



Justice Committee

The Rt Hon. Lord Justice William Davis

Chairman, Sentencing Council

By email only

14 March 2023

Dear William,

The Committee welcomes the opportunity to contribute to the Sentencing Council's consultation on changes to the totality guideline. We would also like to thank the Council for sharing the responses to the consultation with the Committee. Overall, we are supportive of the changes proposed by the Council which will make the totality guideline more accessible and easier to use.

The Committee welcomes the decision to revisit the totality guideline, which came into force in 2012. The guideline is notable for the fact that it is relevant to a significant proportion of cases, and therefore it is right that the Council should re-examine it, evaluate how it is working and ensure that any changes are informed by the best possible evidence, wide consultation and public scrutiny.

The Committee decided to take [oral evidence](#) on the changes proposed by the Council in order to inform its response as well as its ongoing inquiry on public opinion and understanding of sentencing. Accordingly, on 7 March 2023, we heard from Professor Andrew Ashworth CBE KC (Hon), Emeritus Vinerian Professor of English Law, Faculty of Law, University of Oxford; Professor Mandeep Dhimi, Professor in Decision Psychology, Middlesex University London; and Dr Rory Kelly, Lecturer in Criminal Evidence and Criminal Law, Faculty of Laws, University College London.



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Data on totality

The Council's consultation explains that the proposed revisions to the guideline are based on the findings of the research *Exploring sentencers' views of the Sentencing Council's Totality guideline*. That research provided some valuable insights that have helped to inform the Council's proposed changes. The research appeared to indicate that sentencers generally do not rely on the guideline itself to inform their approach to sentencing more than one offence on the same occasion, or when sentencing an offender who is already serving a sentence. The report set out that the majority of sentencers said that they mainly apply its principles and consult it only for difficult or unusual cases. Given this finding, it would have been useful if the Council had been able to gather and analyse a larger data sample to see how the totality principle is being used and applied and, in particular, what difference, if any, there was when the totality guideline was directly referred to by the sentencer.

It was notable that a number of responses to the Council's consultation highlighted the lack of data on multiple offences. The lack of official data on sentencing for multiple offences and, in particular, the sentences imposed for secondary/non principal offences is a significant problem, which we will raise with the Ministry of Justice. We welcome the fact that the Council is planning to gather some data on multiple offences in its pilot data collection exercise, but the Committee would hope that the Common Platform should be able to provide better data to analyse sentencing for multiple offences. We would be grateful if the Council could keep the Committee informed on any developments in this area.

Despite the valuable research conducted by the Council in 2021, the Committee regrets the limited data, and therefore analysis, that has informed the Council's revision of the Totality guideline. The Council's resource assessment does not



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provide any assistance to the Committee, or indeed to the public, in assessing how the proposed changes may affect sentencing. The resource assessment sets out that the Council is unable to provide a reliable estimate of how many cases the guideline is relevant to. The Council then says that it estimates that the changes will have “no resource impact”. While we recognise that the Council is not responsible for the lack of data on sentencing multiple offences, it is a regrettable state of affairs that there is so little useful data to inform the assessment of how changes to such a significant guideline may affect sentencing in the future.

Professor Dhami’s response to the Council’s consultation draws attention to the fact that the lack of data on multiple offences impinges analysis of the potential for the guideline to cause or increase disparity in sentencing. One of the Council’s five strategic aims for 2021-26 is “to explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit”. It is therefore especially problematic that the Council cannot undertake such analysis to inform its revision of this guideline.

We would also like to draw attention to the qualitative analysis included in the Office of the Attorney General’s response. This states that:

In preparation for our response, we reviewed 67 sentences passed between 13 January 2022 to 15 September 2022 that we had referred to the Court of Appeal and where leave was granted. Of the 67 cases, the AGO submitted that there were issues with the way totality was addressed in 32 of the cases, and the Court of Appeal mentioned the issue of totality in 21 cases.



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This highlights the value of qualitative analysis in informing the Council's work and we would be keen to know if the Council had undertaken any analysis of judgments that applied the principle of totality prior to revising the guideline.

Public understanding

The Council's 2021 research on *Exploring sentencers' views of the Sentencing Council's Totality guideline* reported concerns about the general lack of public understanding of the principles of totality and the perception that it results in leniency. As the Council is aware, the Committee is conducting an inquiry on public opinion and public understanding of sentencing. The Committee is concerned that the totality principle is poorly understood by the public in general, and that it can also be difficult for victims and defendants to understand how it works. We agree with Dr Rory Kelly's submission that clear explanations of the principles of totality are vital so that victims understand how harms they have suffered are reflected in the sentence and the public has a clear grasp of how concurrent sentences work. Dr Kelly also points out that judges' considerable discretion in deciding how to apply the principles of totality makes the clarity of explanation particularly valuable to public understanding. The Committee therefore welcomes the Council's decision to make explicit reference in the totality guideline, in the general approach section, to the need for the sentencer to "explain how the sentence is structured in a way that will be best understood by all concerned".

