

Sentencing Council meeting:
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1 ISSUE

1.1 The Council consulted on a revised version of the Totality guideline from 5 October 2022 to 11 January 2023. Research with sentencers had shown that they generally found the guideline to be useful and clear and a practical help in sentencing. The scope of the revisions was therefore limited to updating the guideline without changing the essentials of the content.

1.2 This is the second of two planned meetings to discuss the responses to the consultation. The aim is to publish the revised guideline at the end of May to come into force on 1 July 2023.

2 RECOMMENDATION

2.1 That the Council:

- considers the response from the Justice Committee and reviews the outline of the guideline agreed at the last meeting;
- considers the suggestions for changes to the detailed sections of the guideline; and
- considers the responses relating to the impact of the guideline and issues of equality and diversity.

3 CONSIDERATION

3.1 We have now received the response to the consultation from the Justice Committee (attached at **Annex C**) in addition to the 25 responses already received. At the last meeting the Council considered the basic outline of the guideline without the drop-down sections. At this meeting we will look at the response from the Justice Committee in relation to the outline of the guideline and then consider the content of the drop-down sections. **Annex A** contains a version of the guideline with the changes **suggested** in this paper. **Annex B** contains the outline of the guideline with the changes agreed at the last meeting; the online consultation version of the guideline can be viewed [here](#).

The Justice Committee response

3.2 The Committee welcomed the decision to revisit the Totality guideline and overall was supportive of the changes proposed. On 7 March 2023 the Committee took [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. They heard from Professor Andrew Ashworth, Professor Mandeep Dhani and Dr Rory Kelly.

3.3 Regarding the **General principles** section the Committee suggested:

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.

3.4 The revised version of this section, agreed at the last meeting, now reads:

General principles

When sentencing for more than one offence, the overriding principle of totality is that the overall sentence should:

- reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and
- be just and proportionate.

Sentences can be structured as **concurrent** (to be served at the same time) or **consecutive** (to be served one after the other). There is no inflexible rule as to how the sentence should be structured.

- If consecutive, it is usually impossible to arrive at a just and proportionate sentence 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 overall offending. Ordinarily some upward adjustment is required and may have the effect of going outside the category range appropriate for a single offence.

3.5 The Council felt that there was no contradiction in saying that there is no inflexible rule and then giving examples of how in different circumstances the court should approach the issue. The issue was only raised by one respondent (prior to the Justice Committee’s response) but if the Council feels that the use of the term ‘no inflexible rule’ is liable to cause misunderstanding we could consider removing or rephrasing it.

Question 1: Does the Council wish to rephrase or remove the reference to ‘no inflexible rule’?

3.6 In the **General approach** section, the Justice Committee welcomed the Council’s decision to make explicit reference to the need for the sentencer to ‘explain how the sentence is structured in a way that will be best understood by all concerned’. They recommended 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 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”.

3.7 We have discussed the Ministry of Justice’s suggestion with officials and they proposed adding some wording to the totality step in guidelines to remind sentencers to explain who the overall sentence has been arrived at. For example:

Step 5 – Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour **and consider and explain how the sentence is structured in a way that will be best understood by all concerned**. See [Totality](#) guideline.

3.8 The Committee also supported the Crown Prosecution Service’s recommendation:

- 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?

3.9 The Council considered these matters at the last meeting and the revised version of this section now reads:

General approach (as applied to determinate custodial sentences)

1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
2. Following the guidance provided below, determine whether the case calls for concurrent or consecutive sentences. When sentencing more than two offences, a combination of concurrent and consecutive sentences may be appropriate.
3. Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.
4. Consider and explain how the sentence is structured in a way that will be best understood by all concerned.

Concurrent sentences will ordinarily be appropriate where:

- a. offences arise out of the same incident or facts.

Examples include:

V

- b. there is a series of offences of the same or similar kind, especially when committed against the same person.

Examples include:

V

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved which may take the lead offence outside the category range appropriate for a single offence.

Concurrent custodial sentence examples:

V

Structuring concurrent sentences:

When sentencing for two or more offences of differing levels of seriousness the court can consider structuring the sentence using concurrent sentences, for example:

- consider whether some offences are of such very low seriousness that they can be recorded as 'no separate penalty' (for example technical breaches or minor driving offences not involving mandatory disqualification)
- consider whether some of the offences are of lesser seriousness such that they can be ordered to run concurrently so that the sentence for the most serious offence(s) can be clearly identified.

Consecutive sentences will ordinarily be appropriate where:

- a. offences arise out of unrelated facts or incidents.

Examples include:

V

- b. offences that are unrelated because whilst they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

Examples include:

V

- c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include:

V

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would result in an overall sentence that undermines the statutory minimum sentence.

Examples include: V

However, it is **not** permissible to impose consecutive sentences for offences committed **in a single incident** in order to evade the statutory maximum penalty.

Examples include: V

Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.

Structuring consecutive sentences:

When sentencing for similar offence types or offences of a similar level of severity the court can consider structuring the sentence using consecutive sentences, for example:

- consider whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
- consider whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively in order that the sentence for the lead offence can be clearly identified

3.10 The Council did not adopt the suggestion that the guideline should require the court to state the notional sentence for each offence and then explain how that has been reflected in the overall sentence. The instruction in the guideline is to: ‘Consider and explain how the sentence is structured in a way that will be best understood by all concerned’. The Council may feel that while in many cases this would involve stating the notional sentence for each offence, in others that would be an artificial and over-complicated process.

Question 2: Does the Council wish to make any further changes regarding how the sentence should be explained, including to the Totality step in offence specific guidelines?

3.11 The Committee commented on the inclusion of a separate **Reaching a just and proportionate sentence** section in the draft guideline, stating:

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.

3.12 At the last meeting the Council agreed to integrate the information in that section into the **General approach** section under the subheadings ‘Structuring concurrent sentences’ and ‘Structuring consecutive sentences’.

3.13 The Council may wish to consider whether the revisions agreed at the last meeting, taken as a whole, provide adequate guidance on what is meant by ‘just and proportionate’ over and above reflecting all of the offending behaviour (as set out in the **General principles** section). The Committee’s suggestion of a ‘golden thread’ sounds appealing and to some extent may already have been achieved in the wording:

Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.

