

Revisions to the Totality guideline Consultation

October 2022

Revisions to the Totality guideline

Consultation

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The consultation will close on 11 January 2023

About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 5 October to 11 January 2023
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council
Tel: 020 7071 5793
Email: info@sentencingcouncil.gov.uk
- How to respond:** Please send your response by 11 January 2023 to:
Ruth Pope
Email: consultation@sentencingcouncil.gov.uk
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:
www.sentencingcouncil.org.uk
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: www.sentencingcouncil.org.uk
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.
In addition, responses may be shared with the Justice Committee of the House of Commons.
Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.

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Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines which courts in England and Wales must follow when passing a sentence. The Council consults on its proposed and revised guidelines before they come into force and makes changes to the guidelines as a result of consultations.

What is this consultation about?

The Sentencing Council is proposing to revise the Totality guideline. In summary, when sentencing an offender for more than one offence, or where the offender is already serving a sentence, courts must consider whether the total sentence is just and proportionate to the overall offending behaviour. The Totality 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.

Background

The Council has a statutory duty to ‘prepare sentencing guidelines about the application of any rule of law as to the totality of sentences.’¹ The [Totality guideline](#) has been in force since 11 June 2012 and is used in all criminal courts. In September 2021 the Council published a research report on the Totality guideline: [Exploring sentencers’ views of the Sentencing Council’s Totality guideline](#). The Council stated that in the light of the findings of the research it would review the guideline and consult on the proposed changes in 2022.

The key findings of the research can be summarised as follows:

- Most survey respondents thought that the guideline provides practical help in sentencing. Several made positive comments regarding the guideline’s examples, clarity and usefulness.
- Survey respondents and interviewees both said that they do not always refer to the guideline. The most common way that survey respondents use the guideline is to apply its principles, based on their knowledge of its contents, and consult it only for difficult or unusual cases.
- Nearly half the survey respondents said that they can find it difficult to apply the guideline in some circumstances, for example when sentencing offences that are dissimilar or have multiple victims, and some specific offences.
- Sentencers also told us that, in cases with multiple victims and a range of offending, it can be difficult to reflect the seriousness of the offending against each individual victim in the final sentence.

¹ Coroners and Justice Act 2009 s120(3)(b)

- To counter a perception among the public and victims that the totality principle is lenient, some interviewees thought it could be helpful to include in the guideline a reminder to the court to explain how a sentence has been constructed.
- Most survey respondents commented on the length of the guideline, and some requested improvements to its format. We showed interviewees ideas for improving the format of the guideline (bullet points, drop-down menus and tables) and most were positive about the proposals.

There have also been a number of academic papers published suggesting that changes should be made to the Totality guideline. One of the issues noted by academics is the paucity of data on multiple offences. The Ministry of Justice does not publish figures on multiple offences. The data published by the Ministry of Justice (and used by the Sentencing Council in its statistical bulletins) relates to the principal offence being sentenced for an offender on a particular occasion. The Council recognised this gap in the data and in 2021 considered devoting resources to obtaining improved data on multiple offences. The conclusion reached was set out in the response to the ‘What next for the Sentencing Council’ consultation:

[I]n relation to analysis on multiple offences, we do not currently have access to extensive information on secondary/ non-principal offences or the sentences imposed for them. An approach based on the principal offence is therefore considered the most effective and pragmatic way of conducting our analysis given the data that is available and the difficulties of disentangling the effect of secondary offences on the overall sentence. We do agree that this might be an area to explore in the future but have decided that we need to prioritise other areas of work in the short and medium term. Once we have a clearer idea of the data we might be able to draw from the Common Platform, we will be able to reconsider this. We have therefore not included this as a specific action in our five year strategy but have included it in our longer-term analytical plan.

Despite concluding that we cannot obtain comprehensive data on multiple offences at this time, the Council will include a small number of questions in our pilot data collection exercise to capture information on whether offences have been adjusted to take account of totality and if so in what way. This will inform the type of data we may be able to draw on in the future.

Other suggestions from academics have included restructuring the Totality guideline around harm and culpability taking account of whether the sentences are to be served concurrently (at the same time) or consecutively (one after the other).

