; CDA1998, s.51; PCC(S)A2000, s.3

<sup>6</sup> MCA1980, s.6 for trial or PCC(S)A2000, ss.3, 4 for sentence

<sup>7</sup> Part V, para.51 [www.hmccourts-service.gov.uk/cms/files/consolidated\\_criminal\\_practice\\_directions260505.doc](http://www.hmccourts-service.gov.uk/cms/files/consolidated_criminal_practice_directions260505.doc)

the plea before venue procedure and cannot be taken to reflect fully the considerations that are now relevant.

7. The 2003 Act makes substantial changes to the procedure governing the allocation decision.<sup>8</sup> In addition, provisions exist in the Act to increase the maximum length of a custodial sentence able to be imposed in a magistrates' court to 12 months for a single offence and to 65 weeks for two or more offences.<sup>9</sup> It is anticipated that section 61 of the Criminal Justice and Court Services Act 2000 will also be brought into force at the same time as the changes referred to in the 2003 Act so that a custodial sentence for those aged 18, 19 and 20 will cease to be termed "detention in a young offenders' institution" and will be a sentence of imprisonment.

8. The changes are significant, not least because the emphasis will be firmly on the right determination as to venue being made in the first instance. Whilst the power to commit for sentence after an indication of a **guilty** plea will remain, the general power to commit for sentence is otherwise to be abolished (though it will still be possible to commit under the dangerous offender provisions, where there has been breach of certain Crown Court imposed orders, and where a confiscation order is to be sought<sup>10</sup>).

9. The guideline 'Reduction in Sentence for a Guilty Plea'<sup>11</sup> states that it is acceptable to retain a case in a magistrates' court where an offence would attract a sentence of up to 9 months imprisonment in the Crown Court, on the basis that a one third reduction could be given where a guilty plea is entered at the first reasonable opportunity.<sup>12</sup> Applying the same principle, the new allocation scheme will result in magistrates' courts retaining cases that would attract a sentence of up to 18 months imprisonment. The guideline<sup>13</sup> has clearly established the basis for application of the reduction principle using a scale of proportionate reduction dependent upon the stage of the proceedings at which the guilty plea is indicated.

### ***Content and format of allocation guidelines***

10. The current guidance in relation to mode of trial decisions set out in the Consolidated Criminal Practice Direction includes a short introductory section setting out general considerations (including matters contained in statute to which regard must be had<sup>14</sup>) for determining whether an offence is more suitable for trial in a magistrates' court or trial in the Crown Court. In addition there are guidelines for thirteen offences or categories of offences.

11. The Panel considers that the style of the *Consolidated Criminal Practice Direction* is helpful. In order to be a useful reference tool, the content of the new guidelines should be concise and clearly presented and the Panel proposes that the allocation guidelines should be in two sections:

- ❖ the first section setting out the relevant legislative provisions along with the principles and assumptions that will guide those using and applying the guidelines;

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<sup>8</sup> 2003 Act, s.41 and sched.3

<sup>9</sup> 2003 Act, ss.154, 155

<sup>10</sup> in accordance with Proceeds of Crime Act 2002, section 70.

<sup>11</sup> published December 2004

<sup>12</sup> Section E(ii) paragraph 5.5

<sup>13</sup> published December 2004

<sup>14</sup> MCA1980, s.19(3)

- ❖ the second section containing specific guidelines relating to offences or categories of offence whether or not they are dealt with in offence guidelines.

12. In view of the changes to the legislative considerations and the emphasis on the decision determining the court of both trial and sentence, the Panel makes the following proposal.

### **Recommendation 1**

***The Panel proposes that the first section of the guidelines will comprise a set of guidance notes (which reflect the outcomes of the consultation process) which should include:***

- (a) statement of purpose for the guidelines and of the cases to which the guidelines apply***
- (b) the legislative factors that must be taken into account and other general principles***
- (c) the presumptions upon which the allocation decision should be based***

13. The Panel asked consultees for their views on whether the allocation guidelines need to reproduce or summarise key elements of the assessment of seriousness of an offence which is included in a guideline already published by the Sentencing Guidelines Council. The offence guidelines will guide the courts to what facts and circumstances may make an offence particularly serious by, for example, setting out general and specific aggravating factors that ought to be taken into account. In particular, it is expected that specific offence guidelines will indicate where a starting point will be in excess of 12 months imprisonment.

14. In due course, most either way offences will be subject to guidelines and it may not then be necessary to include specific guidance within the allocation guidelines. However, although some offence guidelines will be issued in 2006/07, others will take longer to be prepared. One approach would have been to include specific guidance for offences not expected to be subject to guidelines from the Sentencing Guidelines Council by the time of implementation of the increase in magistrates' courts sentencing powers but not to include those where such a guideline is expected.

15. Whilst many of the consultees could see the benefit of allocation thresholds and factors relevant to assessing the seriousness of individual offences being covered in a single guideline relating to the offence itself, the majority concluded that, for ease of reference and in order to maintain an overview of a wide range of either-way offences, a separate set of allocation guidelines would be preferable.

### **Recommendation 2**

***The Panel proposes that there be a stand-alone set of allocation guidelines pending the development over time of sufficient offence specific guidelines to assist courts making the venue decision.***

16. The second section will contain details of factors relevant to allocation of a case involving a specific offence. There is a large number of either way offences and, in order to restrict the scope of the allocation guidelines to a manageable scale, the Panel has taken as its starting point that:

- ❖ many of the offences covered by the 1995 guidelines are still high volume offences that are attracting custodial sentences in both magistrates' courts and the Crown Court. This would suggest that they should continue to be included in any new version of the allocation guidelines.
- ❖ some offences have been the subject of legislative change to either the offence itself or the maximum penalty available following conviction, and some have been subject to a guideline judgment from the Court of Appeal.
- ❖ there is a category of offences where the allocation decision is often finely balanced, and the result is a significant number of offences sentenced in the Crown Court within the power of a magistrates' court.
- ❖ there are new offences that justify inclusion in the guidelines such as harassment and the racially aggravated offences that are triable either-way in their own right even though the base offence is not.<sup>15</sup>
- ❖ breach of an anti-social behaviour order is an either-way offence and is known to be troubling the courts in terms of allocation and eventual sentencing.
- ❖ there are less commonly prosecuted but serious offences that are legally complex and often have higher than usual maximum financial penalties which may make the allocation decision a complicated one.