However, ‘just and proportionate’ is not mentioned in the equivalent wording on concurrent sentences:

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved which may take the lead offence outside the category range appropriate for a single offence.

3.14 This could be revised to read:

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved which may take the lead offence outside the category range appropriate for a single offence to ensure the sentence length is just and proportionate.

Question 3: Does the Council wish to make any further references to ‘just and proportionate’ and, if so, should the proposed amendment be adopted?

3.15 Moving on to issues relating to the examples given in the guideline that were not considered at the last meeting. The Justice Committee noted that responses had drawn attention to the application of the totality principles to cases involving multiple offences against the same victim in the concurrent sentences examples in the General approach section:

- b. there is a series of offences of the same or similar kind, especially when committed against the same person.

Examples include: [dropdown]

- repetitive small thefts from the same person, such as by an employee
- repetitive benefit frauds of the same kind, committed in each payment period

3.16 Rory Kelly queried why the fact that it was the same victim was relevant, stating: “This may risk creating the misimpression that there is a discount for targeting one person.” He suggested removing the words ‘especially when committed against the same person’ and

suggested that the first example could be changed to read ‘repetitive small thefts from an employer’.

3.17 Several respondents were concerned that while the examples relate to theft and fraud offences, this approach could be applied to sexual offences and domestic abuse cases and result in sentences that fail to take account of the overall offending. The Attorney-General’s Office (AGO) provided some evidence, from sentences increased on referral to the Court of Appeal, that courts have fallen into error in this regard.

3.18 The guideline includes the following under the consecutive sentences examples:

- c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include: [dropdown]

- where offences committed against different people, such as repeated thefts involving attacks on several different shop assistants
- where offences of domestic violence or sexual offences are committed against the same individual

3.19 The AGO and CPS both suggested that the guideline should include examples of how concurrent sentences can be applied to sexual offending. The AGO suggested adding a fourth bullet to the dropdown list ‘Concurrent custodial sentences: examples’:

- 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

3.20 In order that this is not missed it might be preferable to include similar wording in the entry under concurrent sentences (either as well as or instead of the AGO suggestion). It might also be helpful to cross-reference to the consecutive sentence example. Taking into account all the various suggestions the following is proposed:

- b. there is a series of offences of the same or similar kind, especially when committed against the same person (but note this may not apply in all cases – see below under consecutive sentences at point c.).

Examples include: [dropdown]

- repetitive small thefts from an employer
- repetitive benefit frauds of the same kind, committed in each payment period
- repeated sexual offences against the same victim where the lead offence can be aggravated sufficiently to take account of the overall criminality

3.21 In the consecutive sentences example it would be preferable to refer to ‘domestic abuse’ rather than ‘domestic violence’. This change and the addition of the wording proposed at 3.18 above can be seen in Annex A.

3.22 The CPS made the additional point of the importance of a clear explanation of the sentences for the benefit of victims:

In particular with serious sexual offending where a maximum life sentence is available, in our experience consecutive sentences are not always necessary to achieve a just and proportionate sentence. A lead offence or offences of rape, for instance, can be appropriately adjusted upwards with all sentences running concurrently to reach an appropriate sentence. This further emphasises the importance of a clear explanation to ensure that victims understand how the sentence has been reached.

3.23 The Council may feel that the important points that the guideline needs to convey are that a) however sentences are constructed the final sentence needs to reflect the overall offending and b) this should be explained to offenders and victims. It will be important to ensure that these messages are clear in the final version.

Question 4: Does the Council wish to make the changes proposed above relating to sexual offences?

Question 5: Does the Council wish to make any other changes relating to sexual offences or other offending against the same victim?

Other matters raised by respondents

3.24 A magistrate asked for more examples that relate more to the offences sentenced in magistrates' courts. The difficulty with this suggestion is that the examples can never cover all eventualities. It is important that sentencers focus on the principles rather than look for an example to match the case before them.

3.25 The CPS commented on the examples given under concurrent sentences 'a. offences arise out of the same incident or facts':

Examples include:	[dropdown]
<ul style="list-style-type: none">• a single incident of dangerous driving resulting in injuries to multiple victims• robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it• fraud and associated forgery• separate counts of supplying different types of drugs of the same class as part of the same transaction	

3.26 In relation to the second bullet they suggest it might be clearer to express this as:

- robbery with a weapon where the use of a weapon has been taken into account in categorising the robbery

3.27 In relation to the third bullet they suggest that this could be clearer if it also referred to the possession/making an article used in that fraud. Suggested wording:

- fraud and associated forgery or possession or making an article used in the fraud

3.28 In relation to the fourth bullet they state:

This might imply, by “transaction”, an actual single physical occasion of supplying a drug. We would also suggest that this principle could equally apply when sentencing for more than one conspiracy charge which cover the same offending period but relate to different types of drugs of the same class. There would also be no issue, from our perspective, with concurrent sentences for drugs of different classes, provided the more serious offence was taken as the lead offence.

3.29 It is not clear if the CPS are suggesting that that particular example should be expanded. The list of examples is clearly non-exhaustive and so no change is proposed.

3.30 The West London Bench suggested that it would be clearer if, under the examples for consecutive sentences option (a) (offences arise out of unrelated facts or incidents), each example listed comprised of at least two offences. They suggested that the third and fourth bullet points could be reworded as:

- where one of the offences is a Bail Act offence
- where one of the offences is committed within a prison context

3.31 This is a helpful suggestion, but for the final bullet perhaps it would be better to say:

- offences committed within a prison context should be ordered to run consecutively to any sentence currently being served

Question 6: Does the Council wish to make the changes proposed above to the examples of concurrent and consecutive sentences?

3.32 HM Council of District Judges (Magistrates’ Courts) felt that it was confusing in the General approach section to list examples of when consecutive sentences should be used and then to state what the sentencer should not do:

However, it is **not** permissible to impose consecutive sentences for offences committed **in a single incident** in order to evade the statutory maximum penalty.