Responding to the consultation

This consultation paper has been produced in order to seek views from as many people as possible interested in the sentencing.

Through this consultation process, the Council is seeking views on:

- the approach that the guideline takes to the sentencing of multiple offences;
- the accuracy and clarity of the information in the guideline;
- the presentation and format of the guideline;
- whether there are any issues relating to disparity of sentencing and/or broader matters relating to equality and diversity that the guideline could and should address; and

- anything else you think should be considered.

We would like to hear from anyone who uses sentencing guidelines in their work or who has an interest in sentencing. We would also like to hear from individuals and organisations representing anyone who could be affected by the proposals including:

- victims of crime and their families;
- defendants and their families;
- those under probation supervision or youth offending teams/supervision;
- those with protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

It is important to note that the Council is consulting on the approach to sentencing multiple offences and not on the sentences for particular offences.

During the 14 week consultation period, the Council will also hold meetings with sentencers and key stakeholders to discuss the draft guideline. Following the consultation, once the results of the consultation and the discussions have been considered, the final guideline will be published and used by all courts when sentencing multiple offences.

Alongside this consultation paper, the Council has produced a resource assessment. This can be found on the Sentencing Council's website:

<https://www.sentencingcouncil.org.uk/consultations/>

In the following sections the proposals are outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions below either by email to consultation@sentencingcouncil.gov.uk or by using the online questionnaire: <https://consult.justice.gov.uk/sentencing-council/totality-guideline-consultation>.

Question 1: What is your name?

Question 2: What is your email address?

Question 3: What is your organisation?

Overview

The scope of the revisions

Having considered the findings from the research referred to on page 2 above, the Council agreed to revise the Totality guideline. The evidence from the research was that sentencers generally found the guideline to be useful and clear and a practical help in sentencing. The Council therefore concluded that the revisions should focus on updating the guideline without changing the essentials of the content.

In reviewing each section of the guideline the Council has had regard to the findings of the research with sentencers, recent legislation and caselaw, and commentaries from academics.

The presentation of the revised guideline

Aside from any considerations of the content, the Council decided to update the format of the guideline to take advantage of the digitisation of guidelines. In the research with 130 sentencers, respondents welcomed the level of detail in the guideline (and some requested more detail) but at the same time often felt that the guideline was too long. In ten follow-up interviews we demonstrated to sentencers a version of the guideline with the same content but where the examples were placed in dropdown boxes. Seven of the interviewees were in favour of this approach and the Council decided to consult on presenting the guideline in this way.

A digital version of the revised guideline can be seen [here](#). This is the best way to see how the proposed guideline would work in practice.

Other changes to the format

The existing guideline was originally published as a booklet with over 40 footnotes most of which referred to Court of Appeal cases.

This format does not adapt well to digital guidelines and it seems unlikely that guideline users find those footnotes useful. Indeed, although it may be interesting to see the source of information in a guideline, since courts 'must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case' (section 59 (1)(a) of the Sentencing Code) there is no need for the guideline to refer to an earlier authority. Where the reference to the authority may have provided additional relevant information to the sentencer this information (updated as appropriate to take account of more recent authorities) has been incorporated into the guideline. The revised version has no footnotes and hyperlinks to any legislation referred to are embedded in the text.

The overall structure

The current guideline has four sections:

- General principles
- General approach (as applied to determinate custodial sentences)
- Specific applications – custodial sentences

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- Specific applications – non-custodial sentences

The revised guideline has five sections:

- General principles
- General approach (as applied to determinate custodial sentences)
- Reaching a just and proportionate sentence
- Specific applications – custodial sentences
- Specific applications – non-custodial sentences

The additional section 'Reaching a just and proportionate sentence' largely contains information already in the guideline; the main difference is the way in which the information is presented.

The content of each section of the guideline

The Council has considered each section in depth and has proposed changes which are set out below.

We will ask your views on the format of the guideline alongside consideration of the content and there is also an opportunity to comment on the overall format and structure of the guideline after consideration of the content.

