

Totality: Principle and Practice

Abstract:

The 2012 Totality Guideline deals with sentencing an offender for multiple offences. In September 2021 the Sentencing Council published a paper that appraised sentencers' views of the Guideline and their use of it in practice. The paper includes important findings and finishes with the Council stating that it will reform the Guideline in 2022. This article proposes reform to the 2012 Guideline that would increase its conceptual clarity and utility. The centrepiece of the proposal is to add explicit reference to harm and culpability. These are concepts with which sentencers are familiar. The reform would have advantages for guiding assessments of the length of sentences to be imposed on multiple offenders, the form of those sentences, and the process of sentencing. The article also grapples with an important challenge to the explicit incorporation of harm and culpability rooted in proportionality.

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Dealing with offenders convicted of multiple offences (“multiple offenders”) is a routine part of sentencing. A recent study reports that 48.7% of sentencing cases dealt with concerned multiple offenders and 51.3% concerned single offenders.¹ In 2012 the Sentencing Council introduced the Totality Guideline.² The purpose of the Guideline is to assist judges in imposing a just and proportionate sentence on multiple offenders. The Totality Guideline has much work to do in shaping the sentencing of multiple offenders in a guideline system that is otherwise designed for those who have committed a single offence.

In 2021, the Council published a research paper entitled “Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline”.³ The Paper contains insight into how the present Guideline is used in practice and its limitations. It also states that the Council will consult on a new totality guideline later this year. Reform is on the horizon. The task of drafting a new guideline is no doubt a difficult one. This is in no small part due to the substantial variations between multiple offenders.⁴ For instance, the offences may be committed at one time or over a significant period; the offences may have shared or different drivers; the offences may be similar in type or distinct; there may be one victim or numerous victims; and there may or may not be variation in the seriousness of the offences. Clear principles and processes are needed to guide such varied sentencing exercises and to allow for proportionate sentences to be imposed. The present guideline has been criticised for providing insufficient guidance to sentencers. In this article I propose reform of the present Totality Guideline that centres on adding reference to harm and culpability, the principal factors in assessing the seriousness of offences. My focus is on the general part of the Guideline and its application to custodial sentences. As will be seen, the purpose of the proposal is not conceptual upheaval, but to add clarity to this difficult area of sentencing law and practice.

The article is developed over four sections. In the first, I outline the 2012 Totality Guideline and some early criticisms of it. I then detail the Council’s recent paper on sentencers’ views of the guideline in section two. Section three is the core of the article. It makes the case for adding explicit reference to harm and culpability in the reworked totality guideline. Reference to these familiar concepts would provide three benefits: harm and culpability provide a lens through which to assess the seriousness of the offending and thus the appropriate total sentence length; a focus on harm and culpability also offers insight into how total sentences should be structured; and their adoption would allow a clearer process for sentencing multiple offenders.

¹ M. Dhimi, “Sentencing Multiple- Versus Single-Offence Cases: Does More Crime Mean Less Punishment?” (2022) 62(1) *British Journal of Criminology* 55, 60-61. The study considered ABH, Arson, dangerous driving, domestic burglary, fraud, threats to kill, possession of indecent photograph of a child, possession with intent to supply, robbery and shoplifting. See also, B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.9.

² Sentencing Council, *Totality* (2012) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/> [Accessed 04 March 2022]. The totality principle is also recognised in the Sentencing Act, 2020, s. 77(3)(b).

³ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022].

⁴ See likewise R. Frase, “Principles and Procedures for Sentencing of Multiple Current Offenses” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017), pp. 193-194. A. Manson has developed a typology of multiple offending: “Multiple-Offense Sentencing” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017).

In section four I examine an important challenge to which the proposals may give rise or perhaps just make more apparent. Would a more explicit focus on harm and culpability reveal the impossibility of securing both inter and intra offence proportionality? In other words, can the total sentence for multiple thefts be in proportion with both the sentence for one theft and one more serious offence? The challenge can be met, though, as will be seen, discussion of totality and multiple offenders cannot be easily separated from wider discussions of sentencing reform.

1. The 2012 guideline

At present, guidance on sentencing multiple offenders is contained in the 2012 Totality Guideline. The primary part of the Guideline concerns the general principles for and process of sentencing multiple offenders. It stands at just over 1,000 words.⁵ The Guideline first sets out the two elements of the totality principle:

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, together with the factors personal to the offender as a whole.

The Guideline goes on to provide that there is no “inflexible rule” that deals with imposing consecutive or concurrent sentences on multiple offenders. Concurrent sentences run at the same time whereas consecutive sentences run one after the other. The choice between consecutive or concurrent sentences is secondary to the imposition of a just and proportionate sentence. The implication is that the choice between consecutive and concurrent sentences is one of form and not substance. This implication and the value of the consecutive/concurrent divide will be examined in section three below.