17. There was general support for this approach to identify the key offences to cover in the guidelines.

### **Recommendation 3**

***The Panel proposes that the following offences/categories of offence be the subject of allocation guidelines:***

#### ***Theft Acts Offences/Fraud***

Burglary (dwelling and commercial/other)  
 Handling stolen goods  
 Theft  
 Fraudulent evasion of excise duty  
 Obtaining property by deception  
 Dishonest representations for obtaining benefit

#### ***Offences against the person***

Malicious wounding/inflicting grievous bodily harm (GBH)  
 Assault occasioning actual bodily harm (ABH)  
 Racially/religiously aggravated common assault  
 Harassment (section 4 PFHA 1997 and racially aggravated)  
 Breach of a restraining order

#### ***Sexual Offences***

Sexual assault (section 3 SOA 2003)  
 Sexual activity with a child (section 9 SOA 2003)  
 Causing or inciting a child to engage in sexual activity (section 10 SOA 2003)  
 Indecent photographs of children (section 45 SOA 2003)  
 Grooming (section 15 SOA 2003)

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<sup>15</sup> For example, common assault

Trafficking (sections 57-59 SOA 2003)

***Offences against public order***

Violent disorder

Affray

Racially/religiously aggravated threatening behaviour

Possession of an offensive weapon

Breach of ASBO

***Drugs offences***

Possession of class A & B drugs

Possession with intent to supply

Supply of controlled drugs

Cultivation of cannabis

***Driving Offences***

Dangerous driving

Aggravated vehicle taking

***Other Offences***

Criminal damage and arson

Racially/religiously aggravated criminal damage

Witness intimidation

Health and safety offences

Environmental offences

Passport offences

Currency offences

***The new allocation procedure and other new provisions***

18. The Panel was advised that the package of reforms (detailed below) likely to be introduced simultaneously, and including the changes to the allocation procedure, has been developed to meet the following objectives:

- ❖ to increase the volume of cases retained in magistrates' courts for both trial and sentence
- ❖ to increase the frequency with which the court of trial is also the court of sentence (with the fullest information possible being available at the point when allocation is determined), and
- ❖ where the determination is that trial on indictment is appropriate, the case reaches the Crown Court as soon as possible.

19. Those who attended the consultation seminars raised no issue with these objectives.

***Recommendation 4***

***It is the view of the Panel that they should form part of a Statement of Purpose for the allocation guidelines.***

20. When the amendments contained in the 2003 Act are in force, magistrates' courts committal proceedings will be replaced with a system of 'sending' cases to the Crown Court for trial, similar to the procedure already in place for indictable only offences. As now, a magistrates' court will make the allocation decision; this function can be

discharged by a single justice.<sup>16</sup> It should be noted also that the provisions of section 51 of the CDA1998 have been expanded so that a wider range of either way cases will have to be sent to the Crown Court without the need for a court to determine allocation.<sup>17</sup>

21. Although many aspects of the provisions that will apply are the same as (or similar to) those that currently apply, there are a number of significant differences. Most importantly, the allocation decision will continue to be restricted to those circumstances where a person accused of an either way offence does not indicate a plea of guilty during the plea before venue procedure.

22. In outline, the procedure (and significant issues) will be as follows:

(a) A defendant charged with an either way offence will be asked to indicate a plea at the outset of the procedure. If a guilty plea is indicated, the procedure is unchanged and the court may sentence itself or commit to the Crown Court for sentence either on the general grounds that the sentence required is beyond its powers or because consideration needs to be given to the imposition of a sentence available for a dangerous offender.<sup>18</sup>

(b) If there is no indication of plea or a not guilty plea is indicated, the court will proceed to consider whether the offence is suitable for summary trial or for trial on indictment. The court must consider whether its sentencing powers would be adequate, any representations from the prosecutor or the defendant and any allocation guidelines issued by the Sentencing Guidelines Council.<sup>19</sup>

(c) If the Crown Court is found to be the appropriate venue, the case will be sent forthwith to that court, with directions being given as to case preparation and management as necessary.<sup>20</sup>

(d) Where the court decides that a case is suitable for summary trial, the defendant (as now) will be given the choice of either consenting to be tried summarily or of electing to be tried on indictment.

(e) Moreover, a defendant will have the opportunity to request an indication of sentence (see paragraphs 33-47 below).<sup>21</sup>

(f) Where a magistrates' court has determined for summary trial and the defendant has consented (whether or not after an indication of sentence), the prosecution may make a further application for the offence to be tried on indictment instead.<sup>22</sup> This power is in addition to the right to make representations before the allocation decision is made. Any application under this provision must be made before the summary trial begins and before any other application or issue in relation to the summary trial is dealt with.<sup>23</sup> The

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<sup>16</sup> MCA1980, s.17E and s.18(5)

<sup>17</sup> CDA1998, ss.51B and 51C (as inserted by CJA03, sched.3, para.18) provide for notice to be given by the certain prosecutors in relation to cases of serious or complex fraud or in certain cases involving children.

<sup>18</sup> see MCA1980, s.17A(4)(b) and PCC(S)A2000, ss.3 and 3A as inserted by CJA2003, sched.3, paras. 2 and 22-24

<sup>19</sup> MCA1980, s.19(3) as inserted by CJA2003, sched.3, para. 5

<sup>20</sup> CDA1998, s.51

<sup>21</sup> MCA1980, s.20(3) as inserted by CJA2003, sched.3, para. 6

<sup>22</sup> MCA1980, s.25(2) as amended by the CJA2003, sched.3, para.11

<sup>23</sup> *ibid.* s.25(2A)

application may be granted if the magistrates' court is satisfied that the powers of sentence in a magistrates' court would be inadequate.<sup>24</sup>

23. Once a magistrates' court has accepted jurisdiction it will no longer be possible to commit to the Crown Court for sentence under the general committal power<sup>25</sup> in these circumstances (though it will still be possible to commit for sentence where the defendant comes within the dangerous offender provisions<sup>26</sup>).

24. It is expected (but not as yet confirmed) that the changes to the allocation procedure will be brought into force alongside other provisions in the 2003 Act which will increase the sentencing powers available in a magistrates' court for a single offence to 12 months imprisonment,<sup>27</sup> make changes to the maximum penalties available for certain offences and introduce a new form of shorter custodial sentence, the custody plus order. Custodial sentences of 12 months or less are the subject of separate advice from the Panel.

### ***Legislative and other considerations***

25. Section 19 of the Magistrates' Courts Act 1980, as amended, will read:

*(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 170 of the Criminal Justice Act 2003.*

26. There are to be two major changes from the current section:

- ❖ the new provisions give no further definition of the factors to be considered in determining suitability; those previously contained in section 19(3) of the MCA1980 will be repealed.

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<sup>24</sup> *ibid.* s.25(2B)

<sup>25</sup> PCC(S)A2000, s.3

<sup>26</sup> *ibid.* s.3A

<sup>27</sup> C JA 2003, section 154

- ❖ the court is to be informed about and must take account of any previous convictions of the defendant. In accordance with section 143(2) of the 2003 Act, each previous conviction potentially aggravates the seriousness of an offence. This additional information is relevant, therefore, to the assessment of the seriousness of the offence and so to the assessment of whether the sentencing powers of the magistrates' court would be adequate if the defendant was convicted.