General Principles

The Council is proposing to make changes to the second element of the general principles section to show that when considering what is a just and proportionate sentence it is necessary to consider all aspects of the offending behaviour with reference to harm and culpability as well as aggravating and mitigating factors. This is not expected to make a significant change to the way courts approach the issue of totality – rather it is a point of clarification and reflects that the consideration of totality takes place in the context of the assessment of the individual offences with reference to offence specific guidelines. One other small textual change is proposed.

Proposed wording (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.

We recommend viewing the [online version](#) of the draft guideline to see how it will appear in practice.

Question 4: Do you have any comments on the proposed changes to the General principles section? We are interested in your views on the content and presentation of the section.

General Approach

The proposed changes to this section are more significant. The changes seek to address some of the issues raised by sentencers in the research both in terms of the usability of the guideline and the content.

There are four steps in the existing guideline setting out the approach to be taken and further information and examples are given within each step. In the proposed version, those same steps are retained, but they are listed at the beginning of the section and the detail is then provided below with examples in dropdown boxes.

It is important that offenders, victims and others concerned with the case understand how the overall sentence has been reached and so explicit reference to explaining how the sentence is structured has been added to step 4 of the general approach.

In the part setting out where consecutive sentences will ordinarily be appropriate, there are currently three situations listed:

- a) offences arise out of unrelated facts or incidents;
- b) offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences; and
- c) one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum.

In the proposed version the content has been re-organised so that four situations are listed, with what had been listed under a) now split into:

- a. offences arise out of unrelated facts or incidents; and
- b. offences that are unrelated because while they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition.

An example has been added to illustrate the situation relating to statutory minimum sentences. An example has also been added to illustrate situations where it is not permissible to impose consecutive sentences to evade the statutory maximum penalty.

The proposed text and layout

The proposed changes are set out below – additions to the text are shown in red and deletions are struck through. As before, we recommend viewing the [online version](#) of the draft guideline to see how it would operate in practice.

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]

- a single incident of dangerous driving resulting in injuries to multiple victims
- robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it
- fraud and associated forgery
- separate counts of supplying different types of drugs of the same class as part of the same transaction

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

Examples include:

[dropdown]

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

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]

Examples of concurrent custodial sentences include:

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

Consecutive sentences will ordinarily be appropriate where:

a. offences arise out of unrelated facts or incidents.

Examples include:

[dropdown]

- where the offender commits a theft on one occasion and a common assault against a different victim on a separate occasion
- an attempt to pervert the course of justice in respect of another offence also charged

- a Bail Act offence
- any offence committed within the prison context

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

Examples include: [\[dropdown\]](#)

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

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

Examples include: [\[dropdown\]](#)

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

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

Examples include: [\[dropdown\]](#)

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

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

Examples include: [\[dropdown\]](#)

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

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

Question 5: Do you have any comments on the proposed changes to the General approach section? We are interested in your views on the content and presentation of the section.

Reaching a just and proportionate sentence

This is a new section in the guideline although much the content was previously part of the General approach section. The Council considered that the information in this section is key and by giving it a separate section it will give it more prominence.

This section also includes new guidance on sentencing for offences committed prior to other offences for which an offender has already been sentenced. This was guidance that the Council noted was largely absent from the existing guideline and would therefore be a useful addition. This new guidance will not apply to the majority of cases and therefore the Council decided to include this in a dropdown box to avoid making the core of the guideline too long.

As before, we recommend viewing the [online version](#) of the draft guideline.

The proposed text

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.

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

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

A non-exhaustive list of circumstances could include:

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

If the offender is still subject to the previous sentence:

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

Question 6: Do you have any comments on the proposed new 'Reaching a just and proportionate sentence' section? We are interested in your views on the content and presentation of the section.

Specific applications – custodial sentences

The content of this section is largely unchanged although some textual changes are set out below. The main difference between the existing and the proposed version is the use of dropdown boxes which are designed to make it easier to navigate the guideline. Some text relating to sentencing an offender serving a determinate sentence for offences committed after the instant offence has been removed as it is covered in the section above.

The proposed text

The proposed changes are set out below – additions to the text are shown in red and deletions are struck through. As before, we recommend viewing the [online version](#) of the draft guideline to see how it would operate in practice.