3.33 They thought it was not clear what the sentencer might do wrong from the examples given:

Examples include:

[dropdown]

- more than one offence of causing serious injury in a single incident of dangerous driving
- possession of several prohibited weapons and/or ammunition acquired at the same time

3.34 No other respondent expressed a concern with these examples.

Question 7: Does the Council wish to make any changes to the guidance or examples relating to evading the statutory maximum penalty?

3.35 The dropdown information headed 'Sentencing for offences committed prior to other offences for which an offender has been sentenced' was new in the draft guideline.

Sentencing for offences committed prior to other offences for which an offender has been sentenced [Dropdown]

The court should first reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. The court then has a discretion whether to make further allowance to take into account the earlier sentence (whether or not that sentence has been served in full). The court should consider all the circumstances in deciding what, if any, impact the earlier sentence should have on the new sentence. It is not simply a matter of considering the overall sentence as though the previous court had been seized of all the offences and deducting from that figure the sentence already imposed.

A non-exhaustive list of circumstances could include:

- (a) how recently the earlier sentence had been imposed;
- (b) the similarity of the offences sentenced earlier to the instant offences;
- (c) whether the offences sentenced earlier and instant offences overlapped in time;
- (d) whether on a previous occasion the offender could have "cleaned the slate" by bringing the instant offences to the police's attention;
- (e) whether taking the earlier sentences into account would give the offender an undeserved bonus - this will particularly be the case where a technical rule of sentencing has been avoided or where, for example, the court has been denied the opportunity to consider totality in terms of dangerousness;
- (f) the offender's age and health, and whether their health had significantly deteriorated;
- (g) whether, if the earlier and instant sentences had been passed together as consecutive sentences, the totality principle would have been offended.

If the offender is still subject to the previous sentence:

1. Where the offender is currently serving a custodial sentence for the offence(s) sentenced earlier, consider whether the new sentence should be concurrent with or consecutive to that sentence taking into account the circumstances set out above and the general principles in this guideline.
2. Where the offender is serving an indeterminate sentence for the offence(s) sentenced earlier, see also the guidance in the section 'Indeterminate sentences' below.
3. Where the offender has been released on licence or post sentence supervision from a custodial sentence for the offence(s) sentenced earlier see also the relevant guidance in the section below 'Existing determinate sentence, where determinate sentence to be passed'.

3.36 HM Council of District Judges (Magistrates' Courts) wondered whether at point 3 it should make more explicit reference to the restriction on ordering a consecutive sentence where an offender who is still subject to a previous sentence has been released rather than cross-referencing to the information below. A magistrate asked if a link could be provided to the relevant information

3.37 The West London Magistrates' Bench welcomed this content and had some suggestions for clarifying the language, a view echoed by other magistrates. Professor Dhimi also thought that some of the language could be simplified and suggested it would be helpful for the non-exhaustive list of circumstances to be divided into those that would increase the sentence and those that would decrease it. The Sentencing Academy made a similar point:

Surely it would be more helpful if each circumstance was worded clearly as a plus or minus factor; thus, (a) if the earlier sentence was imposed recently, that would tend to be more serious than if it was long ago; (b) if the previous offending was of a similar nature, that would tend to be more serious than if it was dissimilar. The present non-exhaustive list hints at this, but holds back from utter clarity.

3.38 It would be difficult to divide the list of circumstances into those that increase and those that decrease the sentence, because some are not clear cut. For example '(a) how recently the earlier sentence had been imposed'. If the earlier sentence had been imposed only a very short time ago that might indicate that the offences should have all been dealt with together and therefore the offender should have the benefit of treating them all as one sentencing exercise. On the other hand, if the earlier sentence had been imposed and served many years ago and the offender had lived a blameless life since, that too might indicate that the sentence for the instant offence should be adjusted downwards.

3.39 A magistrate was confused by the sentence: 'It is not simply a matter of considering the overall sentence as though the previous court had been seized of all the offences and deducting from that figure the sentence already imposed.' The West London Bench suggested it could be re-worded as:

g) whether, if the earlier and instant sentences had been passed together as consecutive sentences, it would not have been appropriate to pass a simple cumulative consecutive sentence without taking account of the totality principle.

3.40 Taking all of these comments into account the following is proposed:

Sentencing for offences committed prior to other offences for which an offender has been sentenced [Dropdown]

The court should first reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. The court then has a discretion whether to make further allowance to take into account the earlier sentence (whether or not that sentence has been served in full). The court should consider all the circumstances in deciding what, if any, impact the earlier sentence should have on the new sentence. It is not simply a matter of considering the overall sentence as though the previous court had been seized of **able to sentence** all the offences and deducting **the earlier sentence** from that figure ~~the sentence already imposed~~.

A non-exhaustive list of circumstances could include:

- (a) how recently the earlier sentence had been imposed, **taking account of the reason for the gap and the offender's conduct in the interim**;
- (b) the similarity of the offences sentenced earlier to the instant offences;
- (c) whether the offences sentenced earlier and instant offences overlapped in time;
- (d) whether on a previous occasion the offender could have "cleaned the slate" by bringing the instant offences to the police's attention;
- (e) whether taking the earlier sentences into account would give the offender an undeserved bonus - this will particularly be the case where a technical rule of sentencing has been avoided or where, for example, the court has been denied the opportunity to consider totality in terms of dangerousness;
- (f) the offender's age and health **at the point of sentence**, and whether their health ~~has had~~ significantly deteriorated;
- (g) whether, if the earlier and instant sentences had been passed together as consecutive sentences, the **overall sentence would have required downward adjustment to achieve a just and proportionate sentence** ~~totality principle would have been offended~~.

If the offender is still subject to the previous sentence:

1. Where the offender is currently serving a custodial sentence for the offence(s) sentenced earlier, consider whether the new sentence should be concurrent with or consecutive to that sentence taking into account the circumstances set out above and the general principles in this guideline.
2. Where the offender is serving an indeterminate sentence for the offence(s) sentenced earlier, see also the guidance in the section 'Indeterminate sentences' below.
3. Where the offender has been released on licence or post sentence supervision from a custodial sentence for the offence(s) sentenced earlier **a custodial sentence for the instant offences cannot run consecutively to that earlier sentence** – see also the relevant guidance in the section below 'Existing determinate sentence, where determinate sentence to be passed'.