27. In its consultation, the Panel considered the extent to which the factors set out in section 19(3) of the MCA1980 (as it currently stands) and in the Consolidated Criminal Practice Direction continue to be relevant. It is the view of the Panel (supported by the majority of those consulted) that some continue to be relevant.

### **Recommendation 5**

***In summary, the Panel proposes that the following factors, which are considered in more detail below, are relevant considerations:***

- ❖ ***Adequacy of sentencing powers based on an assumption that the prosecution version of the facts is correct***
- ❖ ***Whether the charge is a specimen charge***
- ❖ ***The need for a separate tribunal to determine fact***
- ❖ ***Presumption in favour of summary trial***
- ❖ ***Presumption in favour of all linked cases being heard before a single court***
- ❖ ***Any representations by the prosecution or defence***

***(i) Adequacy of sentencing power.***

The Panel considers that the issue should be the extent of the sentencing powers (including the financial limits in relation to fines and compensation) following conviction based on the prosecution case at its highest. The Auld Report proposed<sup>28</sup> that the court should allocate either-way cases according to the seriousness of the alleged offence, looking at the case at its worst from the point of view of the defendant. This is also the current position as set out in the Consolidated Criminal Practice Direction.

### **Recommendation 6**

***Given that the allocation decision will be required only where a guilty plea indication is not given, the Panel proposes that this approach be retained.***

This raises a number of consequential matters:

#### **a) Reduction for a guilty plea**

The allocation decision will be made only where the defendant has not indicated a plea and so the assessment of likely sentence will need to be based on sentence after a plea of not guilty.

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<sup>28</sup> Review of the Criminal Courts of England and Wales, October 2001, page 282

## **Recommendation 7**

***It is the view of the Panel that the reduction principle will not influence the court in making an allocation decision.***

### **b) Multiple Offences**

When making an allocation decision, a court may be made aware of other criminal proceedings against the defendant that are pending. This is of particular importance where a defendant is alleged to have committed a number of either-way offences which may come before the court for allocation at different times. Since it will no longer be possible to commit for sentence under the general power, a court will need to proceed with care in order to ensure that the court imposing sentence has the appropriate range of sentencing powers.

Section 19(4) of the MCA1980<sup>29</sup> will provide that, where a defendant is charged with two or more offences which could be joined in the same indictment or arise out of the same or connected circumstances, in making the allocation decision the court shall consider whether the maximum aggregate sentence that the court could impose for all of the offences taken together would be adequate. It is less clear how a court should proceed where the offences are not linked in this way, particularly if not all offences are before the court when the allocation decision is being made.

In addition, there will be situations where a defendant has a number of outstanding offences which, individually, would be suitable for summary trial, but, when taken together, might require a sentence beyond the powers available in a magistrates' court.

There were mixed responses from consultees on the practicalities involved in ascertaining information about other pending cases (both those before the same court and those before another court) and of bringing cases before one court for the allocation decision.

## **Recommendation 8**

***The Panel is proposing that there should be a presumption in favour of all linked cases being dealt with together (see (v) below). It is the view of the Panel that it is possible to extend that principle to cover this situation so that a court should make efforts to consider together as many matters as possible where an allocation decision is yet to be made, unless this would result in significant delay or injustice to the prosecution or defence.***

***Where a defendant has already been convicted of other matters but not yet sentenced, those convictions will be relevant to the assessment of seriousness of the offence(s) currently before the court.<sup>30</sup>***

### **c) Defendant subject to a suspended sentence order**

Where a defendant commits an offence whilst subject to a suspended sentence order or is found by a court to have failed to comply with a requirement of the order

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<sup>29</sup> as inserted by CJA03, sched.3, para.5

<sup>30</sup> MCA1980, s.19(2) as amended

without reasonable excuse, the court must order that the suspended sentence take effect unaltered (or modified in accordance with the statutory provision) unless it determines that it would be unjust to do so.<sup>31</sup> Where that order was imposed by the Crown Court, that Court may have stated that any breach of the requirement of that order may be dealt with by a magistrates' court. In the absence of such an order, a breach must be dealt with in the Crown Court.<sup>32</sup> Even where the matter is released for a magistrates' court, the power exists to commit to the Crown Court.<sup>33</sup>

Where the order was imposed by the Crown Court and the defendant is convicted at a magistrates' court of an offence committed during the operational period, the magistrates' court may commit the defendant to the Crown Court which will then have the power to deal both with the later offence and with the suspended sentence.<sup>34</sup> If the magistrates' court does not so commit, it must notify the Crown Court of the conviction<sup>35</sup> and the Crown Court may initiate process to bring the defendant before the court in order that the Crown Court can consider whether or not to bring the suspended sentence into effect.<sup>36</sup>

The issue was raised as to whether the existence of such an order should be relevant to the allocation decision. If the conviction leading to a suspended sentence order was relevant (and thus an aggravating factor), it will be considered by the court as part of the assessment of seriousness of the current offence. However, there are sufficient powers to commit a suitable offender to the Crown Court for sentence and the Panel has concluded that the existence of the suspended sentence order in itself should not influence the allocation decision.

### **Recommendation 9**

***The Panel believes that the suspended sentence order will be relevant to the allocation decision as it will be a recorded conviction, and the question of whether the defendant is in breach will be separately considered following conviction and action taken as necessary. This will be a similar approach to that proposed for dangerous offenders (see paragraphs 30/31 below).***

#### ***(ii) Whether the charge is a specimen charge***

Specimen charges representing a course of conduct are designed to present a court with sufficient information to know the extent of the criminality of the defendant without making every activity the subject of a specific charge. This usually arises where a defendant is alleged to have acted criminally over a long period. The charges need to be constructed with care as a court is not entitled to make assumptions about the extent of criminality where offences are neither admitted nor proved.<sup>37</sup>

After conviction, a defendant may ask for other offences to be taken into consideration. These offences need not be connected to the offences of which the

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<sup>31</sup> CJA03, sched.12, para.8(2)

<sup>32</sup> CJA03, sched.12, para.5(2)

<sup>33</sup> *ibid.* para.8(6)

<sup>34</sup> *ibid.* para.11(2)

<sup>35</sup> *ibid.* para.11(2)(b)

<sup>36</sup> *ibid.* para.12

<sup>37</sup> The current authority is *R. v. Tovey* [2005] EWCA Crim 530. A revised procedure is set out in sections 17-21 of the Domestic Violence, Crime and Victims Act 2004. Although not yet in force, it is likely that these provisions will be brought into force before the changes covered by this paper.

defendant is convicted. If they are accepted by the court, the defendant may not be prosecuted for them on a later occasion.

This distinction may be less valid than before but, given that the allocation decision will be required where a guilty plea indication is not given and, if the Panel's proposal at (i) above is accepted, will be based on the prosecution version of the facts, the Panel proposes that this factor should continue to apply.

