Sentencing Council

Exploring sentencers' views of the Sentencing Council's Totality guideline

Bethany Brewer and Eliza Cardale
Office of the Sentencing Council

This information is available on the Sentencing Council website:
www.sentencingcouncil.org.uk

Any enquiries regarding this publication and to request alternative format versions of this report, please contact info@sentencingcouncil.gov.uk

Contents

List of figures

Summary

- The Sentencing Council's Totality guideline came into force in June 2012. It applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence.
- In order to explore how the guideline is currently used in practice, the Council decided to conduct qualitative research with sentencers. A survey and a series of interviews were carried out to understand how sentencers use the guideline, to explore their attitudes towards the guideline and to identify any potential problems or issues with the guideline.
- Most survey respondents agreed with the current content in each section of the guideline and agreed that it provides practical help in sentencing. There were several positive comments regarding the guideline's examples, clarity and usefulness.
- The most common way that survey respondents said they used the guideline is to apply its principles and consult it only for difficult or unusual cases. Accordingly, both survey respondents and interviewees commented on their infrequent use of the guideline.
- Some survey respondents highlighted perceived problems with the guideline, such as difficulties ascertaining appropriate financial penalties for multiple offences. In addition, nearly half of survey respondents reported that there are certain offences and circumstances where they have problems applying the guideline. This included offences with multiple victims and offences which are dissimilar, as well as specific offences, such as sexual offences, assaults, driving offences, thefts and drug offences. Interviewees largely agreed that these offences presented the most problems when applying the guideline, and highlighted sexual offences and driving offences as posing the greatest difficulties. They also commented that, in cases with multiple victims and a range of offending, they experience problems reflecting the seriousness of the offending against each individual victim in the final sentence.
- While some survey respondents asked for more detail in the guideline, more commonly there were comments that the guideline is overly detailed and lengthy, as well as requests for improvements to be made to its format. Most interviewees thought the current examples demonstrating how the guideline might apply to certain situations are sufficient. When discussing ideas for improving the format of the guideline, most were positive (particularly with regards to bullet points, drop-down menus and tables).
- Several survey respondents commented that some sections of the guideline have no relevance to magistrates' courts while other sections have little relevance in the Crown Court, so it might be beneficial to have a separate guideline for each jurisdiction. However, most interviewees did not find this a problem and preferred to keep the same document across jurisdictions.
- Some survey respondents expressed concerns regarding external perceptions of the principle of totality and its perceived leniency among the public and victims, and most interviewees agreed that this is a problem. Half the interviewees thought that

including a reminder to explain in court how the sentence has been constructed would be helpful, while others commented that the problem relates to limited understanding of the aims of the guideline, so that altering it would not solve this issue.

- Having considered the findings of the research, the Sentencing Council has taken the decision to review the Totality guideline and will consult on proposed changes in 2022.

1. Introduction

The Sentencing Council was set up in 2010 and produces guidelines for use by all members of the judiciary when sentencing in criminal cases. The Council's Totality guideline has been in force since June 2012.[1] The guideline applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence, where courts must consider whether the total sentence is just and proportionate to the overall offending behaviour. The guideline sets out the principles to be followed, the approach for different types of sentence and gives examples of how sentences should be structured in different circumstances.

The Totality guideline has received some criticism from academics, including: that it is rarely referred to, that it does not help determine how to quantify sentence reductions,[2] and that there is little evidence its principles are widely known by sentencers.[3] Recognising that the guideline might be out of date in terms of some of its content and style, the Council decided to conduct research to assess its use in sentencing.

2. Methodology

Qualitative research was conducted with sentencers to explore their views of the guideline and how it is currently used in practice, with the aim of informing a discussion about whether the guideline needs revising and, if so, in what way.

The aims of the research were:

- to understand how sentencers use the guideline;
- to explore sentencers' attitudes towards the guideline; and
- to identify any potential problems or issues with the guideline.

The first stage of the research was carried out by online survey, via SmartSurvey. The survey used Likert scale[4] questions to measure respondents' use of the guideline and their attitudes towards it. It also asked open-ended questions to understand in more detail respondents' views of the guideline.[5] A link to the survey was emailed to members of the Council's research 'pool'[6] (approximately 550 sentencers at the time). The survey was open for three weeks, from 4 March to 21 March 2021. A total of 130 responses were

---

[1] The guideline can be found here: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/

[2] Harris, Lyndon (2015). R. v DJ: sentencing - serious sexual offences against children - totality - length of sentence Court of Appeal (Criminal Division): Treacy LJ, Stewart and Simler JJ: March, 5, 2015: [2015] EWCA Crim 563. *Criminal Law Review* 2015, 8, 650-654

[3] Ashworth, Andrew (2017). The evolution of English sentencing guidance in 2016. *Criminal Law Review* 2017, 7, 507-520

[4] Likert scale questions use scales to measure respondents' level of agreement with various statements (for example: 'agree', 'somewhat agree', 'neither agree nor disagree', 'somewhat disagree', 'disagree').

[5] The survey questionnaire is set out in Annex A.