Question 8: Does the Council wish to make changes to the 'Sentencing for offences committed prior to other offences for which an offender has been sentenced' guidance?

3.41 There were no suggestions for changes to the Specific applications – custodial sentences section aside from one magistrate who had difficulty understanding the sentence: ‘However, the sentence must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to any recall period (which will be an unknown quantity in most cases); this is so even if the new sentence will in consequence add nothing to the period actually served.’ He suggested that it could be re-worded or an example provided. No other respondent commented on this and, although as currently worded it is long, it is not apparent how it could be made clearer.

3.42 The only other comments on this section related to inconsistencies in how legislation is referred to. This has been addressed and will be checked again before publication.

3.43 In the Specific applications – non-custodial sentences section, HM Council of District Judges (Magistrates’ Courts) queried the wording relating to multiple offences attracting fines crossing the community threshold:

The references to situations where the offences being dealt with are “all imprisonable”, in both the fines and community orders sections, may be misleading to a sentencer who is also dealing with one or more non-imprisonable offences as part of the sentencing exercise. Words similar to “...in relation to those offences being dealt with which are imprisonable...” might be clearer.

3.44 There seems to be no clear and succinct way of expressing this which takes into account the different combination of imprisonable and non-imprisonable offences that a court may be sentencing. One proposal is to re-word as follows:

<p>Multiple offences attracting fines – crossing the community threshold</p>	<p>If more than one of the offences being dealt with are all imprisonable, then the community threshold can be crossed by reason of multiple offending, when it would not be crossed for a single offence (section 204(2) of the Sentencing Code). However, if all the offences are non-imprisonable (e.g. driving without insurance) the threshold cannot be crossed (section 202 of the Sentencing Code).</p>
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3.45 A further proposed change is to remove the words ‘for non-imprisonable offences’ from the heading to this part of the guidance, as it refers to both imprisonable and non-imprisonable offences.

Question 9: Does the Council agree to make the proposed changes to the multiple fines guidance?

3.46 The Council of District Judges also commented that it was not clear which of the bullet points listed in relation to fines and determinate custodial sentences were intended to be conjunctive and which disjunctive. A simple addition might assist:

<p>Fines and determinate custodial sentences</p>	<p>A fine should not generally be imposed in combination with a custodial sentence because of the effect of imprisonment on the means of the offender. However, exceptionally, it may be appropriate to impose a fine in addition to a custodial sentence where:</p> <ul style="list-style-type: none"> • the sentence is suspended or • a confiscation order is not contemplated and • there is no obvious victim to whom compensation can be awarded and • the offender has, or will have, resources from which a fine can be paid
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Question 10: Does the Council agree to the proposed clarification in the fines and determinate custodial sentences guidance?

3.47 In the Community orders dropdown there were some comments on the information on 'Offender convicted of an offence while serving a community order'. A circuit judge commented:

My only reservation for this part relates to the section dealing with offenders convicted during the currency of a community order and the proposed wording - Where the magistrates' court has no power to commit the new offence it should sentence the new offence and commit the offender to the Crown Court to be re-sentenced for the original offence.

Whilst delay is generally inimical to justice, sentencing by the magistrates' court before (rather than after) an offender has been dealt with by the Crown Court does on occasion risk very real difficulties. For example the magistrates' may raise expectations by dealing with an offence by way of a community order in circumstances where the Crown Court would be minded to revoke the existing Crown Court Community Order and re-sentence the offender to a custodial sentence; whilst not a legitimate expectation it can lead to a sense of grievance. More importantly, in circumstances where a community order is imposed by the lower court and the Crown Court determines to leave in place the existing Crown Court Community Order, it risks an offender being subject to two Community Orders and perhaps overly onerous requirements.

3.48 The Justices' Legal Advisers and Court Officers' Service by contrast said:

We welcome the clarity that magistrates' courts when committing for sentence should sentence for offences which they cannot commit.

3.49 The only changes proposed to this guidance are to make the language gender neutral and to correct a minor error.

Question 11: Does the Council wish to make any substantive changes to the community orders guidance?

4 EQUALITY AND DIVERSITY

4.1 The consultation asked a question about the reference to the Equal Treatment Bench Book (ETBB) at the top of the guideline and the addition of the words:

Sentencers should have this in mind in relation to individual sentences but also when considering the total sentence.

4.2 Respondents welcomed this addition and, when asked if there were aspects of the guideline that might cause disparity in sentencing or if there were any other equality and diversity issues, most were unable to identify anything. Professor Dhami commented:

There is clearly potential for disparity if factors such as race/ethnicity are associated with multiple-offending v. single-offence offending behaviour; and in the former case, if factors such as race/ethnicity are associated with multiple-offending that would lead to consecutive sentences. For instance, Stott et al.'s (2021) review of existing governmental studies concluded that there were "demonstrable, quantifiable and robust" patterns of ethnic disparity in relation to various offence types (including drugs, violent crime, burglary, robbery and theft, as well as anti-social behaviour), primarily due to policing practices. Dhami's (2021) study suggests that multiple-offence cases represent over half of sentenced drugs offences, and around 40% each of sentenced robbery and sentenced burglary offences. Hence, the totality guideline likely disproportionately applies to offenders with ethnic backgrounds.

4.3 The Justice Committee noted:

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.

4.4 This may be a valid point, but the fact remains that we do not have the data necessary to do the analysis nor currently the resources to obtain such data.

Question 12: Are there any changes that should be made to the guideline to address issues of disparity in sentencing?

5 IMPACT AND RISKS

5.1 As anticipated, the limited nature of the revisions to the guideline has attracted some criticism from academics. However, overall responses have been positive.

5.2 The guideline is of wide application and therefore any changes could theoretically have a significant impact on sentencing practice. The nature of the revisions, which are designed to clarify and encourage existing best practice, are unlikely to lead to substantive changes. In view of this and the lack of data on multiple offences, a narrative resource assessment was published with the consultation, rather than a statistically based one. A similar document will be prepared for the publication of the definitive guideline and will be circulated to the Council for approval.