### **Recommendation 10**

***The Panel proposes that the fact that a charge is a specimen charge is relevant in assessing the seriousness of the offence and, therefore, to the allocation decision.***

#### ***(iii) The need for a separate tribunal to determine fact***

Increases to the sentencing powers of a magistrates' court and other substantial reforms such as those relating to the law of evidence, the disclosure process, and new case management powers (including those to allow the making of binding rulings), all point toward more cases remaining in magistrates' courts for trial and sentence. This has resulted in those courts becoming better equipped to deal with more complex and technical cases than previously and this was widely supported by those attending the seminars.

It is the view of the Panel that circumstances that might lead a magistrates' court to decline summary trial will be rare. However, there may be a few rare and exceptional cases (for example where unusually complex disclosure issues regarding public interest immunity or sensitivity are to be decided) where it will be especially important to have the separation between Judge and jury that is possible in the Crown Court.

### **Recommendation 11**

***The Panel proposes that a factor be retained to enable courts to deal appropriately with the small number of cases where the separation between Judge and jury would be sufficient reason to send to the Crown Court a case otherwise suitable for trial in a magistrates' court.***

#### ***(iv) Presumption in favour of summary trial***

As stated above at paragraph 18, one of the policy aims of the allocation provisions is to ensure that as many cases as possible are retained in a magistrates' court. Previous guidance provided for a presumption in favour of summary trial, perhaps reflecting concerns that a large number of cases received sentences at the Crown Court that were within the powers of a magistrates' court. Some of the reasons for that were set out in the Panel's discussion paper at pages 9/10.

The main factor in making the allocation decision is the adequacy of the sentencing powers. In many cases it will be clear whether the offence needs to be dealt with summarily or on indictment; however, there will also be cases where, for a variety of reasons, that distinction is less clear.

The removal of the power to commit for sentence once summary trial has been accepted where there is no indication of a plea of guilty might suggest a need for greater caution in cases where the decision on allocation is finely balanced. It was argued that the interests of justice dictate that it would be better for the Crown Court to impose a sentence within the powers of a magistrates' court rather than for a magistrates' court to be required to sentence more leniently than the seriousness of the offence warrants because the decision on allocation was mistaken.

### **Recommendation 12**

***Accordingly, the Panel proposes that as many cases as possible should be dealt with summarily but where any uncertainty remains (in relation to the adequacy of the sentencing powers available) it should be resolved in favour of the case being dealt with in the Crown Court.***

#### ***(v) Presumption in favour of all linked cases being heard before a single court***

The provisions in schedule 3, paras 17 and 18 to the 2003 Act<sup>38</sup> enable all cases to be heard on indictment if the outcome of the allocation procedure leaves linked<sup>39</sup> defendants opting to be dealt with in different courts. Similarly, the fact that a defendant has already been sent for trial can enable a court also to determine for trial on indictment when dealing with separate offences on a later occasion.

### **Recommendation 13**

***The Panel considers that it is generally preferable for all issues to be dealt with in a single trial and the Panel proposes that there should be a presumption in favour of all linked cases being heard before a single court.***

#### ***(vi) Any representations by the prosecution or defence***

The Panel proposes that the assessment of offence seriousness which is relevant to the allocation decision should continue to be based on the prosecution case at its highest (see (i) above). As a consequence, defence representations should normally be limited to identifying inaccuracies in the factual outline of the case upon which seriousness is assessed, and to the issue of the adequacy of the sentencing powers of the court on the basis of the case as put forward by the prosecution. Since the assessment of the seriousness of an offence includes previous convictions that are relevant,<sup>40</sup> defence representations may need to refer to reasons why any previous convictions do not meet the statutory criteria.

### **Recommendation 14**

***The Panel proposes that defence representations will normally be directed to identifying inaccuracies in the factual outline of the case, assessing the adequacy of the court's sentencing powers and determining the relevance of an offender's previous convictions.***

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<sup>38</sup> particularly the combined effect of the new ss.50A(3) and 51(5)

<sup>39</sup> For these purposes, linked means jointly charged, or charged with an offence that appears to be related to an offence for which another has been sent for trial.

<sup>40</sup> CJA2003, s.143(2) provides that the court must treat individual previous convictions as aggravating factors if it is reasonable to do so having regard to the nature of the offence to which the conviction relates and its relevance to the current offence, and to the time that has elapsed since the conviction.

## ***Assessing seriousness***

28. In order to apply the new allocation procedure, the court must make an initial assessment of the seriousness of the offence. It will base the decision upon representations of the prosecution and defence as to the nature and circumstances of the offence which will include the need to consider factors that aggravate or mitigate the seriousness of the offence, and a victim personal statement if available.

29. The court will have regard to definitive guidelines issued by the Sentencing Guidelines Council relating both to principles of sentencing and to specific offences. The guideline '*Overarching Principles: Seriousness*' published by the Sentencing Guidelines Council in December 2004 makes clear that, where there is an imbalance between the harm (or potential harm) caused by the offence and the offender's culpability, it is culpability that provides the initial starting point in assessing seriousness.

30. Statute makes specific provision for certain factors to aggravate the seriousness of an offence. These include the commission of the offence whilst on bail, the existence of relevant previous convictions and the presence of certain other factors such as racial or religious aggravation.

## ***Dangerous offenders***

31. Some either way offences are specified offences for the purposes of sections 224-236 of the 2003 Act. Where an offender is convicted of such an offence committed on or after 4 April, 2005, and the court considers there to be a significant risk of serious harm to the public by the commission of further specified offences by the offender, the court is required to impose one of the sentences designed to increase the protection of the public. Where the offender has previously been convicted of a "relevant offence",<sup>41</sup> there is a rebuttable presumption that that risk exists.<sup>42</sup> There is a separate power to commit for sentence an offender who is convicted summarily of an either way specified offence<sup>43</sup> and the defendant must be warned of that possibility when told that the court considers the case suitable for summary trial.<sup>44</sup>

32. The Panel consulted on the extent to which liability for such a sentence should influence the allocation decision. The clear consensus was that it would be inappropriate for a magistrates' court to make detailed inquiries at the allocation stage in order to discover whether it is likely that there is a significant risk of serious harm. The examination could prove lengthy and there were concerns that the prosecution would have insufficient information available at the time when the allocation decision was being made to inform an assessment of risk.

## ***Recommendation 15***

***The Panel proposes that the correct time to consider the issue is following conviction rather than during the allocation procedure.***

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<sup>41</sup> that is, a specified offence or its equivalent in Scotland or Northern Ireland: CJA03, s.229(4)

<sup>42</sup> *ibid.* s.229(3)

<sup>43</sup> PCC(S)A2000, s.3A as inserted by CJA03, sched.3, para.23

<sup>44</sup> MCA1980, s.20(2)(c)

## ***Indication of sentence***

### A. The Statutory Procedure

33. Where a court has decided that summary trial is suitable, the court is obliged to explain to the defendant that this is the decision of the court, that the defendant can either agree or can opt for trial at the Crown Court and that (if the offence is a “specified offence”<sup>45</sup>) the court will still have the option of committing the defendant to the Crown Court for sentence as a dangerous offender.<sup>46</sup> Before making that decision, the defendant is entitled to ask the court to indicate whether a custodial or non-custodial sentence is more likely if the defendant were to be tried in a magistrates’ court and pleaded guilty.<sup>47</sup>

34. The court is not obliged to give that indication<sup>48</sup> but, if it does, the court must ask whether the defendant wishes to reconsider the decision not to indicate a plea of guilty.