[6] The research 'pool' is a database of sentencers who have agreed to take part in research to support the development and evaluation of the Council's guidelines.

received, from 3 Court of Appeal judges, 1 High Court judge, 42 circuit judges, 10 district judges and 74 magistrates.

Eighty survey respondents indicated that they were willing to participate in a follow-up interview. We aimed to select a stratified random sample of 10 participants, covering each type of sentencer who responded to the survey. We were unable to organise an interview with a district judge, and so our final sample was composed of one Court of Appeal judge, one High Court judge, four circuit judges and four magistrates. The interviews, lasting approximately 30 minutes, were designed to follow up on some of the points raised by sentencers in response to the survey and explore these in more detail. We asked interviewees a series of questions about how they use and view the guideline, as well as about their views on some of the findings that had come out of the survey responses. They were also shown an alternative format for the guideline and asked for their views on this.[7]

In both pieces of the research, participants were self-selecting, and the sample sizes are small, particularly in relation to specific subsamples. Therefore, the findings are not necessarily representative of the views of all sentencers and should be taken as indicative rather than conclusive.

[7] The interview discussion guide is set out in Annex B.

3. Findings

3.1 Use of the guideline

Around half (51 per cent) of survey respondents reported that most cases they sentence involve more than one offence, 15 per cent reported that most cases involved just one offence and the remaining 35 per cent said that the split is about even.[8] When asked whether they usually find it more difficult to sentence cases involving more than one offence, 36 per cent of respondents said that they usually find it more difficult, 25 per cent said that they find it about the same and 39 per cent said that the difficulty varies.

Most sentencing guidelines have a totality step that reads like this:

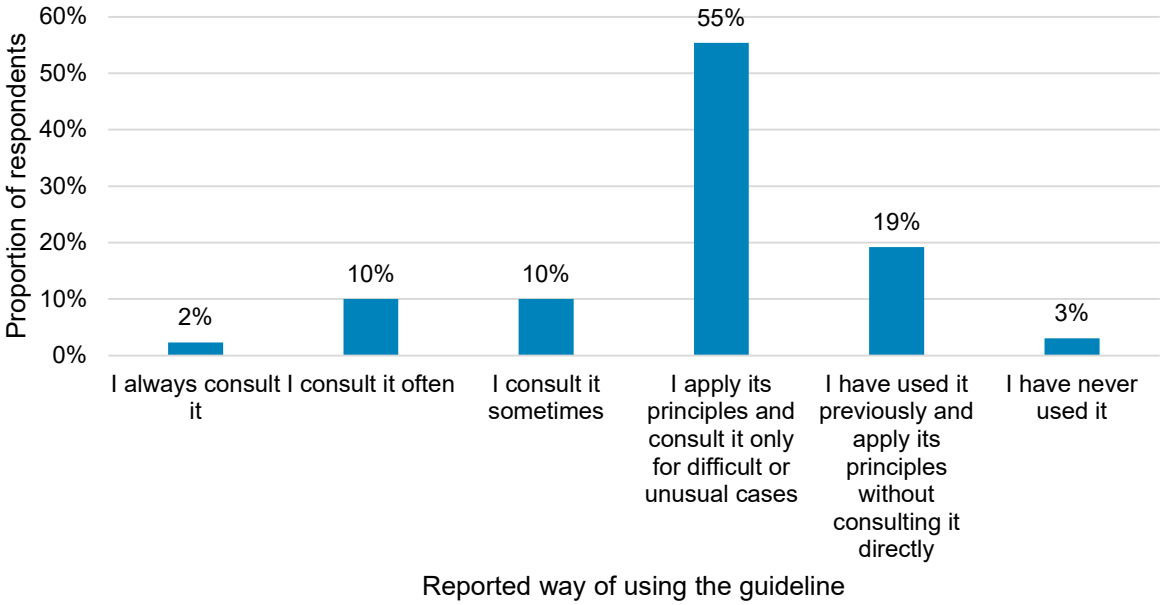
> If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

Nearly all (95 per cent) survey respondents reported being somewhat or very familiar with the totality step in the sentencing guidelines. Additionally, 69 per cent said that the inclusion of this step is useful or very useful.

Figure 1 shows how respondents use the Totality guideline when sentencing. When the totality step applies, 2 per cent of respondents said that they always consult the Totality guideline, and a further 20 per cent reported that they consult it often or sometimes. However, the most common way of using the guideline, reported by 55 per cent of respondents, is to apply its principles, based on a knowledge of its contents and principles, and then specifically consult it only for difficult or unusual cases. A further 19 per cent of respondents reported that they had used the guideline previously and apply its principles without consulting it directly. Only 3 per cent of respondents stated that they had never used the guideline. Overall, survey respondents commented that the guideline is currently underused or used infrequently: one circuit judge stated that *"it is one of the least used guidelines"*. Several magistrates commented that they tend to get advice from the legal adviser rather than the guideline when considering totality.

[8] Where percentages do not total 100 per cent, this is because individual percentages have been rounded to the nearest whole number.