5.3 To cover some of the gaps in data, we have added a small number of questions to our ongoing data collection to capture information on whether offences have been adjusted to take account of totality and if so in what way.

5.4 The Justice Committee commented:

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 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.

5.5 We set out in the resource assessment published with the consultation that the Ministry of Justice does not publish figures on multiple offences and the Council does not currently have access to extensive information on secondary or non-principal offences nor the sentences imposed for them. The resource assessment noted that the Council would like to explore this area in the future but to do so would be resource intensive and the Council has decided to prioritise other areas of work in the short and medium term but once we have a clearer idea of the data that may be available from the Common Platform, we can reconsider this. Despite the lack of data we felt able to estimate that the revised guideline would not have a resource impact because the changes proposed are not designed or expected to affect sentencing severity.

5.6 This view was shared by many respondents who thought that that the changes to the guideline were unlikely to have a substantial impact on sentencing outcomes but should improve the usability of the guideline and the way in which sentences are crafted and explained. The AGO thought that there was a particular issue with sentencing sexual offences (as evidenced by their analysis of cases successfully referred to the CACD) and were unsure that the changes would make any difference to sentencing unless the guideline highlighted sexual offences.

5.7 The Justice Committee also noted that the Attorney General's response refers to a review they conducted of 67 cases they had referred to the Court of Appeal and the Committee asks whether the Council had carried out any such analysis of judgments. The answer to that we have not. We have, of course, looked at CACD judgments where totality has been an issue and these judgments, predictably, reflect the approach in the current guideline. Without data on multiple offences it would be difficult to identify a representative sample of cases and to draw useful conclusions from a review of judgments.

5.8 The Justice Committee expressed an interest in any plans the Council has to monitor the impact of the guideline stating:

It would be particularly interesting and valuable to understand what effect the new guidance on explaining the application of totality principles was having.

5.9 While the Council would, no doubt, concur with that sentiment it is unlikely that we will have large amounts of robust data with which to do this. However, we will be able to consider the evidence we are currently collecting along with evidence from future data collections to explore how best to use it to monitor the impact of the guideline.

Question 13: Is the Council content to proceed on the basis of the limited data that we currently have?

Question 14: Is the Council content to sign off the guideline for publication subject to the changes agreed at this meeting?

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Totality

Effective from: tbc

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Sentencers should have this in mind in relation to individual sentences but also when considering the total sentence.

Applicability - DROPDOWN

The principle of totality applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence.

General principles

When sentencing for more than one offence, the overriding principle of totality is that the overall sentence should:

- reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and
- be just and proportionate.

Sentences can be structured as **concurrent** (to be served at the same time) or **consecutive** (to be served one after the other). There is no inflexible rule as to how the sentence should be structured.

- If consecutive, it is usually impossible to arrive at a just and proportionate sentence 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 overall offending. Ordinarily some upward adjustment is required **and may have the effect of going outside the category range appropriate for a single offence.**

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**
2. **Following the guidance provided below, determine whether the case calls for concurrent or consecutive sentences. When sentencing more than two offences, a combination of concurrent and consecutive sentences may be appropriate.**
3. **Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.**
4. **Consider and explain how the sentence is structured in a way that will be best understood by all concerned.**

Concurrent sentences will ordinarily be appropriate where:

- a. offences arise out of the same incident or facts.

Examples include: [dropdown]

- a single incident of dangerous driving resulting in injuries to multiple victims;

- robbery with a weapon where ~~the weapon offence is ancillary to the robbery and is not distinct and independent of it~~ **the use of a weapon has been taken into account in categorising the robbery**
- fraud and associated forgery **or possession or making an article used in the fraud**
- separate counts of supplying different types of drugs of the same class as part of the same transaction

- b. there is a series of offences of the same or similar kind, especially when committed against the same person **(but note this may not apply in all cases – see below under consecutive sentences at point c.)**

Examples include: [dropdown]

- repetitive small thefts from ~~the same person, such as by an employee~~ **an employer**
- repetitive benefit frauds of the same kind, committed in each payment period
- **repeated sexual offences against the same victim where the lead offence can be aggravated sufficiently to take account of the overall criminality**

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved which may take the lead offence outside the category range appropriate for a single offence to ensure the sentence length is just and proportionate.

Concurrent custodial sentences: examples [dropdown]

Examples of concurrent custodial sentences include:

- a single incident of dangerous driving resulting in injuries to multiple victims where there are separate charges relating to each victim. The sentences should generally be passed concurrently, but each sentence should be aggravated to take into account the harm caused
- repetitive fraud or theft, where charged as a series of small frauds/thefts, would be properly considered in relation to the total amount of money obtained and the period of time over which the offending took place. The sentences should generally be passed concurrently, each one reflecting the overall seriousness
- robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it. The principal sentence for the robbery should properly reflect the presence of the weapon. The court must avoid double-counting and may deem it preferable for the possession of the weapon's offence to run concurrently to avoid the appearance of under-sentencing in respect of the robbery
- **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**

Structuring concurrent sentences:

When sentencing for two or more offences of differing levels of seriousness the court can consider structuring the sentence using concurrent sentences, for example:

- consider whether some offences are of such very low seriousness that they can be recorded as 'no separate penalty' (for example technical breaches or minor driving offences not involving mandatory disqualification). **See also the 'Multiple fines' guidance below.**
- consider whether some of the offences are of lesser seriousness such that they can be ordered to run concurrently so that the sentence for the most serious offence(s) can be clearly identified.

Consecutive sentences will ordinarily be appropriate where:

a. offences arise out of unrelated facts or incidents.