35. If the defendant does then indicate an intention to plead guilty, the court must proceed on that basis and a custodial sentence may only be imposed if that was the indication of sentence given by the court<sup>49</sup> or if the defendant comes within the “dangerous offender” provisions.<sup>50</sup>

36. If the defendant does not indicate an intention to plead guilty following the indication of sentence, the indication of sentence ceases to have effect.<sup>51</sup>

37. Where the court declines to give an indication of sentence or, such indication having been given, the defendant does not indicate that a plea of guilty would be entered, the court will proceed to ascertain whether the defendant consents to summary trial. If the defendant does consent to summary trial and either pleads guilty or is found guilty, the sentencing court is not restrained by any indication of sentence given under this procedure.<sup>52</sup>

38. This statutory procedure only applies in a magistrates’ court and only in the context of allocation proceedings where there has been no indication of a guilty plea. In *R. v. Goodyear*,<sup>53</sup> the Court of Appeal (Criminal Division) considered sentence indications in reference to proceedings in the Crown Court and established a procedure for that Court. Although the procedure and approach of the Crown Court are very different from that in a magistrates’ court, the Panel has concluded that many of the principles identified in *Goodyear* can be applied.

39. As with the approach to the allocation decision generally, the approach to the giving of an indication of sentence should be to set the maximum type of sentence realistically possible in the light of the facts as presented by the prosecution, with the additional element of a guilty plea tendered at this stage in the proceedings. If alternative charges are before the court, there must be clarity about the factual basis upon which an indication is sought. At this stage, the defendant has not yet indicated a guilty plea and

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<sup>45</sup> *ibid.* s.224

<sup>46</sup> MCA1980, s.20(2) as substituted by CJA03, sched.3, para.6

<sup>47</sup> *ibid.* s.20(3)

<sup>48</sup> *ibid.* s.20(4)

<sup>49</sup> *ibid.* s.20A(1)

<sup>50</sup> *ibid.* s.20A(2)

<sup>51</sup> *ibid.* s.20A(3)

<sup>52</sup> *ibid.* s.20A(3)

<sup>53</sup> [2005] EWCA Crim 888

so it will not be possible, in practice, for the defendant to offer personal mitigation, nor for the court to request a pre-sentence report. Those issues which mitigate the seriousness of the offence are likely to be apparent from the agreed basis of plea.

### **Recommendation 16**

#### ***The Panel proposes that:***

- (i) A court would expect to give an indication of sentence when requested and it is clear whether or not a custodial sentence is likely, except where it has a serious concern that it would be unable to do justice either to the defendant or to others.***
- (ii) An indication would not necessarily be given where the court has a serious concern in relation to one of the issues identified in paragraph 40 below or there is no firm factual basis for an indication to be given.***
- (iii) Normally, the court would not be expected to give reasons for a refusal.***

#### **B. Deciding whether to give an indication**

40. There is an absolute discretion to refuse to give an indication of sentence. Examples of circumstances where a refusal may be appropriate are:

- ❖ where the court considers that the defendant is already under pressure to plead guilty (perhaps from a co-defendant) and that giving the indication may add to that pressure
- ❖ where there is concern about whether the defendant appreciates that a plea of guilty should be entered only where the defendant is guilty of the offence charged
- ❖ where the court is concerned that it would not be able to judge properly the culpability of the defendant or differing levels of responsibility between defendants
- ❖ where the case is on the borderline between a custodial or non-custodial proposal and that it is not reasonable for the court to state which type of disposal is more likely
- ❖ where the court is concerned that the request for an indication is part of a tactical manoeuvre.

41. In most circumstances, a court would be expected to be more cautious about giving an indication to one of a number of co-defendants than to a sole defendant.

42. A court must be satisfied that it has enough information to determine whether or not a custodial sentence ought to be available for consideration by the court that imposes sentence. The consequence of an indication of sentence could be to eliminate the possibility of a custodial sentence if the defendant then pleads guilty yet it is the removal of that possibility that is most likely to affect the decision of the defendant on plea.

43. In its Guideline, *Reduction in Sentence for a Guilty Plea*,<sup>54</sup> the Sentencing Guidelines Council stated at paragraph 2.6 that:

“Where an offence crosses the threshold for imposition of a community or custodial sentence, application of the reduction principle may properly form the basis for imposing a fine or discharge rather than a community sentence, or an alternative to an immediate custodial sentence. Where the reduction is applied in this way, the actual sentence imposed incorporates the reduction.”

Since an indication is only likely to be sought where the defendant considers that there is a likelihood of a custodial sentence and that that could be influenced by the decision to plead guilty, this guideline is likely to be of particular relevance.

44. A court will need to assess whether the offence crosses the custody threshold and, if so, whether the fact of a guilty plea would be sufficient to enable another type of sentence to be imposed. The Panel suggests that the court should not need to go beyond this issue or to explore elements of personal or other mitigation.

#### C. The extent of a reduction for a guilty plea for the purposes of sentence indication

45. In order to set the maximum type of sentence in cases where the offence is close to the threshold for a custodial sentence, a magistrates’ court would have to consider whether the maximum reduction in sentence for a guilty plea would potentially be available where a guilty plea is forthcoming only after a sentence indication has been given. The Guideline, *Reduction in Sentence for a Guilty Plea*, at paragraph 4.3 states:

“(i) The maximum reduction will be given only where the offender indicated willingness to admit guilt at the **first reasonable opportunity**. When this occurs will vary from case to case.

(ii) Where the admission of guilt comes later than the first reasonable opportunity, the reduction for guilty plea will be less than one third.”

In considering further when the “first reasonable opportunity” occurs, Annex 2 of the Guideline emphasises the purpose of giving the reduction which is in recognition of “the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases”. There may only be a relatively short time gap between the opportunity to give an indication prior to allocation and the opportunity after an indication of sentence but the court will have had to consider allocation and determine summary trial and will then have to consider its response to the request for an indication of sentence. In those circumstances, it would appear that delay had taken place that could have been avoided and this will influence the extent of the reduction.

46. Those attending the consultation seminars were evenly split in relation to whether the ‘first reasonable opportunity’ could be after a sentence indication has been sought, even though the allocation decision is a single process (but with distinct stages) and the fact that the court might decline to give an indication in any event. Some considered that the level of reduction would not be much less if the plea of guilty came later but many favoured guidance on this particular issue. One proposal was that a guilty plea entered after an indication might attract a reduction in the order of 25%.