Figure 1: Responses to the question 'When sentencing more than one offence on the same occasion, or when sentencing an offender who is already serving a sentence, which of the following statements most closely reflects your use of the Totality guideline?'[9]



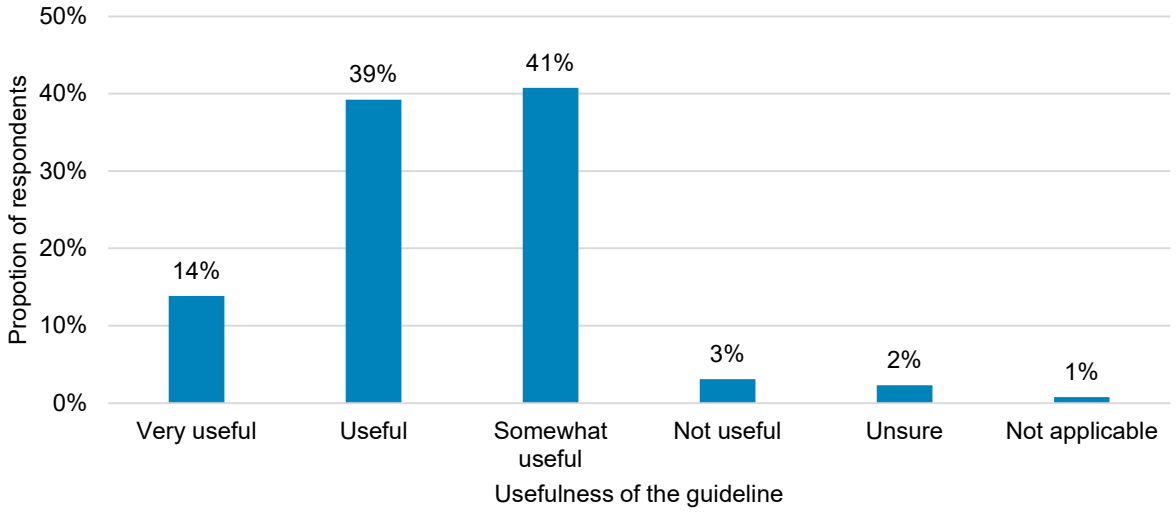
We also asked interviewees how often they refer to the Totality guideline. One circuit judge reported that they refer to it two or three times a week, and another circuit judge said that they refer to it *"regularly"* when sentencing cases with multiple offences. However, the other interviewees commented that they refer to it *"rarely"* or *"not very often"*. Two magistrates commented that they use the guideline to train other magistrates or in discussions with their colleagues about totality when sentencing, while other sentencers commented that they refer to the guideline in instances where they have a particularly complex case or are sentencing a case without a specific guideline. Explaining why they rarely referred to it, one magistrate commented that *"we could all do with a bit of training on it… what its underlying principles and intentions are, then perhaps how to use it"*. Interviewees had a range of sentencing experience, from 3 to 27 years, and there was no obvious correlation between years of experience and the frequency with which interviewees use the guideline.

3.2 Usefulness of the guideline

Figure 2 shows that around half (53 per cent) of all survey respondents said they find the Totality guideline useful or very useful, with a further 41 per cent stating that they find the guideline somewhat useful.

[9] Where percentages do not total 100 per cent, this is because individual percentages have been rounded to the nearest whole number.

Figure 2: Responses to the question 'How useful do you find the Totality guideline?'



Despite this, 47 per cent of all respondents reported that there are particular types of offences that pose difficulties when applying the guideline. When asked for more detail on these offences, the most common examples listed were sexual offences (including historical sexual offences), assaults, driving offences, thefts, and drug offences (including where firearms are involved). Several sentencers reported that sentencing offences involving multiple victims poses particular difficulties, as well as cases involving offences which are dissimilar or unrelated.

Having identified these themes from the survey data, we asked interviewees whether any of these types of offences posed them problems when applying the Totality guideline, and whether they had any suggestions for how the guideline could provide more help in any of these situations. All but one interviewee (the High Court judge) agreed that some or all of these offences pose difficulties. However, four of the ten interviewees said that changing the guideline would not address the problem, or that they did not have any suggestions as to what the guideline could do to help.

Sexual offences and driving offences were the main offences identified by interviewees as causing particular difficulties in this part of the research. One circuit judge reported having difficulties sentencing multiple historical sexual offences, where some have different maximum sentences as a result of having been committed prior to the 2003 Act. This judge also commented on the difficulties of composing and explaining a sentence where there are multiple counts on one indictment, which they said is a common situation in sexual offences, and cases where offenders are convicted of multiple dissimilar offences. They suggested that, instead of having to look at and remark upon each count individually before coming up with a just and proportionate final sentence, *"it might be helpful to have in the guidelines that one of the options is to take a lead offence"*.

The Court of Appeal judge suggested that further *"mathematical"* guidance regarding appropriate reductions might be helpful where similar offences have been committed over a period of time.[10] However, they acknowledged that there would be difficulties with such

[10] The Totality guideline does not provide precise information on how to calculate reductions in individual sentences to take into account the totality of offending, rather it talks in terms of considering whether the total sentence is 'just and proportionate'.

an approach and that there would be exceptions, including *"some situations where you end up with a ridiculous sentence"*.

