

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

3 March 2023
SC(23)MAR07 – Totality
TBC
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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 first of two planned meetings to discuss the responses to the consultation. The aim is to publish the revised guideline in May to come into force on 1 July 2023.

2 RECOMMENDATION

2.1 That the Council:

- retains the overall structure of the guideline;
- considers whether an opening statement as to applicability should be added;
- makes textual changes to the General principles and General approach sections; and
- agrees that it is not possible to create an objective test for a just and proportionate sentence.

3 CONSIDERATION

3.1 There were 25 responses to the consultation and a response from the Justice Committee is expected in time for discussion at the next Council meeting. In general, the response to the proposals was positive with many helpful suggestions for limited changes or additions. There were also some responses (chiefly from academics) which made more radical suggestions for change. In order to consider the issues raised and the changes suggested in a logical way, at this meeting we will look at the basic outline of the guideline without the drop-down sections. **Annex A** contains the outline of the guideline; the online version can be viewed [here](#).

General principles

3.2 The first question in the consultation related to the proposed changes to the opening section (deletions are shown struck through and additions are in red):

General principles

The principle of totality comprises two elements:

1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
2. It is usually impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentences. It is necessary to address the offending behaviour **with reference to overall harm and culpability**, together with the **aggravating and mitigating** factors personal to the offender ~~as a whole~~.

Concurrent/consecutive sentences

There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive ~~components~~. The overriding principle is that the overall sentence must be just and proportionate.

3.3 Professor Mandeep Dhani commented:

What is “just and proportionate” ought to be clearly defined at the outset.

It is unclear how sentencers will calculate “overall” harm and culpability.

There is potential for double-counting of personal mitigating factors. In a recent study (Dhani, 2021), I analysed CCSS data in order to compare the penalties received by multiple-offence (MO) cases and similar single-offence (SO) cases. I found that for the large majority offence types examined an offence in a MO case received the same or a less severe penalty than its counterpart in a SO case. This finding took account of the effect of offender gender and age, as well as other sentencing relevant variables such as offence seriousness, number of aggravating factors (including previous convictions) and mitigating factors, and guilty plea reduction. There are several possible explanations for this potentially unwanted outcome, and the totality guideline could be revised to target at least two of these.

First, although personal mitigation is common to both MO and SO cases, it may be considered twice in MO cases. The first opportunity is when an initial sentence is considered for each offence (as per the offence-specific guidelines) and the second is when the totality principle is applied. Therefore, the overarching guideline should not ask sentencers to apply the same set of personal mitigating factors (again). It should either refrain from applying such factors altogether or ask sentencers to apply mitigating factors that pertain to the ‘multiple’ offence nature of the case and/or the consequences of the sentence. Second, the sentence for one or more of the offences in a MO case may be adjusted downwards if sentences are to be served consecutively, and adjusted upwards if they are to be served concurrently. It may be that the downwards adjustment is too much, and/or the upwards adjustment is too little (especially when considering the aforementioned penalty reducing effects of

personal mitigation) or that the two adjustments cancel each other out. Therefore, the overarching guidelines ought to include clear guidance on how much downwards adjustment should be made for consecutive sentences made up of different combinations of offences, and how much upwards adjustment should be made for concurrent sentences in these cases.

Finally, by saying “There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive”, and then later in the guidelines providing examples of when sentences should be concurrent or consecutive, the Council is undermining the latter guidance and presenting a mixed (confusing) message.

3.4 The Council may feel that defining ‘just and proportionate’ at the outset is not a practicable suggestion. The point about it not being clear about how sentencers will calculate overall harm and culpability was not repeated by any other respondents. Indeed, Dr Rory Kelly in his response welcomed this addition:

The Council proposes adding reference to harm and culpability in the General Principles section of the Totality Guideline. This is an important and positive step. Consideration of harm and culpability may help the sentencing judge to frame the overall seriousness of a series of offences, and to avoid the risk of double counting where the offences have overlapping harm and/or culpability factors.

3.5 The West London Magistrates’ Bench was among those who approved of the reference to harm and culpability, stating: ‘The addition of text that mentions overall harm and culpability is a good idea, as that is where sentencing should start in categorising the seriousness of an offence’.

3.6 In contrast the Justices’ Legal Advisers and Court Officers’ Service (JCS) said:

The deletion of the words "as a whole" renders section two redundant. It is a statutory principle of all sentencing that sentences refer to harm, culpability, aggravating and mitigating circumstances, doesn't need repeating here, and now adds nothing. The essential point of section two was that the TOTAL sentence should reflect those factors. If section two doesn't say that, there is no point in it being there. We recommend that "as a whole" is restored.