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<sup>54</sup> published December 2004, see [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk)

### **Recommendation 17**

***The Panel proposes that where a guilty plea is indicated after the court has given an indication of the likely sentence, the appropriate reduction in sentence for the guilty plea should be a maximum of one quarter.***

47. In *R. v. Goodyear*,<sup>55</sup> the Court of Appeal (Criminal Division) also set out the obligations on the defence and the prosecution within the context of the procedure established for the Crown Court and these appear to the Panel to apply equally to the procedure provided for a magistrates' court.

### **Recommendation 18**

***The Panel takes the view that it is possible to apply the principles of Goodyear in a way that enables a similar approach to be adopted in a magistrates' court, with additional factors to reflect the statutory and procedural differences between the courts.***

***Key elements of the approach to giving a sentence indication:***

***(i) A court should set the maximum type of sentence realistically possible in the light of the facts as presented by the prosecution, with the additional element of a guilty plea tendered at this stage in the proceedings, and subject to defence representations as to the accuracy of the factual outline of the case. Wherever possible, the key elements of the basis upon which the indication is given should be recorded in writing.***

***(ii) A court should proceed with caution where an offender is unrepresented. The offender should be advised of the availability of independent legal advice. The Justices' Clerk (or assistant to the Justices' Clerk) present in court has a duty to assist the unrepresented party,<sup>56</sup> and this will include drawing to the attention of an unrepresented defendant that there is an entitlement to request an indication of sentence.***

***(iii) A court should not give an indication of sentence where there are alternative charges unless the prosecution has indicated that an agreement as to acceptable pleas has been established following discussions with the defence, and there is an appropriate factual basis upon which an indication could be given.***

***(iv) The prosecution must ensure that the court is fully informed of the facts of the case and any relevant background.***

***(v) The Justices' Clerk (or assistant to the Justices' Clerk) present in court must ensure that the court applies any relevant guidelines or other authorities affecting sentence; prosecution advocates must be alert to provide further information where necessary.***

***(vi) The information presented to the court will not include personal mitigation except in so far as it has influenced the facts of the case presented to the court.***

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<sup>55</sup> [2005] EWCA Crim 888

<sup>56</sup> in accordance with paragraph V.55.9 of the Practice Direction (criminal: consolidated) [2002] 3 All ER 904

*(vii) The court should not normally go beyond the legislative requirements in giving an indication of sentence and should indicate only whether a custodial or non-custodial sentence is more likely. Any indication given must be recorded in writing and entered onto the court register.*

### **Youths charged together with an adult**

48. At present, the plea before venue procedure applies only to a defendant aged 18 or above.<sup>57</sup> Where an adult appears before a court charged with an indictable offence and a person under 18 is charged jointly, it is provided that, where the adult is committed or sent for trial, the court must also commit or send the youth if the court considers that it is necessary in the interests of justice.<sup>58</sup>

49. When the amending provisions are brought into force, the plea before venue procedure will apply to youths also.<sup>59</sup> A court will be required to follow this procedure before determining whether the allocation procedure is required.<sup>60</sup> If there is an indication of a guilty plea, the court will proceed as with an adult and will need to determine whether to sentence itself or to commit to the Crown Court or (if not itself a Youth Court) to remit to the Youth Court for sentence. Accordingly, the allocation decision will be required only where there is no indication of a guilty plea.

50. The Panel has concluded above (see paragraph 27(v)) that there should be a presumption in favour of dealing together on a single occasion with all who are accused of the same, or a connected, offence. Where a youth is jointly charged with an adult there are additional considerations because of the need to ensure that the requirements for a fair trial are met in the event of the case either being sent to the Crown Court or heard in the adult court, rather than being tried in a youth court. There are circumstances where a fair trial is more difficult in the Crown Court than in a youth court.<sup>61</sup>

51. When a youth is jointly charged with an adult there is a potentially wide range of culpability since it would be possible for a youth either to be on the periphery or to be the ringleader and for there to be a wide age gap. Normally, it would be expected that a youth would be dealt with in a youth court. That court has a wide range of sentencing powers and only a dangerous offender or a “grave crime” will usually be sentenced in the Crown Court. There is an additional requirement to take account of the welfare of the youth when imposing sentence and to deal speedily with cases.

52. However, dealing on a single occasion with a contested case involving two or more defendants generally enables all the relevant issues to be dealt with and minimises the demands on witnesses, victims and the resources of the criminal justice system. In balancing these two potentially conflicting principles, it seems to the Panel that there would be justification for a presumption that a youth who has not indicated a guilty plea should be sent to the Crown Court alongside a jointly charged adult. The court will need to consider carefully representations from both the prosecution and defence as to whether a joint trial is the most suitable course, taking into account factors relating to the case and to the offender. Circumstances where a joint trial might not be appropriate

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<sup>57</sup> MCA1980, s.17A(1)

<sup>58</sup> MCA1980, s.24(1); CDA1998, s.51(5)

<sup>59</sup> MCA1980, s.24A as inserted by the 2003 Act, sched.3, para.10

<sup>60</sup> *ibid.* s.24A(1)(b), s.24A(2)

<sup>61</sup> Consolidated Criminal Practice Direction, para. IV 39.1-17; see also *S.C. v. U.K.* ECHR 60958/00, June 15, 2004; [2005] Crim.L.R. 130

could arise where there is a substantial age gap, where the youth is alleged to have played a very minor role, or where the issues in dispute are substantially different. Consultees generally supported this presumption but felt strongly that the allocation guidelines should give examples of factors that could cause the presumption to be rebutted, which might relate to the alleged offence or to the defendant.

### **Recommendation 19**

***The Panel proposes that there should be a presumption in favour of sending to the Crown Court a youth who is jointly charged with an adult who is being sent.***

***Factors that might suggest that the presumption be rebutted in a particular case include:***

- ❖ The young age of the offender, particularly where the age gap between the adult and youth offenders is substantial***
- ❖ The immaturity and intellect of the youth***
- ❖ The relative culpability of the youth compared with the adult and whether the role played by the youth was minor***
- ❖ Lack of previous convictions on the part of the youth compared with the adult offender***
- ❖ Whether the trial of the adult and youth can be severed without inconvenience to witnesses or injustice to the case as a whole***

## SUMMARY OF THE PANEL'S RECOMMENDATIONS

### Content and Format of Allocation Guidelines:

The Panel proposes that the first section of the guidelines will comprise a set of guidance notes (which reflect the outcomes of the consultation process) which should include:

- (a) statement of purpose for the guidelines and of the cases to which the guidelines apply
- (b) the legislative factors that must be taken into account and other general principles
- (c) the presumptions upon which the allocation decision should be based

The Panel proposes that there be a stand-alone set of allocation guidelines pending the development over time of sufficient offence specific guidelines to assist courts making the venue decision.