Existing determinate sentence, where determinate sentence to be passed [dropdown]	
Existing determinate sentence, where determinate sentence to be passed	
Circumstance	Approach
<p>Offender serving a determinate sentence (<i>Instant offence(s) committed after original sentence imposed offence(s) sentenced earlier</i>)</p>	<p>Generally the sentence will be consecutive as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender’s criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Where a prisoner commits acts of violence in custody, any reduction for totality is likely to be minimal.</p>
<p>Offender serving a determinate sentence but released from custody Offender subject to licence, post sentence supervision or recall</p>	<p>The new sentence should start on the day it is imposed: s225 Sentencing Code prohibits a sentence of imprisonment running consecutively to a sentence from which a prisoner has been released. <i>If the new offence was committed while subject to licence or post sentence supervision</i>, the sentence for the new offence will should take that into account as an the aggravating feature that it was committed on licence. However, the sentence must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to any the recall period (which will be an unknown quantity in most cases); this is so</p>

	even if the new sentence will in consequence add nothing to the period actually served.
Offender sentenced to a determinate sentence subject to an existing suspended sentence order	Where an offender commits an additional offence during the operational period of a suspended sentence and the court orders the suspended sentence to be activated, the additional sentence will generally be consecutive to the activated suspended sentence, as it will arise out of unrelated facts.

Extended sentences

[dropdown]

Extended sentences	
Circumstance	Approach
Extended sentences – using multiple offences to calculate the requisite determinate term	In the case of extended sentences, providing there is at least one specified offence, the threshold requirement under s267 or s280 of the Sentencing Code is reached if the total determinate sentence for all offences (specified or not) would be four years or more. The extended sentence should be passed either for one specified offence or concurrently on a number of them. Ordinarily either a concurrent determinate sentence or no separate penalty will be appropriate to the remaining offences. The extension period is such as the court considers necessary for the purpose of protecting members of the public from serious harm caused by the offender committing further specified offences. The extension period must not exceed five years (or eight for a sexual offence). The whole aggregate term must not exceed the statutory maximum. The custodial period must be adjusted for totality in the same way as determinate sentences would be. The extension period is measured by the need for protection and therefore does not require adjustment.

Indeterminate sentences

[dropdown]

Indeterminate sentences	
Circumstance	Approach
Imposing multiple indeterminate sentences on the same occasion and using multiple offences to calculate the minimum term for an indeterminate sentence	Indeterminate sentences should start on the date of their imposition and so should generally be ordered to run concurrently. If the life sentence provisions in sections 272-274 or sections 283 – 285 of the Sentencing Code apply then:

	<ol style="list-style-type: none"> 1. first assess the notional determinate term for all offences (specified or otherwise), adjusting for totality in the usual way 2. ascertain whether any relevant sentence condition is met and 3. the indeterminate sentence should generally be passed concurrently on all offences to which it can apply, but there may be some circumstances in which it suffices to pass it on a single such offence.
<p>Indeterminate sentence (where the offender is already serving an existing determinate sentence)</p>	<p>It is generally undesirable to order an indeterminate sentence to be served consecutively to any other period of imprisonment on the basis that indeterminate sentences should start on their imposition.</p> <p>The court should instead order the sentence to run concurrently but can adjust the minimum term for the new offence to reflect half of any period still remaining to be served under the existing sentence (to take taking account of the relevant early release provisions for the determinate sentences). The court should then review the minimum term to ensure that the total sentence is just and proportionate.</p>
<p>Indeterminate sentence (where the offender is already serving an existing indeterminate sentence)</p>	<p>It is generally undesirable to order an indeterminate sentence to be served consecutively to any other period of imprisonment on the basis that indeterminate sentences should start on their imposition. However, where necessary (such as where the offender falls to be sentenced while still serving the minimum term of a previous sentence and an indeterminate sentence, if imposed concurrently, could not add to the length of the period before which the offender will be considered for release on parole in circumstances where it is clear that the interests of justice require a consecutive sentence), the court can order an indeterminate sentence to run consecutively to an indeterminate sentence passed on an earlier occasion (<u>section 384 of the Sentencing Code</u>). The second sentence will commence on the expiration of the minimum term of the original sentence and the offender will become eligible for a parole review after serving both minimum terms (<u>Section 28(1B) of the Crime (Sentences) Act 1997</u>). The court should consider the length of the aggregate minimum terms that must be served before the offender will be eligible for consideration by the Parole Board. If this is not just</p>