3.7 Some Council members may recall discussing the study referred to by Professor Dhami above, in January 2022. The chief flaw we identified in the study is that it purports to draw conclusions from a comparison of sentences passed for a single offence and the lead offence where there were multiple offences without identifying whether the other offences were sentenced consecutively or concurrently to the lead offence. It also works on the misconception that the guideline as currently worded requires consideration only of mitigating factors when it refers to ‘factors personal to the offender’. In order to clarify that point we consulted on adding the words ‘aggravating and mitigating’.

3.8 The Council may feel that the objection to the guideline saying there is ‘no inflexible rule’ on the grounds that it is confusing to then give examples later of when sentences

should be concurrent or consecutive, does not stand up to scrutiny. There is 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.

3.9 Among those who were supportive of the General principles section there were suggestions for changes. The CPS said:

Some of the current phrasing may be a little difficult to follow ... we wonder whether the principles might address, first, the lack of an inflexible rule and, secondly, the mirror principles of consecutive and then concurrent sentences and what, in outline, totality means in respect of each in terms of downward/upward adjustment.

We offer the following suggested wording for the Sentencing Council's consideration:

General principles

When sentencing for more than a single offence, the overall sentence must be just and proportionate. There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive.

1. 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.
2. 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.

3.10 HM Council of District Judges (Magistrates' Courts) suggested rewording:

It is necessary to address the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors personal to the offender.

As:

It is necessary to address 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.

3.11 The Attorney General's Office (AGO) observed "that judges at the Crown Court are routinely passing concurrent sentences when consecutive sentences would have been more appropriate". They suggested adding the words in red:

There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive. 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.**

3.12 The Sentencing Academy suggested the following alterations:

(1) The final sentence in the first element would seem better placed in the section 'Concurrent / Consecutive Sentences'. The general principle here is simply that the

sentence imposed is just and proportionate with regards to all the offending behaviour.

(2) The second principle builds on this by stating that a sentence should consider 'overall harm and culpability' in determining a proportionate sentence (as well as aggravating and mitigating factors if relevant). It would be worth stating that harm includes intended harm or harm that might foreseeably have been caused (s.63 Sentencing Act 2020).

3.13 The Academy go on to say, "sentencing guidelines have multiple audiences and we can see value in providing an example of both concurrent and consecutive sentencing in this section. This would reiterate the fact that concurrent sentences would usually be longer than a sentence for a single offence".

3.14 A circuit judge agreed with the proposed wording but suggested a stylistic changes:

When sentencing for more than a single offence, sentences can be structured as concurrent or consecutive. There is no inflexible rule as to this.

However such a sentence is structured, the court must apply the principle of totality.

The overriding principle is that the **overall** sentence must be just and proportionate.

Accordingly, all courts must pass a sentence which:

- Reflects **all** the offending behaviour before it; AND
- Is just and proportionate.

When considering what is just and proportionate, note:

- Concurrent sentences will ordinarily be longer than a single sentence for a single offence.
- Consecutive sentences will rarely involve simply adding together notional single sentences. Address the offending behaviour with reference to **overall** harm and culpability, together with the aggravating and mitigating factors personal to the offender.

3.15 Looking at the guideline as a whole, there may be scope for spelling out more explicitly than is currently the case that:

- where consecutive sentences are passed some or all of them will usually need to be reduced to achieve a proportionate overall sentence; and
- where concurrent sentences are passed the lead sentence will usually need to be increased to achieve a proportionate overall sentence.

3.16 The Council may feel that the suggestions at 3.9 and 3.14 above have merit but both have the disadvantage that they omit the reference to harm and culpability etc that the Council was keen to introduce and was explicitly welcomed by some respondents. A suggested alternative building on all the suggestions is:

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.

3.17 One further issue that was not raised by any respondents, but which might be worth considering is that the General principles section refers only to sentencing for more than one offence, it makes no mention of the other situation to which the guidelines applies, namely when sentencing an offender who is already subject to a sentence. Every offence specific guideline includes a step:

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 in accordance with the [Totality](#) guideline.

3.18 There is an 'Applicability' dropdown at the beginning of the existing guideline which states:

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders, whose cases are dealt with on or after 11 June 2012.