Examples include: [dropdown]

- where the offender commits a theft on one occasion and a common assault against a different victim on a separate occasion
- an attempt to pervert the course of justice in respect of another offence also charged
- **where one of the offences is a Bail Act offence**
- **offences committed within a prison context should be ordered to run consecutively to any sentence currently being served** ~~any offence committed within the prison context~~

b. offences that are unrelated because while they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

Examples include: [dropdown]

- an assault on a constable committed to try to evade arrest for another offence also charged
- where the offender is convicted of drug dealing and possession of a firearm offence. The firearm offence is not the essence or the intrinsic part of the drugs offence and requires separate recognition
- where the offender is convicted of threats to kill in the context of an indecent assault on the same occasion, the threats to kill could be distinguished as a separate element

c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include: [dropdown]

- where offences committed against different people, such as repeated thefts involving attacks on several different shop assistants
- where offences of domestic ~~violence~~ **abuse** or sexual offences are committed against the same individual

d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum

Examples include: [dropdown]

- other offences sentenced alongside possession of a prohibited weapon (which attracts a five year minimum term) – any reduction on grounds of totality should not reduce the effect of properly deterrent and commensurate sentences. The court should not reduce an otherwise appropriate consecutive sentence for another offence so as to remove the impact of the mandatory minimum sentence for the firearms offence.

However, it is **not** permissible to impose consecutive sentences for offences committed **in a single incident** in order to evade the statutory maximum penalty.

Examples include: [dropdown]

- more than one offence of causing serious injury in a single incident of dangerous driving.
- possession of several prohibited weapons and/or ammunition acquired at the same time

Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.

Structuring consecutive sentences:

When sentencing for similar offence types or offences of a similar level of severity the court can consider structuring the sentence using consecutive sentences, for example:

- consider whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
- consider whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively in order that the sentence for the lead offence can be clearly identified

Sentencing for offences committed prior to other offences for which an offender has been sentenced [Dropdown]

The court should first reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. The court then has a discretion whether to make further allowance to take into account the earlier sentence (whether or not that sentence has been served in full). The court should consider all the circumstances in deciding what, if any, impact the earlier sentence should have on the new sentence. It is not simply a matter of considering the overall sentence as though the previous court had been ~~seized of~~ able to sentence all the offences and deducting **the earlier sentence** from that figure ~~the sentence already imposed~~.

A non-exhaustive list of circumstances could include:

- how recently the earlier sentence had been imposed, **taking account of the reason for the gap and the offender's conduct in the interim**;
- the similarity of the offences sentenced earlier to the instant offences;
- whether the offences sentenced earlier and instant offences overlapped in time;
- whether on a previous occasion the offender could have "cleaned the slate" by bringing the instant offences to the police's attention;
- whether taking the earlier sentences into account would give the offender an undeserved bonus - this will particularly be the case where a technical rule of sentencing has been avoided or where, for example, the court has been denied the opportunity to consider totality in terms of dangerousness;
- the offender's age and health **at the point of sentence**, and whether their health ~~had~~ **has** significantly deteriorated;
- whether, if the earlier and instant sentences had been passed together as consecutive sentences, the **overall sentence would have required downward adjustment to achieve a just and proportionate sentence** ~~totality principle would have been offended~~.

If the offender is still subject to the previous sentence:

1. Where the offender is currently serving a custodial sentence for the offence(s) sentenced earlier, consider whether the new sentence should be concurrent with or consecutive to that sentence taking into account the circumstances set out above and the general principles in this guideline.
2. Where the offender is serving an indeterminate sentence for the offence(s) sentenced earlier, see also the guidance in the section ‘Indeterminate sentences’ below.
3. Where the offender has been released on licence or post sentence supervision from a custodial sentence for the offence(s) sentenced earlier **a custodial sentence for the instant offences cannot run consecutively to that earlier sentence** – see also the relevant guidance in the section below ‘Existing determinate sentence, where determinate sentence to be passed’.

Specific applications – custodial sentences

Existing determinate sentence, where determinate sentence to be passed [Dropdown]

Existing determinate sentence, where determinate sentence to be passed	
Circumstance	Approach
Offender serving a determinate sentence (Instant offence(s) committed after offence(s) sentenced earlier)	Generally the sentence will be consecutive as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender’s criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Where a prisoner commits acts of violence in custody, any reduction for totality is likely to be minimal.
Offender subject to licence, post sentence supervision or recall	The new sentence should start on the day it is imposed: section 225 of the Sentencing Code of the Sentencing Code prohibits a sentence of imprisonment running consecutively to a sentence from which a prisoner has been released. If the new offence was committed while subject to licence or post sentence supervision, the sentence for the new offence should take that into account as an aggravating feature. However, the sentence must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to any recall period (which will be an unknown quantity in most cases); this is so even if the new sentence will in consequence add nothing to the period actually served.
Offender subject to an existing suspended sentence order	Where an offender commits an additional offence during the operational period of a suspended sentence and the court orders the suspended sentence to be activated, the additional sentence will generally be consecutive to the activated suspended sentence, as it will arise out of unrelated facts.

Extended sentences [dropdown]

Extended sentences	
Circumstance	Approach
Extended sentences – using multiple offences to calculate the requisite determinate term	<p>In the case of extended sentences, providing there is at least one specified offence, the threshold requirement under sections 267 or 280 of the Sentencing Code is reached if the total determinate sentence for all offences (specified or not) would be four years or more. The extended sentence should be passed either for one specified offence or concurrently on a number of them. Ordinarily either a concurrent determinate sentence or no separate penalty will be appropriate to the remaining offences.</p> <p>The extension period is such as the court considers necessary for the purpose of protecting members of the public from serious harm caused by the offender committing further specified offences. The extension period must not exceed five years (or eight for a sexual offence). The whole aggregate term must not exceed the statutory maximum. The custodial period must be adjusted for totality in the same way as determinate sentences would be. The extension period is measured by the need for protection and therefore does not require adjustment.</p>

Indeterminate sentences [dropdown]

Indeterminate sentences	
Circumstance	Approach
Imposing multiple indeterminate sentences on the same occasion and using multiple offences to calculate the minimum term for an indeterminate sentence	<p>Indeterminate sentences should start on the date of their imposition and so should generally be ordered to run concurrently. If the life sentence provisions in sections 272-274 or sections 283 – 285 of the Sentencing Code apply then:</p> <ol style="list-style-type: none"> 1. first assess the notional determinate term for all offences (specified or otherwise), adjusting for totality in the usual way 2. ascertain whether any relevant sentence condition is met and 3. the indeterminate sentence should generally be passed concurrently on all offences to which it can apply, but there may be some circumstances in which it suffices to pass it on a single such offence.
Indeterminate sentence (where the offender is already serving an existing determinate sentence)	<p>It is generally undesirable to order an indeterminate sentence to be served consecutively to any other period of imprisonment on the basis that indeterminate sentences should start on their imposition.</p> <p>The court should instead order the sentence to run concurrently but can adjust the minimum term for the new</p>