The Panel proposes that the following offences/categories of offence be the subject of allocation guidelines:

#### ***Dishonesty***

Burglary (dwelling and commercial/other)  
 Handling stolen goods  
 Theft  
 Fraudulent evasion of excise duty  
 Obtaining property by deception  
 Dishonest representations for obtaining benefit

#### ***Violence/offences against the person***

Malicious wounding/inflicting grievous bodily harm (GBH)  
 Assault occasioning actual bodily harm (ABH)  
 Racially/religiously aggravated common assault  
 Harassment (section 4 PFHA 1997 and racially aggravated)  
 Breach of a restraining order

#### ***Sexual Offences***

Sexual assault (section 3 SOA 2003)  
 Sexual activity with a child (section 9 SOA 2003)  
 Causing or inciting a child to engage in sexual activity (section 10 SOA 2003)  
 Indecent photographs of children (section 45 SOA 2003)  
 Grooming (section 15 SOA 2003)  
 Trafficking (sections 57-59 SOA 2003)

#### ***Offences against public order***

Violent disorder  
 Affray  
 Racially/religiously aggravated threatening behaviour  
 Possession of an offensive weapon  
 Breach of ASBO

#### ***Drugs offences***

Possession of class A & B drugs

Possession with intent to supply  
Supply of controlled drugs  
Cultivation of cannabis

***Driving Offences***

Dangerous driving  
Aggravated vehicle taking

***Other Offences***

Criminal damage and arson  
Racially/religiously aggravated criminal damage  
Witness intimidation  
Health and safety offences  
Environmental offences  
Passport offences  
Currency offences

**The new allocation procedure and other new provisions:**

It is the view of the Panel that the objectives of the changes to the allocation procedure should form part of a Statement of Purpose for the allocation guidelines.

**Legislative and other considerations:**

In summary, the Panel proposes that the following factors are relevant considerations:

- ❖ *Adequacy of sentencing powers based on an assumption that the prosecution version of the facts is correct*
- ❖ *Whether the charge is a specimen charge*
- ❖ *The need for a separate tribunal to determine fact*
- ❖ *Presumption in favour of summary trial*
- ❖ *Presumption in favour of all linked cases being heard before a single court*
- ❖ *Any representations by the prosecution or defence*

***Adequacy of sentencing powers based on an assumption that the prosecution version of the facts is correct***

Given that the allocation decision will be required only where a guilty plea indication is not given, the Panel proposes that this approach be retained.

It is the view of the Panel that the reduction for a guilty plea principle will not influence the court in making an allocation decision.

The Panel is proposing that there should be a presumption in favour of all linked cases being dealt with together. It is the view of the Panel that it is possible to extend that principle to cover this situation so that a court should make efforts to consider together as many matters as possible where an allocation decision is yet to be made, unless this would result in significant delay or injustice to the prosecution or defence.

Where a defendant has already been convicted of other matters but not yet sentenced, those convictions will be relevant to the assessment of seriousness of the offence(s) currently before the court.

The Panel believes that the suspended sentence order will be relevant to the allocation decision as it will be a recorded conviction, and the question of whether the defendant is in breach will be separately considered following conviction and action taken as necessary. This will be a similar approach to that proposed for dangerous offenders.

***Whether the charge is a specimen charge***

The Panel proposes that the fact that a charge is a specimen charge is relevant in assessing the seriousness of the offence and, therefore, to the allocation decision.

***The need for a separate tribunal to determine fact***

The Panel proposes that a factor be retained to enable courts to deal appropriately with the small number of cases where the separation between Judge and jury would be sufficient reason to send to the Crown Court a case otherwise suitable for trial in a magistrates' court.

***Presumption in favour of summary trial***

The Panel proposes that as many cases as possible should be dealt with summarily but where any uncertainty remains (in relation to the adequacy of the sentencing powers available) it should be resolved in favour of the case being dealt with in the Crown Court.

***Presumption in favour of all linked cases being heard before a single court***

The Panel considers that it is generally preferable for all issues to be dealt with in a single trial and the Panel proposes that there should be a presumption in favour of all linked cases being heard before a single court.

***Any representations by the prosecution or defence***

The Panel proposes that defence representations will normally be directed to identifying inaccuracies in the factual outline of the case, assessing the adequacy of the court's sentencing powers and determining the relevance of an offender's previous convictions.

**Dangerous offenders:**

The Panel proposes that the correct time to consider the issue is following conviction rather than during the allocation procedure.

***Indication of sentence:***

*The Panel proposes that:*

- (i) A court would expect to give an indication of sentence when requested and it is clear whether or not a custodial sentence is likely, except where it has a serious concern that it would be unable to do justice either to the defendant or to others.*
- (ii) An indication would not necessarily be given where the court has a serious concern in relation to one of the issues identified or there is no firm factual basis for an indication to be given.*
- (iii) Normally, the court would not be expected to give reasons for a refusal.*

The Panel proposes that where a guilty plea is indicated after the court has given an indication of the likely sentence, the appropriate reduction in sentence for the guilty plea should be a maximum of one quarter.

The Panel takes the view that it is possible to apply the principles of *Goodyear* in a way that enables a similar approach to be adopted in a magistrates' court, with additional factors to reflect the statutory and procedural differences between the courts.

**Key elements of the approach to giving a sentence indication:**

(i) A court should set the maximum type of sentence realistically possible in the light of the facts as presented by the prosecution, with the additional element of a guilty plea tendered at this stage in the proceedings, and subject to defence representations as to the accuracy of the factual outline of the case. Wherever possible, the key elements of the basis upon which the indication is given should be recorded in writing.

(ii) A court should proceed with caution where an offender is unrepresented. The offender should be advised of the availability of independent legal advice. The Justices' Clerk (or assistant to the Justices' Clerk) present in court has a duty to assist the unrepresented party,<sup>62</sup> and this will include drawing to the attention of an unrepresented defendant that there is an entitlement to request an indication of sentence.

(iii) A court should not give an indication of sentence where there are alternative charges unless the prosecution has indicated that an agreement as to acceptable pleas has been established following discussions with the defence, and there is an appropriate factual basis upon which an indication could be given.

(iv) The prosecution must ensure that the court is fully informed of the facts of the case and any relevant background.

(v) The Justices' Clerk (or assistant to the Justices' Clerk) present in court must ensure that the court applies any relevant guidelines or other authorities affecting sentence; prosecution advocates must be alert to provide further information where necessary.

(vi) The information presented to the court will not include personal mitigation except in so far as it has influenced the facts of the case presented to the court.

(vii) The court should not normally go beyond the legislative requirements in giving an indication of sentence and should indicate only whether a custodial or non-custodial sentence is more likely. Any indication given must be recorded in writing and entered onto the court register.

**Youths charged together with an adult:**

The Panel proposes that there should be a presumption in favour of sending to the Crown Court a youth who is jointly charged with an adult who is being sent.