	<p>and proportionate, the court can adjust the minimum term.</p>
<p>Ordering a determinate sentence to run consecutively to an indeterminate sentence</p>	<p>The court can order a determinate sentence to run consecutively to an indeterminate sentence. The determinate sentence will commence on the expiry of the minimum term of the indeterminate sentence and the offender will become eligible for a parole review after servicing half of becoming eligible for release from the determinate sentence. The court should consider the total sentence that the offender will serve before becoming eligible for consideration for release. If this is not just and proportionate, the court can reduce the length of the determinate sentence, or alternatively, can order the second sentence to be served concurrently.</p>

Question 7: Do you have any comments on the proposed changes to the ‘Specific applications – custodial sentences’ section? We are interested in your views on the content and presentation of the section.

Specific applications – non-custodial sentences

Again, the content of this section is largely unchanged although, as well as the use of dropdown boxes to make it easier to navigate the guideline, there are some proposed revisions set out below. Attention is drawn to the proposed additional wording and sub-headings in the approach to sentencing an offender convicted of an offence while serving a community order. This aims to further clarify the approach to be taken in different circumstances and any changes agreed to this wording will also be made to the equivalent wording in the [Breach of a community order guideline](#).

The proposed text

The proposed changes are set out below – additions to the text are shown in red and deletions are struck through. As before, we recommend viewing the [online version](#) of the draft guideline to see how it would operate in practice.

Multiple fines for non-imprisonable offences [dropdown]	
Multiple fines for non-imprisonable offences	
Circumstance	Approach
Offender convicted of more than one offence where a fine is appropriate	<p>The total is inevitably cumulative. The court should determine the fine for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court (section 125 of the Sentencing Code). The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved.</p> <p>For example:</p> <ul style="list-style-type: none"> • where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences. • where an offender is to be fined for two or more offences that arose out of different incidents, it will often be

	<p>appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed.</p> <p>Where separate fines are passed, the court must be careful to ensure that there is no double-counting.</p> <p>Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.</p>
Multiple offences attracting fines – crossing the community threshold	<p>If the offences being dealt with are all imprisonable, then the community threshold can be crossed by reason of multiple offending, when it would not be crossed for a single offence (section 204(2) of the Sentencing Code). However, if the offences are non-imprisonable (e.g. driving without insurance) the threshold cannot be crossed (section 202 of the Sentencing Code).</p>

Fines in combination with other sentences

[dropdown]

Fines in combination with other sentences

Circumstance	Approach
A fine may be imposed in addition to any other penalty for the same offence <u>except</u>:	<ul style="list-style-type: none"> • a hospital order • a discharge • a sentence fixed by law (minimum sentences, EPP, IPP) (murder) • a minimum sentence imposed under section 311, 312, 313, 314, or 315 of the Sentencing Code • a life sentence imposed under section 274 or 285 of the Sentencing Code or a sentence of detention for life for an offender under 18 under section 258 of the Sentencing Code • a life sentence imposed under section 273 or 283 Sentencing Code • a serious terrorism sentence under section 268B or 282B of the Sentencing Code <p>(Sections 118 to 121 of the Sentencing Code)</p>
Fines and determinate custodial sentences	<p>A fine should not generally be imposed in combination with a custodial sentence because of the effect of imprisonment on the means of the defendant offender. However, exceptionally, it may be appropriate to impose a fine in addition to a custodial sentence where:</p> <ul style="list-style-type: none"> • the sentence is suspended

	<ul style="list-style-type: none"> • a confiscation order is not contemplated and • there is no obvious victim to whom compensation can be awarded and • the offender has, or will have, resources from which a fine can be paid
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Community orders [dropdown]