	<p>offence to reflect any period still remaining to be served under the existing sentence (taking account of the relevant early release provisions for the determinate sentence). The court should then review the minimum term to ensure that the total sentence is just and proportionate.</p>
<p>Indeterminate sentence (where the offender is already serving an existing indeterminate sentence)</p>	<p>It is generally undesirable to order an indeterminate sentence to be served consecutively to any other period of imprisonment on the basis that indeterminate sentences should start on their imposition. However, where necessary (such as where the offender falls to be sentenced while still serving the minimum term of a previous sentence and an indeterminate sentence, if imposed concurrently, could not add to the length of the period before which the offender will be considered for release on parole in circumstances where it is clear that the interests of justice require a consecutive sentence), the court can order an indeterminate sentence to run consecutively to an indeterminate sentence passed on an earlier occasion (section 384 of the Sentencing Code). The second sentence will commence on the expiration of the minimum term of the original sentence and the offender will become eligible for a parole review after serving both minimum terms (Section 28(1B) of the Crime (Sentences) Act 1997). The court should consider the length of the aggregate minimum terms that must be served before the offender will be eligible for consideration by the Parole Board. If this is not just and proportionate, the court can adjust the minimum term.</p>
<p>Ordering a determinate sentence to run consecutively to an indeterminate sentence</p>	<p>The court can order a determinate sentence to run consecutively to an indeterminate sentence. The determinate sentence will commence on the expiry of the minimum term of the indeterminate sentence and the offender will become eligible for a parole review after becoming eligible for release from the determinate sentence. The court should consider the total sentence that the offender will serve before becoming eligible for consideration for release. If this is not just and proportionate, the court can reduce the length of the determinate sentence, or alternatively, can order the second sentence to be served concurrently.</p>

Specific applications – non-custodial sentences

Multiple fines for non-imprisonable offences [dropdown]

Multiple fines for non-imprisonable offences

Circumstance	Approach
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<p>Offender convicted of more than one offence where a fine is appropriate</p>	<p>The total is inevitably cumulative. The court should determine the fine for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court (section 125 of the Sentencing Code). The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.</p> <p>For example:</p> <ul style="list-style-type: none"> • where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences. • where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed. <p>Where separate fines are passed, the court must be careful to ensure that there is no double-counting.</p> <p>Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.</p>
<p>Multiple offences attracting fines – crossing the community threshold</p>	<p>If more than one of the offences being dealt with are all imprisonable, then the community threshold can be crossed by reason of multiple offending, when it would not be crossed for a single offence (section 204(2) of the Sentencing Code). However, if the all offences are non-imprisonable (e.g. driving without insurance) the threshold cannot be crossed (section 202 of the Sentencing Code).</p>

Fines in combination with other sentences [dropdown]

Fines in combination with other sentences	
Circumstance	Approach
<p>A fine may be imposed in addition to any other</p>	<ul style="list-style-type: none"> • a hospital order • a discharge • a sentence fixed by law (murder)

<p>penalty for the same offence <u>except</u>:</p>	<ul style="list-style-type: none"> • a minimum sentence imposed under section 311, 312, 313, 314, or 315 of the Sentencing Code • a life sentence imposed under section 274 or 285 of the Sentencing Code or a sentence of detention for life for an offender under 18 under section 258 of the Sentencing Code • a life sentence imposed under section 273 or 283 Sentencing Code • a serious terrorism sentence under section 268B or 282B of the Sentencing Code <p>(Sections 118 to 121 of the Sentencing Code)</p>
<p>Fines and determinate custodial sentences</p>	<p>A fine should not generally be imposed in combination with a custodial sentence because of the effect of imprisonment on the means of the offender. However, exceptionally, it may be appropriate to impose a fine in addition to a custodial sentence where:</p> <ul style="list-style-type: none"> • the sentence is suspended or • a confiscation order is not contemplated and • there is no obvious victim to whom compensation can be awarded and • the offender has, or will have, resources from which a fine can be paid

Community orders [dropdown]

Community orders	
Circumstance	Approach
<p>Multiple offences attracting community orders – crossing the custody threshold</p>	<p>If the offences are all imprisonable and none of the individual sentences merit a custodial sentence, the custody threshold can be crossed by reason of multiple offending (section 230(2) of the Sentencing Code). If the custody threshold has been passed, the court should refer to the offence ranges in sentencing guidelines for the offences and to the general principles.</p>
<p>Multiple offences, where one offence would merit immediate custody and one offence would merit a community order</p>	<p>A community order should not be ordered to run consecutively to or concurrently with a custodial sentence. Instead the court should generally impose one custodial sentence that is aggravated appropriately by the presence of the associated offence(s). The alternative option is to impose no separate penalty for the offence of lesser seriousness.</p>
<p>Offender convicted of more than one offence where a community order is appropriate</p>	<p>A community order is a composite package rather than an accumulation of sentences attached to individual counts. The court should generally impose a single community order that reflects the overall criminality of the offending behaviour. Where it is necessary to impose more than one community order, these</p>

	<p>should be ordered to run concurrently and for ease of administration, each of the orders should be identical.</p>
<p>Offender convicted of an offence while serving a community order</p>	<p>The power to deal with the offender depends on his the offender being convicted while the order is still in force; it does not arise where the order has expired, even if the additional offence was committed while it was still current. (Paragraphs 22 and 25 of Schedule 10 to the Sentencing Code)</p> <p>Community order imposed by magistrates’ court If an offender, in respect of whom a community order made by a magistrates’ court is in force, is convicted by a magistrates’ court of an additional offence, the magistrates’ court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.</p> <p>Community order imposed by the Crown Court Where an offender, in respect of whom a community order made by the Crown Court is in force, is convicted by a magistrates’ court, the magistrates’ court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence. The magistrates’ court may also commit the new offence to the Crown Court for sentence where there is a power to do so. Where the magistrates’ court has no power to commit the new offence it should sentence the new offence and commit the offender to the Crown Court to be re-sentenced for the original offence.</p> <p>When sentencing both the original offence and the new offence the sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence. If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.</p>