We would recommend that the Council considers going further and includes within the guideline specific reference to the elements that the sentencer should explain when applying the totality guideline, or the principles of totality more generally. We would recommend that there is a stand-alone principle in the general approach section on how to explain the application of totality to the sentence, as was recommended by the Justices' Legal Advisers and Court Officers' Service. We also



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support the Ministry of Justice's suggestion of an inclusion of a further explanation box to assist sentencers with explaining how sentences are constructed in the context of totality. The principle and the box should set out what the explanation of the application of totality to the sentence should cover. Giving evidence to the Committee, Professor Andrew Ashworth, said that the Council's guidance on the explanation of the application of the principles should also ask the sentencer to explain how the sentence is calculated. The Office of the Attorney General also recommended included a reminder that "greater clarity may be achieved by explaining the effect of totality on the notional sentence". The Crown Prosecution Service also welcomed the emphasis on explaining how the sentence is structured, but recommended consideration of whether this could be taken further:

Where consecutive sentences are imposed, is it good practice to identify and explain in open court what the notional sentence on each count is, and then indicate where any downward adjustment has been made and to what extent, so that the application of totality is clear?

Where concurrent sentences are imposed, is it good practice to identify and explain in open court what sentence would have been imposed for a notional single offence, and what upward adjustment and to what extent has been made to reflect the commission of more than a single offence?

The Committee supports these proposals and suggests that the guidance on the explanation should state how the sentencer should explain the application of the totality principles affected the way in which the length of the sentence was calculated and how the sentence was structured.



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The same victim

A number of responses draw attention to the revised guideline's references to the application of the totality principles to cases involving multiple offences against the same victim in the general approach section, where it says that: "Concurrent sentences will ordinarily be appropriate where [...] there is a series of offences of the same or similar kind, especially when committed against the same person". The Office of Attorney General's response suggested that the general approach section should include a reference to cases with repeated sexual offences against the same victim: "the sentences can be passed concurrently, but the lead offence should be aggravated to take into account the overall criminality carried out". We agree. We also support the point made by the CPS that when concurrent sentences are used in cases of serious sexual offending, it is particularly important that there is a clear explanation so that victims understand how the sentence has been reached.

We would also draw the Council's attention to the point made by Professor Mandeep Dhami in her evidence to the Committee that by recommending concurrent sentences for offences committed against the same person there is a risk that "you could be introducing a bias against victims who suffer from these types of crimes; these victims are likely to be women who are subject to stalking and harassment, and domestic abuse, as well as children subjected to abuse and neglect" ([Q36](#)). This again highlights the need for the Council to have access to better data to be able to test these claims about the potential disproportionate effect of the guidance within the guideline.

General principles

We are not convinced that there is much value in the statement that "there is no inflexible rule governing whether sentences should be structured as concurrent or consecutive". Dr Rory Kelly, in his evidence to the Committee, rightly praised the



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revised guideline for including more detailed examples and guidance on when a concurrent sentence is more appropriate and when a consecutive sentence is more appropriate. There does seem to be a risk of some confusion arising from the inclusion of the statement about “no inflexible rule” alongside statements such as “concurrent sentences will ordinarily be appropriate where offences arise out of the same incident or facts”. At the very least, the statement of “there is no inflexible rule” is superfluous when the relevant guidance uses the language of “will ordinarily be appropriate”. Removing the “there is no inflexible rule” statement could encourage sentencers to make greater use of the expanded guidance and examples included in the guideline.

Reaching a just and proportionate sentence

We support the aim of seeking to make the guidance on reaching a just and proportionate sentence more prominent within the guidelines. However, the Council should consider whether this point might be more prominent if it was integrated within each section, as the “golden thread” that runs throughout the guideline, rather than as a standalone section.

Professor Dhami, in her evidence to the Committee and her response to the Council’s consultation, argued that the guideline did not provide sufficient guidance on what constitutes a just and proportionate sentence. We note the proposed amendment to the just and proportionate test in the general principles section suggested by the Office of Attorney General, so that it would read:

The overriding principle is that the overall sentence must be just and proportionate, taking into account the aggregate effect of all offending. A sentence that is just and proportionate would generally reflect whether the multiple offending had arisen out of the same facts and incidents, or not.



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This could provide helpful additional guidance. They also suggest that it would be valuable to include a reminder within the guideline that reaching a just and proportionate sentence can include upwards as well as downwards adjustments. The CPS's suggestion to include the following in the general principles, to expand the just and proportionate test, would also add clarity in our view:

If consecutive, it is usually impossible to arrive at a just and proportionate sentence for more than a single offence simply by adding together notional single sentences. Ordinarily some downward adjustment is required.

If concurrent, it will often be the case that the notional sentence on any single offence will not adequately reflect the commission of more than a single offence. Ordinarily some upward adjustment is required.

Evaluation

The Committee would be keen to hear if the Council has any plans to monitor the effect of the changes proposed to the Totality guideline. It would be particularly interesting and valuable to understand what effect the new guidance on explaining the application of totality principles was having.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R Neill'.

Sir Robert Neill MP

Chair

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