[Section 59\(1\) of the Sentencing Code](#) provides that:

"Every court -

- a. must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, and
- b. must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

This guideline applies when sentencing an offender for multiple offences or when sentencing an offender who is already serving an existing sentence. In these situations, the courts should apply the principle of totality.

3.19 The Council may consider that this is sufficient. Alternatively an opening paragraph could be added to the face of the guideline stating:

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

Question 1: Should an opening paragraph be added?

Question 2: What changes should be made to the General principles section?

General approach

3.20 The next question in the consultation related to the proposed 'General approach' section (deletions are shown struck through and additions are in red):

General approach (as applied to determinate custodial sentences)

1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
2. Determine whether the case calls for concurrent or consecutive sentences.
When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate.
3. Test the overall sentence(s) against the requirement that ~~they be~~ **the total sentence is** just and proportionate to the offending as a whole.
4. Consider ~~whether~~ **and explain how** the sentence is structured in a way that will be best understood by all concerned ~~with it~~.

Concurrent sentences will ordinarily be appropriate where:

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

Examples include: [dropdown]

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

Examples include: [dropdown]

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.

Concurrent custodial sentences: examples [dropdown]

Consecutive sentences will ordinarily be appropriate where:

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

Examples include: [dropdown]

- 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]

- 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]

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

Examples include:

[dropdown]

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

Examples include:

[dropdown]

Where consecutive sentences are to be passed, add up the sentences for each offence and consider if the aggregate length is just and proportionate.

3.21 The AGO suggested some additions to the four steps in this section in part to address their experience that judges often categorise correctly and adopt an appropriate starting point for a lead offence but fail to make uplift for totality (additions in red):

1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
2. Determine, **following the guidance provided below**, whether the case calls for concurrent or consecutive sentences. When sentencing **for 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, **aggravating the lead offence where appropriate**.
4. Consider and explain how the sentence is structured in a way that will be best understood.

3.22 Dr Kelly suggested adding a reference to harm and culpability to step 3 to link the General principles section to the General approach section suggesting:

3. Test the overall sentence(s) against the requirement that the total sentence is just and proportionate to the offending as a whole noting that that the relevant offences may have distinct or overlapping harm and culpability factors.

3.23 Kelly goes on to explain:

The sentencing judge considers the relevant offence specific guidelines independently at part one of the General Approach. At part three they then have an important and complex task in bringing together this information to arrive at a just and proportionate overall sentence. At part one the sentencing judge may rely on the same factor more than once when reaching initial sentences for each individual offence. Take an attack on V where V is badly beaten, and their watch is broken. When sentencing the criminal damage, the judge may, for example, have considered the intention to create a high risk of injury, which would also affect the sentencing of a s. 20 offence. An explicit reminder that harm and culpability factors may overlap at part 3 then would give the judge a test by which to assess overall proportionality in difficult cases as opposed to this being instinct lead.

3.24 Professor Dhimi states:

... in point 3, it is unclear what the Council means by “Test the overall sentence against the requirement that the total sentence is just and proportionate to the offending as a whole.” Specifically, what is the so-called “test”? It appears that the Council is simply asking sentencers to use their own judgment to test if their own judgment meets the requirement. This is an inadequate test. The Council ought to provide a clear and objective test that all sentencers can apply and which can be used by others when reviewing the sentences meted out in multiple-offence cases.

3.25 This reflects her point made earlier that ‘just and proportionate’ should be defined. The obvious difficulty here is how to define an overarching objective test that could be applied. It is not clear what (if anything) Dhimi envisages.

3.26 Professor Dhimi welcomes the reference to explaining how the sentence is structured and suggests that the Council should “monitor the extent to which the explanations given are useful”. She goes on to say that “the Council ought to consider the extent to which reminding sentencers of their obligation to provide reasons for their decision might alter the decision/judgment process they apply in cases, and consequently the decision (outcome) itself.”

3.27 This is not something that we will be able to do. As we set out in the resource assessment published with the consultation, 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.

3.28 Dr Kelly also welcomed the addition of a reference to explaining the sentence in step 4 and the JCS suggested that it would be clearer to have this as a distinct step:

4. Check that the sentenced is structured in a way that will be best understood by all concerned with it.
5. Consider how to explain the sentence clearly.

3.29 The CPS also welcomed the emphasis on explaining how the sentence is structured and suggested taking it slightly further to promote greater clarity and transparency, particularly in complicated sentencing exercises, saying:

- 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?

3.30 Regarding the wording:

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.

HM Council of District Judges (Magistrates' Courts) suggested rewording the second sentence to read: "the sentence should appropriately reflect the aggravating feature of the presence of the associated offences".