Problems applying the guideline to multiple driving offences were identified by all four magistrates and one of the circuit judges, including in cases where the offender is also being sentenced for unrelated offences. Two of the magistrates explained that it is difficult to balance financial penalties with the seriousness of offending in these types of cases. One said that *"even with totality, the guidance can lead you to too high a sentence in terms of fines and their affordability"* and suggested that magistrates could receive refresher training on fines. The other commented that a maximum of a fine and disqualification is not *"appropriate"* in instances either where life-changing harm has been caused to a victim, or where the person being fined is already in financial distress. This sentencer wanted the guideline to contain the option of taking cases into the area of community penalties in these situations.[11]

In interview, four sentencers highlighted problems with explaining the final sentence when there are multiple victims. Three circuit judges explained that there are particular difficulties reflecting the effect of crimes on victims of the less serious sexual offences in a case involving multiple counts, because they become less visible in the context of the most serious offence. One of these judges said that, instead of imposing one extended sentence, which reflects all the criminality:

> *I think there should be a way that the guideline sets out where you can and can't impose, for example, a lesser sentence, a significantly lesser sentence, but still reflect the criminality on that particular victim.* Circuit judge

3.3 The guideline's examples

Survey responses relating to the guideline's clarity and detail were largely positive, and several respondents reported that they like the examples given in each section. Respondents told us that the guideline helps them to work out how sentences can be combined, with one circuit judge stating that the guideline *"is specifically and importantly useful in considering the interplay between consecutive and concurrent sentences"*.[12] However, some respondents asked for more detail and a greater number of specific examples.

We asked interviewees what their views were on the guideline's inclusion of examples of particular combinations of offences and the approach that should be taken when sentencing them. One circuit judge said that the guideline is not the place for examples and that the Bench Book[13] would be the better place for them. However, the other interviewees all expressed positive views about their inclusion, calling them *"helpful"* and *"a good starting point"*.

In contrast, the Court of Appeal judge said that, for more experienced sentencers *"who know this bit and are more interested in the acute problems you get with a whole series of*

---

[11] There are legal limitations on when a community penalty can be imposed, which would limit the scope of this suggestion.

[12] Consecutive sentences are served one after the other and concurrent sentences are served alongside one another.

[13] https://www.judiciary.uk/publications/crown-court-compendium-published/

similar offences", the examples are less useful and *"don't go far enough"*. One circuit judge wanted the examples to be updated to cover more specific problems, including how to combine sentences where offenders have to serve two-thirds of some sentences and half of other sentences. This sentencer also wanted further *"worked examples"* detailing how to structure sentences. Another circuit judge similarly commented, *"I was going to say that it would be nice to have some actual examples of percentages to reduce by, but it's impossible to do that"*.

Despite these suggestions, most interviewees thought that the examples are sufficient and that it is not necessary to include more. One circuit judge commented, *"I think the examples are about right actually. Because they are specific examples, but they give you a good feel for what you ought to be doing"*. Two interviewees (from the High Court and magistrates' court) also said that offering more detail could result in the guideline becoming very long.

3.4 Layout and usability of the guideline

Among the survey responses, comments that the guideline is overly detailed and lengthy for regular use in a busy court were more common than requests for more examples. One magistrate said that *"there is rarely the time to ponder and absorb material of this kind"*. Respondents made the following suggestions for improving the guideline's format: the inclusion of flow charts; matrices; more tables; a reference index or table; concise summaries of each section; and, the use of bullet points rather than prose.

We explored with interviewees the issue that had been raised in the survey that some people felt that the guideline was difficult to use in a busy court. We asked them what they thought about the suggestions for tables, bullet points and flowcharts as a way of making the guideline easier to use, or if they had any other ideas that might help with this issue.

Four interviewees (from the Crown Court, High Court and Court of Appeal) commented that they do not find the guideline difficult to use. In comparison, one circuit judge said that the guideline is *"not the easiest to follow, but that's because it's not a tabular type guideline like the offence guidelines"*. Two magistrates also commented that they are unlikely to use the guideline in a busy court unless it is an exceptional case.

Despite this range of opinions about whether they personally find the guideline difficult to use, interviewees were generally positive about the potential to alter the format to make the guideline easier to use, although views on the specific ideas suggested were mixed. Views on more use of bullet points were generally positive. The Court of Appeal judge and one magistrate expressed positive views about flowcharts, while a different magistrate and the High Court judge said that they did not like this idea. Four interviewees liked the idea of more tables, with one saying that it would allow them to find the part of the guideline they needed more quickly.

Interviewees also suggested that the main principles of totality could be shortened and placed on one page, and that headings and important parts such as the general principles section could be put in bold. One circuit judge suggested that *"it might be better just to highlight the different sections more effectively, because it all runs into one as it looks at the moment"*. Another circuit judge also commented that *"if it was set out with steps, like in the modern guidelines, that might be helpful"*.

Interviewees were also shown a mocked-up version of the guideline with the same content, but with the examples placed in drop-down menus. We then asked interviewees their opinions of using such a format to condense the guideline. Three interviewees (from the Crown Court, High Court and Court of Appeal) did not like the idea of drop-down menus, saying that the online guidelines should contain the guidance on the page in full and should match the paper guidelines that were previously used. One commented that *"if you have got to click on things then you might miss them"*. The other seven interviewees were in favour of the drop-down menu format, commenting that it would make the guideline appear shorter on the page, would mean less scrolling, and would mean that the main points remain on the page while the examples could be accessed if needed. Three interviewees also mentioned that this format is good as it aligns with how other new guidelines are presented.