Community orders	
Circumstance	Approach
Multiple offences attracting community orders – crossing the custody threshold	If the offences are all imprisonable and none of the individual sentences merit a custodial sentence, the custody threshold can be crossed by reason of multiple offending (section 230(2) of the Sentencing Code). If the custody threshold has been passed, the court should refer to the offence ranges in sentencing guidelines for the offences and to the general principles.
Multiple offences, where one offence would merit immediate custody and one offence would merit a community order	A community order should not be ordered to run consecutively to or concurrently with a custodial sentence. Instead the court should generally impose one custodial sentence that is aggravated appropriately by the presence of the associated offence(s). The alternative option is to impose no separate penalty for the offence of lesser seriousness.
Offender convicted of more than one offence where a community order is appropriate	A community order is a composite package rather than an accumulation of sentences attached to individual counts. The court should generally impose a single community order that reflects the overall criminality of the offending behaviour. Where it is necessary to impose more than one community order, these should be ordered to run concurrently and for ease of administration, each of the orders should be identical.
Offender convicted of an offence while serving a community order	<p>The power to deal with the offender depends on his being convicted while the order is still in force; it does not arise where the order has expired, even if the additional offence was committed while it was still current. (Paragraphs 22 and 25 of the Sentencing Code)</p> <p>Community order imposed by magistrates’ court</p> <p>If an offender, in respect of whom a community order made by a magistrates’ court is in force, is convicted by a magistrates’ court of an additional offence, the</p>

	<p>magistrates’ court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.</p> <p>Community order imposed by the Crown Court Where an offender, in respect of whom a community order made by the Crown Court is in force, is convicted by a magistrates’ court, the magistrates’ court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence. The magistrates’ court may also commit the new offence to the Crown Court for sentence where there is a power to do so.</p> <p>Where the magistrates’ court has no power to commit the new offence it should sentence the new offence and commit the offender to the Crown Court to be re-sentenced for the original offence.</p> <p>When sentencing both the original offence and the new offence the sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence. If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.</p>
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Disqualifications from driving [dropdown]	
Disqualifications from driving	
Circumstance	Approach
<p>Offender convicted of two or more obligatory disqualification offences (s34(1) Road Traffic Offender Act 1988)</p>	<p>The court must impose an order of disqualification for each offence unless for special reasons it does not disqualify the offender. All orders of disqualification imposed by the court on the same date take effect immediately and cannot be ordered to run consecutively to one another. The court should take into account all offences when determining the disqualification periods and should generally impose like periods for each offence.</p>

<p>Offender convicted of two or more offences involving either:</p> <ol style="list-style-type: none"> 1. discretionary disqualification and obligatory endorsement from driving, or 2. obligatory disqualification but the court for special reasons does not disqualify the offender <p>and the penalty points to be taken into account number 12 or more (ss28 and 35 Road Traffic Offenders Act 1988)</p>	<p>Where an offender is convicted on same occasion of more than one offence to which section 35(1) of the Road Traffic Offenders Act 1988 applies, only one disqualification shall be imposed on him. However the court must take into account all offences when determining the disqualification period. For the purposes of appeal, any disqualification imposed shall be treated as an order made on conviction of each of the offences. (Section 35(3) of the Road Traffic Offenders Act 1988)</p>
<p>Other combinations involving more two or offences involving discretionary disqualification</p>	<p>As orders of disqualification take effect immediately, it is generally desirable for the court to impose a single disqualification order that reflects the overall criminality of the offending behaviour.</p>

Compensation orders

[dropdown]

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

Compensation orders and suspended sentence orders	A compensation order can be combined with a suspended sentence order.
Compensation orders and custody	A compensation order can be combined with a sentence of immediate custody where the offender is clearly able to pay or has good prospects of employment on his release from custody.

Question 8: Do you have any comments on the proposed changes to the ‘Specific applications – non-custodial sentences’ section? We are interested in your views on the content and presentation of the section.

Overall considerations

The preceding sections have outlined the Council's proposals for revising the Totality guideline and have invited comments on each aspect of the draft guideline. This section considers issues that apply across the guideline.

The overall format and structure of the guideline

The Overview section on page 5 above summarises the changes made to the presentation of the guideline. Having looked at the content of each section, we are interested in your views on whether the use of dropdown boxes and the slight rearrangement of the content of the guideline makes it easier or more difficult to navigate, or any other comments you may have on the presentation of the guideline.