3.31 The CPS suggested making the need to uplift the sentence clearer:

Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. Consideration should be given to what increase in sentence is appropriate to reflect the commission of more than a single offence. The increase may be none, minimal or significant, depending on what is required in each individual case to reflect properly the commission of more than a single offence. In some cases a significant uplift is required to reflect properly the offending in its totality.

3.32 The CPS questioned the helpfulness of adding: "When sentencing three or more offences a combination of concurrent and consecutive sentences may be appropriate". Their concern being that "it may give the impression that it is more likely to be appropriate to use a combination". The Sentencing Academy, by contrast, welcomed this addition noting that it will be particularly important where this applies that the sentence is explained "as it may not be apparent to defendants, victims and the public why offences are being treated in different ways".

3.33 In relation to:

Where consecutive sentences are to be passed, add up the sentences for each offence and consider if the aggregate length is just and proportionate.

The CPS suggested it would be more consistent with the general principles section to say: "add up the sentences for each offence and consider the extent of any downward adjustment required to ensure the aggregate length, looked at in totality, is just and proportionate."

3.34 The AGO suggested rewording point d. under consecutive sentences to read:

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.**

3.35 A suggested revised version taking account of the responses (changes highlighted):

General approach (as applied to determinate custodial sentences)

1. Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.

2. Determine following the guidance provided below, 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]

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

Examples include: [dropdown]

Where concurrent sentences are to be passed the lead sentence should reflect the overall criminality involved. The sentence should appropriately reflect the aggravating feature of the presence of the associated offences.

Concurrent custodial sentences: examples [dropdown]

Consecutive sentences will ordinarily be appropriate where:

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

Examples include: [dropdown]

- 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]

- 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]

- 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: [dropdown]

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]

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.

Question 3: Does the Council wish to make the suggested changes to the General approach section?

Reaching a just and proportionate sentence

3.36 The next section of the draft guideline reads:

Reaching a just and proportionate sentence

There are a number of ways in which the court can achieve a just and proportionate sentence. Examples include:

- when sentencing for similar offence types or offences of a similar level of severity the court can consider:
 - whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
 - 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
- when sentencing for two or more offences of differing levels of seriousness the court can consider:
 - whether some offences are of such **very** low seriousness ~~in the context of the most serious offence(s)~~ that they can be recorded as 'no separate penalty' (for example technical breaches or minor driving offences not involving mandatory disqualification)
 - 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.

3.37 Professor Dhami comments:

The examples that the Council provides for when sentences may run consecutively versus concurrently suggests that some multiple-offence offenders may face longer/harsher penalties than their single-offence counterparts (i.e., an offender whose single offence is the same as the principal offence in the multiple-offence case), whereas other multiple-offence offenders may actually face shorter/less severe penalties than their single-offence counterparts. Specifically, based on the Council's examples, one could predict that multiple-offence offenders sentenced for "similar offence types or offences of a similar level of severity" will face longer/harsher penalties than their single-offence counterparts, whereas multiple-offence offenders sentenced for "two or more offences of differing levels of seriousness" will face shorter/less severe penalties than their single-offence counterparts. Clearly, this would be unjust. [It is also unclear if the Council is referring to different or same offence types in the latter example].

3.38 It is difficult to follow the logic of her argument – the conclusions she draws as the relative severity of sentences does not follow from the examples given in the guideline.

3.39 The Sentencing Academy makes a related point:

The Academy understands why the revised guideline has a bespoke section to emphasise the central aim of achieving a just and proportionate sentence. Inevitably

though there are questions of placement and potential overlap (much of the previous section relates to reaching a just and proportionate sentence in that it considered issues relating to culpability and harm).

The consultation paper is focussed on design and on improving the guideline's practical usefulness. This is indeed an important objective, but a prior question is on what basis the court should decide whether a particular sentence for a multiple offender is 'just and proportionate'. The question 'proportionate to what?' is usually answered by saying 'proportionate to the total offending for which the court is passing sentence'. But as soon as the curtain is drawn back, the complexities are revealed.

...[examples are given from the fines section of the guideline]

All of this is to be seen in the context of general principle (2) stated at the beginning of the Consultation Paper:

It is usually impossible to arrive at a just and proportionate sentence for multiple offences simply by adding together notional single sentences. It is necessary to address the offending behaviour with reference to the overall harm and culpability together with the aggravating and mitigating factors personal to the offender.