3.5 Sections of the guideline

For each section of the guideline, we asked survey respondents the extent to which they agreed with what the section says, and the extent to which they agreed that the section provides practical help in sentencing. Figures 3 and 4 show their responses.

Figure 3: Responses to the question 'Looking at X section, to what extent do you agree with what is said in this section?'

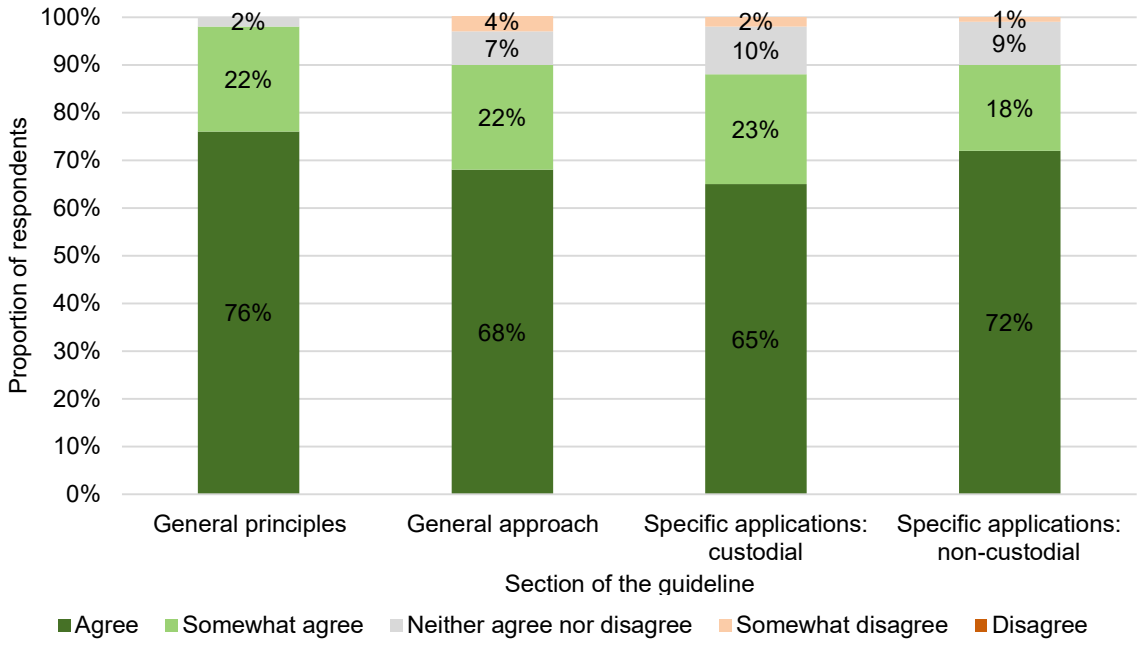
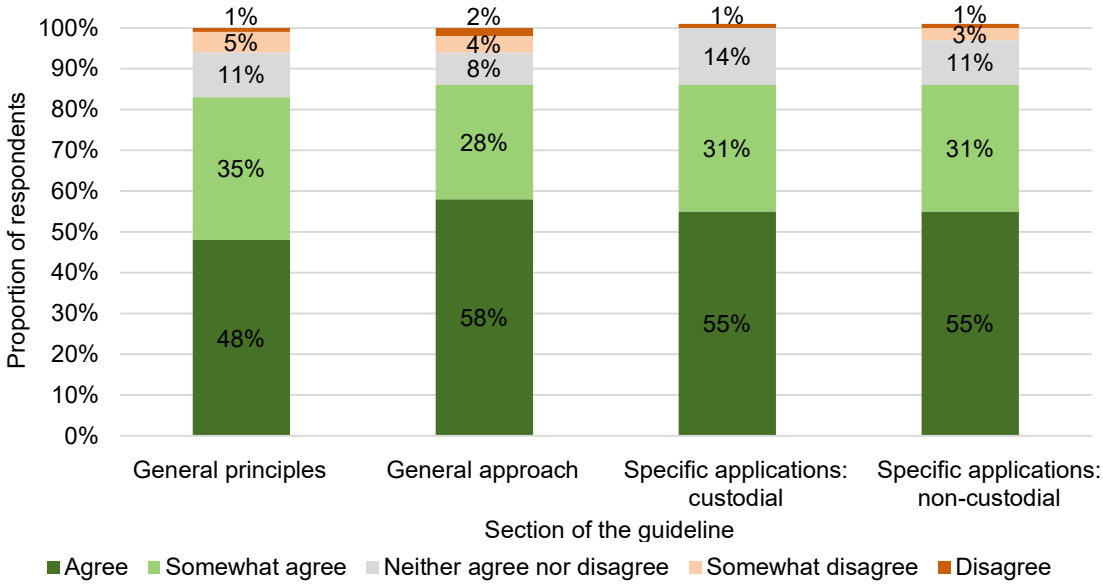


Figure 4: Responses to the question 'To what extent to do you agree that X section provides practical help in sentencing?'