Disqualifications from driving [dropdown]	
Disqualifications from driving	
Circumstance	Approach
<p>Offender convicted of two or more obligatory disqualification offences</p>	<p>The court must impose an order of disqualification for each offence unless for special reasons it does not disqualify the offender. All orders of disqualification imposed by the</p>

<p>(s34(1) Road Traffic Offenders Act 1988)</p>	<p>court on the same date take effect immediately and cannot be ordered to run consecutively to one another. The court should take into account all offences when determining the disqualification periods and should generally impose like periods for each offence.</p>
<p>Offender convicted of two or more offences involving either:</p> <ol style="list-style-type: none"> 1. discretionary disqualification and obligatory endorsement from driving, or 2. obligatory disqualification but the court for special reasons does not disqualify the offender <p>and the penalty points to be taken into account number 12 or more (sections 28 and 35 Road Traffic Offenders Act 1988)</p>	<p>Where an offender is convicted on same occasion of more than one offence to which section 35(1) of the Road Traffic Offenders Act 1988 applies, only one disqualification shall be imposed on him. However the court must take into account all offences when determining the disqualification period. For the purposes of appeal, any disqualification imposed shall be treated as an order made on conviction of each of the offences. (Section 35(3) of the Road Traffic Offenders Act 1988)</p>
<p>Other combinations involving two or more offences involving discretionary disqualification</p>	<p>As orders of disqualification take effect immediately, it is generally desirable for the court to impose a single disqualification order that reflects the overall criminality of the offending behaviour.</p>

Compensation orders [dropdown]

Compensation orders	
Circumstance	Approach
<p>Global compensation orders</p>	<p>The court should not fix a global compensation figure unless the offences were committed against the same victim. Where there are competing claims for limited funds, the total compensation available should normally be apportioned on a pro rata basis.</p>
<p>The court may combine a compensation order with any other form of order (Section 134 of the Sentencing Code)</p>	
<p>Compensation orders and fines</p>	<p>Priority is given to the imposition of a compensation order over a fine (section 135(4) of the Sentencing Code). This does not affect sentences other than fines. This means that the fine should be reduced or, if necessary, dispensed with altogether, to enable the compensation to be paid.</p>

Compensation orders and confiscation orders	A compensation order can be combined with a confiscation order where the amount that may be realised is sufficient. If such an order is made, priority should be given to compensation (Section 135 of the Sentencing Code).
Compensation orders and community orders	A compensation order can be combined with a community order.
Compensation orders and suspended sentence orders	A compensation order can be combined with a suspended sentence order.
Compensation orders and custody	A compensation order can be combined with a sentence of immediate custody where the offender is clearly able to pay or has good prospects of employment on his release from custody.

Totality

Effective from: tbc

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Sentencers should have this in mind in relation to individual sentences but also when considering the total sentence.

Applicability - DROPDOWN

The principle of totality applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence.

General principles

When sentencing for more than one offence, the overriding principle of totality is that the overall sentence should:

- reflect all of the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors relating to the offences and those personal to the offender; and
- be just and proportionate.

Sentences can be structured as **concurrent** (to be served at the same time) or **consecutive** (to be served one after the other). There is no inflexible rule as to how the sentence should be structured.

- If consecutive, it is usually impossible to arrive at a just and proportionate sentence 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 overall offending. Ordinarily some upward adjustment is required **and may have the effect of going outside the category range appropriate for a single offence.**

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**
2. **Following the guidance provided below, determine whether the case calls for concurrent or consecutive sentences. When sentencing more than two offences, a combination of concurrent and consecutive sentences may be appropriate.**
3. **Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.**
4. **Consider and explain how the sentence is structured in a way that will be best understood by all concerned.**

Concurrent sentences will ordinarily be appropriate where:

- a. offences arise out of the same incident or facts.

Examples include:

V

- b. there is a series of offences of the same or similar kind, especially when committed against the same person.

Examples include: V

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved which may take the lead offence outside the category range appropriate for a single offence.

Concurrent custodial sentence examples: V

Structuring concurrent sentences:

When sentencing for two or more offences of differing levels of seriousness the court can consider structuring the sentence using concurrent sentences, for example:

- consider whether some offences are of such very low seriousness that they can be recorded as ‘no separate penalty’ (for example technical breaches or minor driving offences not involving mandatory disqualification)
- consider whether some of the offences are of lesser seriousness such that they can be ordered to run concurrently so that the sentence for the most serious offence(s) can be clearly identified.

Consecutive sentences will ordinarily be appropriate where:

- a. offences arise out of unrelated facts or incidents.

Examples include: V

- b. offences that are unrelated because whilst they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

Examples include: V

- c. offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.

Examples include: V

- d. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would result in an overall sentence that undermines the statutory minimum sentence.

Examples include: V

However, it is **not** permissible to impose consecutive sentences for offences committed **in a single incident** in order to evade the statutory maximum penalty.

Examples include: V

Where consecutive sentences are to be passed, add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length is just and proportionate.

Structuring consecutive sentences:

When sentencing for similar offence types or offences of a similar level of severity the court can consider structuring the sentence using consecutive sentences, for example:

- consider whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
- consider whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the

category ranges within sentencing guidelines) and passed consecutively in order that the sentence for the lead offence can be clearly identified

Sentencing for offences committed prior to other offences for which an offender has been sentenced	V
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Specific applications – custodial sentences

Existing determinate sentence, where determinate sentence to be passed	V
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Extended sentences	V
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Indeterminate sentences	V
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Specific applications – non-custodial sentences

Multiple fines for non-imprisonable offences	V
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Fines in combination with other sentences	V
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Community orders	V
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Disqualifications from driving	V
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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 Dhimi 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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