This general principle is important, but yet again it does not spell out exactly what factors go to make up 'proportionality' in this context. The various offence guidelines created by the Sentencing Council indicate what proportionality means for a single offence, and for comparisons between single offences. But nowhere, in the Council's documents or the Court of Appeal's judgments, is there any guidance on what a court should do, once it departs from the simple cumulation of sentences. General principle (2) states bluntly that 'it is usually impossible to arrive at a just and proportionate sentence ... by adding together notional single sentences.' But what criteria should guide the court? Often the format will be to identify the most serious offence and then to make some modest increase in the sentence to reflect the other offences. The choice of concurrent or consecutive sentences is largely presentational. But how is the size of the increase to be calculated? Reference to 'overall harm and culpability' and to 'aggravating and mitigating factors' is all very well, but offers no specific guidance to the sentencer.

The proposed text starts by presenting alternatives for situations where (a) the offences are of a similar type or severity (b) the offences are of a differing level of seriousness. This could come earlier in the guideline – perhaps even in the general principles – as it presents the options available. Guidance on the operation of these principles is largely found in the preceding section. Questions can arise about whether offences are of a similar type (e.g. in the context of property offences) or severity, but, particularly with regards to the latter, sentencers will follow offence-specific guidance which typically detail factors which are to be taken into account in assessing offence-severity.

3.40 Rory Kelly makes a similar comment:

The relationship of this new section to the General Approach section could be made clearer. Part three of the General Approach requires the judge to "Test the overall sentence(s) against the requirement that the total sentence is just and proportionate to the offending as a whole." The new section has been taken out of the General Approach section because it is "key and by giving it a separate section it will give it more prominence". A risk may be that it is overlooked if the judge focuses on the earlier requirement in the General Approach. It may then be safer to re-join this section with the previous one, or at least to include a cross-reference.

The new section provides numerous ways for a court to reach a proportionate sentence to include proportionate reductions across similar offences and imposing no further penalty for very low serious offences. The Council though could do more to explain how a judge is to know whether the overarching sentence is proportionate. If the section is to be retained, the following text may usefully be added between the section heading and the current first sentence:

“The judge should assess whether the overall sentence is just and proportionate with reference to the overall seriousness of the offences committed. Overall seriousness may be assessed through reference to the offender’s culpability in committing the offences and any harm the offences caused, were intended to cause, or might foreseeably have caused.”

3.41 The AGO welcomed this section but suggested elaborating further, to remind judges that reaching a just and proportionate sentence can include upwards as well as downwards adjustments. They considered that as currently drafted there is a greater emphasis on the reduction of an overall sentence to reflect totality than on the need to accurately reflect the level of criminality. They refer to examples where the sentence on a lead offence was not aggravated sufficiently to reflect the overall criminality of the multiple offending or the severity of the other offences. They suggested adding a requirement for judges to detail how the sentence has been aggravated for totality, to ensure that it is a just and proportionate sentence and proposed changing the opening paragraph to read:

There are a number of ways in which the court can achieve a just and proportionate sentence. Greater clarity may be achieved by explaining the effect of totality on the notional sentence(s).

3.42 Conversely, a magistrate commented that it would not be helpful to have to announce in court what each element of the sentence should be.

3.43 The Magistrates’ Association (MA) agreed with the content of this section but suggested it should come before the General approach section.

3.44 A circuit judge commented:

I like the principle. The matter that concerns the Judiciary is how much extra to sentence a Defendant to in cases where there are multiple victims, for example Death by Dangerous Driving, or multiple offences against the same victim, for example domestic context rapes. It would be helpful to have a guide as to how much extra for 2 rapes, 3 rapes etc.

3.45 The JCS disagreed with the changes to the wording in the existing guideline:

- whether some offences are of such low seriousness in the context of more serious offences that they can be recorded as ‘no separate penalty’

Arguing:

For example it is common for offenders to commit a number of road traffic offences, which are of only slightly differing seriousness, e.g. defective tyre, no insurance, no MOT certificate. Under the old guideline one offence (probably the defective tyre or no insurance) would bear the fine and the rest No Separate Penalty. But since none of these offences are of VERY low seriousness, it would imply that in future each

should bear a fine, which would not have been the case before. We also think that the removal of the words "relative to each other" has the same tendency. It means that the only offences which would receive a No Separate Penalty would be offences which are in absolute terms of very low seriousness. But for example, while careless driving may seem relatively minor when committed in conjunction with a GBH assault, and might justify NSP, it would not when committed in conjunction with a defective windscreen wiper. We think the old wording should be restored.