Looking at Figure 3, for each section, at least 65 per cent of respondents agree with the content of the section, and at least 88 per cent of respondents agree or somewhat agree with what is said.

Lower proportions of respondents reported that they agree that each section provides practical help in sentencing, as can be seen in Figure 4: responses of agreement ranged from 48 per cent (General principles) to 58 per cent (General approach as applied to

Determinate Custodial sentences). However, for each section, at least 84 per cent of respondents reported that they agree or somewhat agree that it provides practical help.

Survey respondents were asked to provide more detail of their views on each section of the guideline[14] and these are set out below.

General principles

Respondents commented that the 'General principles' section is a *"useful"*, *"clear"* and *"straightforward"* guide and a reminder of the overall principles of totality. However, some respondents noted that this section does not give practical help. One magistrate said that this section contains *"general statements, rather than specific advice"*. Two respondents (a Court of Appeal judge and a circuit judge) commented that the section is of little practical use as the principles are already familiar to sentencers, especially those who are experienced.

General approach (as applied to Determinate Custodial sentences)

Several respondents gave positive comments about the advice regarding concurrent and consecutive sentences in the 'General approach (as applied to Determinate Custodial sentences)' section, describing it as *"clear"* and *"useful used in conjunction with specific sentencing guidelines"*. However, some sentencers highlighted perceived problems with the advice provided in the guideline. Two circuit judges queried the robbery with a firearm example: one believed it to be unclear in what it says about the weapon being ancillary to and not distinct and independent of the robbery; the other stated that there is Court of Appeal authority that there should be a consecutive sentence for the firearm. Additionally, in relation to the guidance about domestic violence, a magistrate commented:

> *[The guideline] specifies that consecutive sentences should be considered if the offences are domestic violence, but this is specifically not included as an aggravating factor in common assault cases, as has been pointed out by defence lawyers.* Magistrate

One respondent noted that there are issues in magistrates' courts when sentencing spree offenders who move in and out of remand custody before facing sentence for multiple minor offences. This magistrate said that the situation becomes complex for the sentencer if new offences are subsequently committed during a suspended sentence order and the sentencer has to work out which sentence to activate. The respondent asked:

> *Given the difficulties in part-activating a suspended sentence constructed from multiple short sentences, could the guidance address whether a global sentence would be a preferable approach to multiple short sentences, particularly when such sentences are to be suspended?* Magistrate

[14] The content of each section can be found in the Totality guideline: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/

One magistrate commented that this section would be improved by dividing it into Crown Court considerations and magistrates' court considerations.

Specific applications – custodial sentences

Survey responses were largely positive regarding the 'Specific applications – custodial sentences' section. Respondents commented that the section is *"clear"* and provides "*a useful framework and guidance"*. However, some points of disagreement with the guidance were highlighted. Three sentencers (a circuit judge, district judge and magistrate) disagreed with the guidance concerning recalled prisoners.[15] Two wrote that it is *"unjust"* and *"defies common sense"* not to impose a consecutive sentence.

Another circuit judge stated that the advice on imposing a determinate sentence on someone already serving a custodial sentence is *"too simplistic"* as it does not take into account cases such as historical sexual offences, or multiple burglaries where the offender chose to hide their other offences when originally sentenced. The same respondent also disagreed that sentences should generally be consecutive if the offence post-dates the offence for which the offender is in custody.

Some respondents commented that elements of this section (including determinate sentences, indeterminate sentences, and extended sentences for public protection) have little relevance to the magistrates' courts. However, one magistrate wrote that although the section was aimed at Crown Court users, *"it does have some implications when sentencing historical offences"*. One district judge commented that it would be helpful to have guidance on applying consecutive sentences when required to take into consideration the maximum sentencing powers of the magistrates' court.

Specific applications – non-custodial sentences

Survey responses were largely positive with regards to the 'Specific applications – non-custodial sentences' section. Comments included that the section is helpful in determining which sentences can and cannot be combined, and that the guidance is *"clear"* and *"comprehensive"*.

Several respondents, mostly magistrates, made comments in relation to ascertaining fines and compensation. Two magistrates and a circuit judge noted that the section is particularly useful in this respect. Three magistrates commented on the importance of ascertaining whether an offender has the ability to pay any financial penalties. A further magistrate commented that it would be beneficial if the guideline provided advice on *"occasions where the totality element takes the calculated fine above the maximum fine for the most serious offence and holding the fine at the maximum does not feel just and proportionate"*.

[15] The position relating to recalled prisoners is covered by legislation (section 225 of the Sentencing Code).

Several survey respondents commented that the cases in 'Specific applications – non-custodial sentences' occur often in the magistrates' court. Three circuit judges commented that this section is rarely relevant in the Crown Court.

The relevance of different sections for different jurisdictions

Following on from points raised in the survey that some parts of the guideline are not relevant to magistrates' courts, and others are rarely relevant to the Crown Court, we asked interviewees whether they had any views on this, and whether they thought it could be helpful to have sections specifically for each jurisdiction.