Question 9: Do you have comments on the overall structure and format of the guideline?

Impact of the changes

The Totality guideline is of wide application and therefore any changes could theoretically have a substantial impact on sentencing practice. However, the Council considers that the proposed revisions which are designed to clarify and encourage existing best practice, are unlikely to lead to substantive changes to current sentencing practice. The changes are therefore unlikely to have any substantial impact on prison or probation resources or to levels of fines. A [resource assessment](#) has been produced which considers the likely impact of the revised guideline on prison and probation resources in a little more detail.

The Council would welcome comments from consultees on whether any aspects of the proposed revisions are likely to change sentence levels and whether any such change would be desirable.

Question 10: Do you have views on the impact the proposed revisions may have on sentence outcomes?

Equality and diversity

The Sentencing Council considers matters relating to equality and diversity to be important in its work. The Council is always concerned if it appears that guidelines have different outcomes for different groups. The Council has had regard to its duty² under the Equality Act 2010 in drafting these proposals, specifically with respect to any potential effect of the proposals on victims and offenders with protected characteristics. There may be many causes for disparities in sentencing, some of which the Council is not able to do anything about.

The Council has commissioned an independent external contractor to undertake a project to review our work for any potential to cause disparity in sentencing across demographic groups. Aspects to be examined will include those such as the language used, factors, offence context, expanded explanations and structure of sentencing guidelines. The work will also consider whether any aspects of our processes of guideline development and revision have any implications for equalities and disparity in sentencing and how the Council can best engage with under-represented groups to increase awareness and understanding of sentencing guidelines.

The available demographic data, (sex, age group and ethnicity of offenders) is examined as part of the work on each offence specific guideline, to see if there are any concerns around potential disparities within sentencing. For some offences it may not be possible to draw any conclusions on whether there are any issues of disparity of sentence outcomes between different groups caused by the guidelines. However, the Council takes care to ensure that the guidelines operate fairly and includes reference to the Equal Treatment Bench Book in all guidelines:

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.

For this guideline we are proposing to add:

² The Public Sector Equality Duty (PSED) is a duty set out in section 149 of the Equality Act 2010 (the 2010 Act) which came into force on 5 April 2011. It is a legal duty which requires public authorities (and those carrying out public functions on their behalf) to have “due regard” to three “needs” or “limbs” when considering a new policy or operational proposal. Complying with the duty involves having due regard to each of the three limbs:

The first is the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act. The second is the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not. The third is to foster good relations between those who share a “protected characteristic” and those who do not.

Under the PSED the protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment. The protected characteristic of marriage and civil partnership is also relevant to the consideration of the first limb of the duty.

Section 149 of the Equality Act 2010 contains further detail about what is meant by advancing equality of opportunity and fostering good relations

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

As referenced in the background section at the outset of this document, there is very little data on sentencing for multiple offences and therefore, no analysis of demographic data of those likely to be affected is possible.

The potential for disparities in sentencing to arise from aspects of sentencing guidelines may not be obvious and we are therefore seeking views widely on any such potential impacts. We would like to hear from those reading this document on these matters.

We would like to know whether there is anything in the draft guideline we are consulting on which could cause, or contribute to, such disparities across different groups, and/or whether any changes to the guideline could be made to address any disparities. These could relate to:

- the language used;
- the approach taken to sentencing more than one offence;
- the approach taken when sentencing an offender who is already serving a sentence;
- the examples provided;
- the format and structure of the guideline.

The Council would welcome suggestions from consultees as to any equality and diversity matters that it should address in the revision of this guideline.

Question 11: Do you have any comment on the proposed change in the reference to the ETBB at the beginning of the Totality guideline ?

Question 12: Are there any aspects of the Totality guideline that you feel may cause or increase disparity in sentencing?

Question 13: Are there any existing disparities in sentencing that you are aware of which the Totality guideline could and should address?

Question 14: Are there any other matters relating to equality and diversity that you consider we ought to be aware of and/or that we could and should address in the Totality guideline?

General observations

We would also like to hear any other views you have on the proposals that you have not had the opportunity to raise in response to earlier questions.

Question 15: Do you have any other comments on the proposals that have not been covered elsewhere?