Factors that might suggest that the presumption be rebutted in a particular case include:

- ❖ The young age of the offender, particularly where the age gap between the adult and youth offenders is substantial
- ❖ The immaturity and intellect of the youth

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<sup>62</sup> in accordance with paragraph V.55.9 of the Practice Direction (criminal: consolidated) [2002] 3 All ER 904

- ❖ The relative culpability of the youth compared with the adult and whether the role played by the youth was minor
- ❖ Lack of previous convictions on the part of the youth compared with the adult offender
- ❖ Whether the trial of the adult and youth can be severed without inconvenience to witnesses or injustice to the case as a whole

## THE CONSULTATION PROCESS

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a discussion paper on 14 September 2005, which was published on the Panel's website and sent to the Panel's 33 regular consultees. The discussion paper set out some of the Panel's provisional views and asked a number of key questions relating to the allocation decision in the context of the new legislative provisions and procedure.

The paper was discussed by 8 groups of key stakeholders, drawn from across the criminal justice system, at a series of seminars on 23, 26 and 28 September. This was the Panel's primary method of consultation on this occasion, as there is a pressing need for sentencing guidelines to be ready to inform the training of sentencers next spring.

Seminar delegates were also invited to submit written comments responses and the closing date for all responses was 30 September.

### Seminar delegates

<b>Kate Akester</b>	Secretariat, Home Affairs Committee
<b>Ruth Allan</b>	National Offender Management Service
<b>Judge Tony Ansell</b>	Sentencing Advisory Panel
<b>Chris Armstrong</b>	Justices' Clerks' Society
<b>Judge Badley</b>	Council of HM Circuit Judges
<b>Estella Baker</b>	School of Law, University of Sheffield
<b>Robert Banks</b>	Criminal Bar Association
<b>Heather Barclay</b>	Equal Opportunities Commission
<b>Cindy Barnett</b>	Magistrates' Association
<b>David Brewer</b>	Justices' Clerks' Society
<b>Judge Philip Browning</b>	District Judge
<b>Charles Bushell</b>	Prison Governors' Association
<b>Richard Chown</b>	Trial Policy and Procedure Unit, Home Office
<b>Helen Cousins</b>	Law Society
<b>Joanna Crowley</b>	Sentencing Advisory Panel
<b>Richard Crowley</b>	Crown Prosecution Service
<b>Amu Devani</b>	Sentencing Advisory Panel
<b>Michael Downes</b>	Police Federation
<b>Norman Draper</b>	Justices' Clerk, Merseyside
<b>David Evans</b>	Crown Prosecution Service
<b>Mohammed Farooq</b>	National Probation Directorate
<b>Judge David Fletcher</b>	Council of HM Circuit Judges
<b>Alison Foulds</b>	Sentencing Policy and Penalties Unit, Home Office
<b>Derek French</b>	Solicitor, Member of Criminal Procedure Rules Committee
<b>Loraine Gelsthorpe</b>	Institute of Criminology, Cambridge
<b>Alisdair Gillespie</b>	De Montfort Law School, Leicester & Society of Legal Scholars
<b>David Griffiths</b>	National Probation Directorate
<b>David Greensmith</b>	Justices' Clerks' Society
<b>Nigel Groves</b>	National Probation Service
<b>Judge Tony Hammond</b>	Council of HM Circuit Judges
<b>Heather Harker</b>	Sentencing Advisory Panel

<b>Keir Hopley</b>	Sentencing Policy and Penalties Unit, Home Office
<b>Elizabeth Howe</b>	Crown Prosecution Service
<b>Dewi Hughes</b>	Magistrates' Association
<b>Sally Ireland</b>	JUSTICE
<b>Kevin Kerrigan</b>	Northumbria University
<b>Paul Kiff</b>	Penal Affairs Consortium
<b>Adele Kirkwood</b>	Police Federation
<b>Rachel Lipscomb</b>	Magistrates' Association
<b>Janet Males</b>	Magistrates' Association
<b>Theresa Mallabone</b>	National Probation Directorate
<b>David Mallen</b>	Sentencing Advisory Panel
<b>Richard Mason</b>	National Probation Directorate
<b>Neil Masters</b>	Crown Prosecution Service
<b>Mark May</b>	National Offender Management Service
<b>Mike McClelland</b>	NAPO
<b>Timothy McDonnell</b>	Lord Chief Justices' Office
<b>Wendy Middleton</b>	Revenue and Customs Prosecution Office
<b>Judge Fergus Mitchell</b>	Council of HM Circuit Judges
<b>Duncan Moass</b>	Legal Secretariat to the Law Officers
<b>David Murray</b>	Murray Bayliss, Solicitors
<b>Steve Murphy</b>	National Offender Management Service
<b>Lal Nawbatt</b>	Department for Trade and Industry
<b>Nicky Padfield</b>	Fitzwilliam College, University of Cambridge
<b>Joanna Perry</b>	Victim Support
<b>John Phillipson</b>	Magistrates' Association
<b>St John Pilkington</b>	Justices' Clerks' Society
<b>Cordell Pillay</b>	NAPO
<b>Judge John Platt</b>	Council of HM Circuit Judges
<b>Philip Plowden</b>	Law Society
<b>Jonathan Price</b>	Justices' Clerks' Society
<b>Naomi Redhouse</b>	Solicitor
<b>Simon Reed</b>	Police Federation
<b>Judge Paul Richardson</b>	District Judge
<b>Justin Rivett</b>	Rodney Warren & Co., Solicitors
<b>Judge Alison Rose</b>	District Judge
<b>Judge John Samuels QC</b>	Council of HM Circuit Judges
<b>Andrea Saunders</b>	National Probation Directorate
<b>Julian Schon</b>	Trial Policy and Procedure Unit, Home Office
<b>Nisha de Silva</b>	Research, Development and Statistics Directorate, NOMS
<b>Malathy Sitaram</b>	Sentencing Guidelines Council
<b>Judge Slinger</b>	Council of HM Circuit Judges
<b>Enver Soloman</b>	Prison Reform Trust
<b>Nicola Stell</b>	Magistrates' Association
<b>Zoe Stowe</b>	Roadpeace
<b>Robert Street</b>	Research, Development and Statistics Directorate, NOMS
<b>Judge Swift</b>	Council of HM Circuit Judges
<b>David Thomas</b>	Probation Managers' Association
<b>Tracey Wareham</b>	Crown Prosecution Service
<b>Joan Webster</b>	Sentencing Advisory Panel
<b>Hans Weijman</b>	Probation Managers' Association
<b>Sally Wentworth-James</b>	NACRO
<b>Jacqueline Westrop</b>	Probation Managers' Association

**Written responses were also received from:**

**Julian Fox**, Solicitor, South Yorkshire Probation Board

**Dr. Loraine Gelsthorpe**, Institute of Criminology, Cambridge

**Judge Miles McColl**

**Justices' Clerks' Society**

**Magistrates' Association**

**Professor Kiron Reid**, University of Liverpool

**Nicola Stell**, J.P.

**Victim Support**

**Youth Justice Board**