The High Court judge and one magistrate were in favour of having specific sections. The magistrate said that the sections on indeterminate and extended sentences were not relevant in magistrates' courts, while the sections on fines and community orders were particularly relevant. Additionally, another magistrate commented that it would be helpful to have a guideline tailored to the magistrates' courts, but said they were unsure whether this would be practical.

In comparison, two interviewees (from the Court of Appeal and magistrates' courts) highlighted potential problems with having different versions of the guideline across jurisdictions. The Court of Appeal judge gave the example of a serial offender being committed to the Crown Court, but then being acquitted of the most serious offences and as a result *"the Crown Court judge is then sentencing almost as if they are in a magistrates' court"*. The magistrate commented that they sit in the youth courts where, especially due to the backlog caused by the COVID pandemic, they sentence serious crimes for which it is useful to have Crown Court guidance. Additionally, five other interviewees said that they either do not experience problems with all the information being contained in one guideline, because they *"just go to what [they] need"*, or that they would simply prefer one document covering all jurisdictions. Two interviewees also commented that the other suggestions for making the guideline easier to use, particularly the drop-down menus, could address this issue.

3.6 External perception of totality

Several survey respondents raised concerns about the general lack of public understanding of the principles of totality, including among defendants, and the perception by victims and the public that totality results in leniency. Some, therefore, suggested that the guideline could include a reminder to explain in court how the sentence has been constructed.

We asked interviewees whether they thought the external perception of totality was a problem. We also asked whether they thought the inclusion of a reminder to explain in court how the sentence has been constructed would help, or if they had any other suggestions for addressing this possible perception of leniency.

Two interviewees (a High Court judge and a circuit judge) commented that they disagreed about there being a lack of understanding of totality among defendants. Nine out of ten interviewees agreed that there is a general problem regarding the perception that totality

results in leniency, particularly among the public and victims. Three of these sentencers (two circuit judges and a magistrate) commented that they felt the problem lies mainly in a combination of poorly informed press reporting and a lack of education among the public, and that any change to the guideline is unlikely to help with this. One circuit judge and two magistrates made similar comments regarding the importance of how the sentence is reported back to victims by police officers, the prosecution and witness services, with the circuit judge suggesting that police officers could receive more training on how multiple offences are sentenced so that they are better able to explain sentences to victims.

While it was commented by several interviewees that sentencers explain the implications of totality anyway, five interviewees agreed that a reminder to explain in court how the sentence has been constructed would be helpful. The Court of Appeal judge said that the guideline *"could give three short sentences which would then be capable of being used by any judge who wanted to use them in an appropriate case"* and one circuit judge thought it would be helpful *"if there was a phrase which could be used, or suggested to be used, in a way which would resonate with the victims and the police and the other people who hear this"*.

Three interviewees said that the perception of leniency was linked to sentences being passed that do not reflect the harm caused to particular victims. One magistrate commented that not being able to go outside the sentencing limits for offences means that some of the guidance for multiple offences is *"jarring"*. One circuit judge said:

> *The key thing is to ensure that where there are two victims and one offence is much more severe than the other, it's better to pass a concurrent sentence where you still are heard to say that it was a longish sentence for the lesser offence, than to diminish the sentence for the lesser offence because of totality.* Circuit judge

Identifying this same problem, but suggesting a different solution, another circuit judge commented:

> *I think it's important to sometimes reflect [multiple offences] by way of consecutive sentences or sentences that mean something to each victim. Because I think it is an issue with the principle, not that you can change that.* Circuit judge

4. Conclusions

The findings from the survey and interviews conducted as part of this assessment show that sentencers find the Totality guideline helpful to the sentencing process. Most sentencers told us that they usually apply the guideline's principles and consult it only for difficult or unusual cases.

Concerns were raised about external perceptions of totality and its perceived leniency, and some sentencers have suggested that this could be addressed through further guidance in the guideline, or by more informed press coverage and public education.

There were also suggestions that the clarity and usability of the guideline could be improved by changes to the format and the inclusion of further or different examples.

The Sentencing Council has taken the decision to review the Totality guideline in the light of these findings and will consult on proposed changes in 2022.

Annex A: survey questionnaire

The Sentencing Council would be very grateful for your participation in this short survey. The Totality guideline has been in force since 2012 and the Council is carrying out some exploratory work to see what sentencers think of the guideline. Please feel free to express your views - there are no right or wrong answers.

The responses will be collated and reported to the Council, but will not be attributable to any individual.

It will be helpful if you have a copy of the Totality guideline open to refer to during the survey. You can find it here (right click to open the link in a new tab on a computer; click and hold to open in a new tab on a phone or tablet).

It should take approximately 15 minutes to complete the survey. Questions marked with an * must be answered.

The Council's privacy notice can be found here.

Thank you again for your help with our work in this area.