3.46 RoadPeace also had concerns about this wording:

We would prefer to see clarity on "technical breaches" and what exactly is considered to be a "minor" driving offence when sentencing. RoadPeace's opinion is that the judicial system is too accepting of unacceptable driver behaviour and that sentencing should always reflect a zero tolerance of offences that challenge Road Danger Reduction (safety) or working towards Vision Zero.

3.47 Leaving aside issues of drafting, there are two points that arise from these comments: firstly what is the relationship between this section and the references to reaching a just and proportionate sentence earlier in the guideline, and secondly, could or should the guideline give a more precise indication of how to identify if a sentence is 'just and proportionate'?

3.48 As to the first point, respondents are right to point out that there is a degree of overlap between the different sections and there is no clear logic as to what information is in each section. One way of restructuring the information would be to place the first two examples (which relate to consecutive sentences) at the end of the consecutive sentences part of the 'General approach' section and the second two examples (which relate to concurrent sentences) at the end of the concurrent sentences part of that section. The reason 'Reaching a just and proportionate sentence' was given its own section was that in the existing guideline it appears to be included in the consecutive sentences part and it does not really fit there. It is worth noting that the General approach section applies to determinate custodial sentences whereas the example relating to no separate penalty in the 'Reaching a just and proportionate sentence section' could be applied to non-custodial sentences. Having said that (bearing in mind the response from the JCS) it could be preferable to restrict the content to considerations of custodial sentences.

3.49 A revised version of the guideline incorporating the changes suggested elsewhere in this paper and a restructuring of the information is provided for consideration at **Annex B**.

3.50 As to giving a more precise indication of how to reach a just and proportionate sentence, it is noticeable that it is primarily academics rather than sentencers or other guideline users who have raised this issue. It is certainly arguable that the more room the guideline leaves for sentencer discretion the more chance there is of bias or uncertainty of outcome. However, if more certainty is desirable, it is by no means clear how to achieve this.

There can be no precise mathematical formula and even employing a 'rule of thumb' would be problematic. For example, the number of charges that an offender faces for a course of conduct could vary depending on prosecutorial decisions. The number of permutations of related and unrelated matters of varying seriousness that a particular sentencing exercise can involve are too great to devise an objective test for what is 'just and proportionate'.

Question 4: Should the information in the Reaching a just and proportionate sentence section be moved?

Question 5: Does the Council agree that it is not possible to create an objective test for a just and proportionate sentence?

Question 6: Should any of the other suggestions be incorporated, for example adding a further reference to harm and culpability?

4 IMPACT AND RISKS

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

4.2 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 referred to at 3.27 above a narrative resource assessment was published with the consultation, rather than a statistics based one.

4.3 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.

4.4 The responses to the consultation relating to impact and to equality issues will be discussed at the next meeting

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

General principles

The principle of totality comprises two elements:

1. All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
2. It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour with reference to overall harm and culpability, together with the aggravating and mitigating factors personal to the offender.

Concurrent/consecutive sentences

There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive. The overriding principle is that the overall sentence must be just and proportionate.

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**
2. **Determine whether the case calls for concurrent or consecutive sentences. When sentencing three or more 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 with it.**

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
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Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.

Concurrent custodial sentence examples:	V
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Consecutive sentences will ordinarily be appropriate where:

a. offences arise out of unrelated facts or incidents.

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

Examples include:	V
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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
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Where consecutive sentences are to be passed add up the sentences for each offence and consider if the aggregate length is just and proportionate.

Reaching a just and proportionate sentence

There are a number of ways in which the court can achieve a just and proportionate sentence.

Examples include:

- when sentencing for similar offence types or offences of a similar level of severity the court can consider:
 - whether all of the sentences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively
 - 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
- when sentencing for two or more offences of differing levels of seriousness the court can 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)

- 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.

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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Compensation orders	V
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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

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 the overall offending. Ordinarily some upward adjustment is required.

General approach (as applied to determinate custodial sentences)

1. **Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.**
2. **Determine following the guidance provided below, 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. The sentence should appropriately reflect the aggravating feature of the presence of the associated offences.

Concurrent custodial sentence examples:	V
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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
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- 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
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- 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
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- 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
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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

Specific applications – custodial sentences

Existing determinate sentence, where determinate sentence to be passed V

Extended sentences V

Indeterminate sentences V

Specific applications – non-custodial sentences

Multiple fines for non-imprisonable offences V

Fines in combination with other sentences V

Community orders V

Disqualifications from driving V

Compensation orders V

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