1. What type of sentencer are you? *
    - Court of Appeal Judge
    - High Court Judge
    - Circuit Judge
    - Recorder
    - District Judge
    - Deputy District Judge
    - Magistrate

2. How often do the cases you sentence involve more than one offence? *
    - Most cases involve more than one offence
    - Most cases involve just one offence
    - The split is about even

3. What has been your experience of sentencing cases involving more than one offence? *
    - I usually find it more difficult to sentence cases involving more than one offence
    - I usually find it easier to sentence cases involving more than one offence
    - I usually find it about the same as sentencing cases involving just one offence
    - It varies

4. Most sentencing guidelines have a 'Totality' step which reads something like this: '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. See Totality guideline.' Are you familiar with seeing this step in the guidelines? *
    - Yes, very familiar
    - Somewhat familiar
    - No, not familiar

5. How useful do you find the inclusion of this step in the sentencing guidelines? *
   - Very useful
   - Useful
   - Somewhat useful
   - Not useful

6. When sentencing more than one offence on the same occasion, or when sentencing an offender who is already serving a sentence, which of the following statements most closely reflects your use of the Totality guideline? *
   - I always consult it
   - I consult it often
   - I consult it sometimes
   - I apply its principles and consult it only for difficult or unusual cases
   - I have used it previously and apply its principles without consulting it directly
   - I have never used it

7. How useful do you find the Totality guideline? *
   - Very useful
   - Useful
   - Somewhat useful
   - Not useful
   - Unsure
   - Not applicable

8. Are there any particular types of offence that pose difficulties when applying the totality guideline? *
   - Yes
   - No
   - Don't know

9. Please provide more detail about the types of offence for which you have problems applying the totality guideline: * [open ended response]

We will now be asking a series of questions about each part of the Totality guideline. Please have a copy of the guideline open to refer to while you answer these questions. We are interested in any views you may have on each section.

10. Looking at the 'General principles' section, to what extent do you agree with what is said in this section? *
   - Agree
   - Somewhat agree
   - Neither agree nor disagree
   - Somewhat disagree
   - Disagree

11. To what extent do you agree that the 'General principles' section provides practical help in sentencing? *
   - Agree
   - Somewhat agree
   - Neither agree nor disagree

- Somewhat disagree
- Disagree

12. Please can you provide more detail of your views on the 'General principles' section: [open ended response]

13. Looking at the 'General approach (as applied to Determinate Custodial Sentences)' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

14. To what extent do you agree that the 'General approach (as applied to Determinate Custodial Sentences)' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

15. Please can you provide more detail of your views on the 'General approach (as applied to Determinate Custodial Sentences)' section: [open ended response]

16. Looking at the 'Specific applications - custodial sentences' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

17. To what extent do you agree that the 'Specific applications - custodial sentences' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

18. Please can you provide more detail of your views on the 'Specific applications - custodial sentences' section: [open ended response]

19. Looking at the 'Specific applications - non-custodial sentences' section, to what extent do you agree with what is said in this section? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

20. To what extent do you agree that the 'Specific applications - non-custodial sentences' section provides practical help in sentencing? *

- Agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Disagree

21. Please can you provide more detail of your views on the 'Specific applications - non-custodial sentences' section: [open ended response]

22. Finally, considering the totality guideline as a whole, are there any other views that you would like to add? [open ended response]

23. The Sentencing Council may conduct further research to explore sentencers' views and experiences of the Totality guideline. This is likely to involve a 30-minute interview. Would you be willing to participate in this research? *

- Yes
- No

Annex B: interview discussion guide

1. How many years' experience do you have as a sentencer?

2. How often do you refer to the Totality guideline?

In our survey, we asked for types of offences that posed problems when applying the totality guideline in court. Responses included:

- offences with multiple victims and offences which are dissimilar or unrelated; and
- particular specific types of offences – e.g. sexual offences; assaults; driving offences; thefts; and drug offences.

3. Do you find that any of these offences pose problems when applying the totality guideline?

4. Do you have any suggestions for how the guideline could provide more help in any of these situations?

The guideline currently contains examples of particular combinations of offences and the approach that should be taken when sentencing them. Views on the provisions of these examples were mixed – some respondents found them helpful and wanted more, while others thought there were too many.

5. Do you have any views on this?

Several sentencers said that the guideline was difficult to use in a busy court. Suggestions for making it easier to use included more use of tables, bullet points, or flowcharts.

6. Do you have any views on these suggestions? Or do you have any other ideas that might help with this issue?

We have mocked up a version of the guideline with a slightly different format, but with the same content. Can I share my screen to show it to you?

7. What are your views on using a similar format to this mocked-up version to condense the guideline?

It was pointed out that some parts of the guideline are not relevant to magistrates' courts and others are rarely relevant to the Crown Court.

8. Do you have any views on this, and do you think it could be helpful to have sections specifically for each jurisdiction?

Concerns were raised about the general lack of public understanding of totality (including among defendants) and the perception by victims, law enforcement and the public that totality results in leniency. There were some suggestions that the guideline should include a reminder to explain in court how the sentence has been constructed.

9. Do you think this external perception is a problem, and if so, do you have any other suggestions for addressing it?

10. Is there anything else that you would like to mention in relation to the Totality guideline which the Council should consider?

Acknowledgements

We would like to thank the judges and magistrates who took part in the survey and interviews for this research.

The authors

Bethany Brewer and Eliza Cardale

Office of the Sentencing Council