The second half of the overarching section sets out a four-stage process by which to impose determinate custodial sentences on multiple offenders - “the general approach”. First, the sentencer should consider the sentence for each individual offence with reference to relevant offence-specific guidelines. Secondly, they should determine whether to impose concurrent or consecutive sentences. A concurrent sentence will likely be appropriate where the offence arises out of a single incident or where all the offending is of the same or a similar type. Consecutive sentences, by comparison, are likely to be appropriate where the offending arises out of unrelated facts; concurrent sentencing could not reflect the “overall criminality”; and where concurrent sentences would undermine a statutory minimum sentence. Regardless of whether concurrent or consecutive sentences are imposed, the Guideline emphasises that the sentencer should check that the proposed total sentence is proportionate. It also provides indicative ways in which an initial consecutive sentence can be reduced if it appears too severe. Thirdly, the sentencer should test the sentence against the requirement it is just and proportionate. No further guidance is given at this important step. Fourthly, the sentencer

⁵ The guideline then details particular circumstances such as the application of the general principles to custodial sentences where the offender is already serving a custodial sentence and dealing with multiple offences that attract a community order.

should consider whether the sentence is structured in a manner that “will be best understood by all concerned with it”. Again, no further guidance is provided.

The Totality Guideline provides the means by which to arrive at an initial total sentence and the means by which to alter an overall sentence in pursuit of a just and proportionate sentence. But it does not detail criteria for assessing if a proposed total sentence is just and proportionate. This point bears emphasising. A judge sentencing an offender for theft and criminal damage would have detailed guidance to assist them in imposing a proportionate sentence for each offence such as on relevant harm and culpability factors, starting points, and aggravating and mitigating factors. By comparison, when they turned to the vital task of bringing their work on each offence together, there is notably less guidance on how to ensure the total sentence is proportionate. This has led to a number of criticisms of the Guideline. Martin Wasik has written that the principles governing the sentencing of multiple offenders are “obscure and unsatisfactory”.⁶ Andrew Ashworth has likewise observed that the calculations required to impose a proportionate total sentence are “shrouded in mystery” and that the Guideline “falls well short of rule-of-law ideals of certainty”.⁷ The Guideline certainly gives rise to many important questions. Is it always clear when concurrent sentences should be imposed as opposed to consecutive sentences? How is a judge to appraise whether the final sentence is just and proportionate? How can a judge discern whether multiple offences occurred during a single incident? Does the single incident principle affect the form of the sentence only or also its length? The relevant principles – totality, concurrent sentences, consecutive sentences, and the single incident principle – will be examined in section three below. For now, there is reason at least to think that the Guideline needs fresh scrutiny. As will be seen in the next section, the Sentencing Council has accepted this view.

2. Exploring Sentencer’s Views

In 2021 the Council published *Exploring Sentencers’ Views*: a paper designed to examine how the Totality Guideline is used in practice, sentencer’s views of the Guideline, and any problems to which it gives rise.⁸ The Paper acknowledged that the Totality Guideline “might be out of date in terms of some of its content and style”.⁹ In this section I detail the main findings of the paper, make brief comment on its methodology, and draw out steering principles for reform of the Totality Guideline.

The 2021 paper reports the results of a survey undertaken by 130 judges of varying seniority and 10 follow-up interviews. Its main findings are as follows.

⁶ M. Wasik, “Concurrent and Consecutive Sentences Revisited” in L. Zedner and J. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) p. 285.

⁷ See now, A. Ashworth and R. Kelly, *Sentencing and Criminal Justice*, 7th edn (Hart Publishing, 2021), p.333. The criticism was picked up in A. Bottoms, *The Sentencing Council in 2017* (2018) paras. 51 and 77-78. Ashworth has also queried whether the present Guideline satisfies the duty on the Council contained in Coroners and Justice Act 2009, s 120(3): “The Evolution of English Sentencing Guidance in 2016” [2017] Crim. L.R. 511. That duty is to “prepare...sentencing guidelines about the application of any rule of law as to the totality of sentences.”

⁸ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.7.

⁹ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.7.

- 36% of survey respondents usually found sentencing multiple offences more difficult than sentencing one offence, 25% said they found it about the same and 39% said the difficulty varies.¹⁰
- 2% of respondents always consult the Totality Guideline when it applies, 20% consult it often or sometimes, 55% apply the Guideline’s principles and consult it for difficult cases, 19% had used the Guideline previously and report applying its principles without consultation, and 3% had never used the Guideline.¹¹
- 53% of respondents found the Guideline useful or very useful, 41% found it somewhat useful, and 3% did not find it useful.¹²
- 47% of respondents reported difficulties with applying the Guideline to particular types of multiple offences. Common examples were (historic) sexual offences, assaults, driving offences, thefts, and drug offences (including with firearms).¹³ There was general agreement with these findings in later interviews. An interviewee reported issues with sentencing multiple dissimilar offences.¹⁴
- A Court of Appeal judge in interview stated more “mathematical” guidance on sentencing multiple similar offences may be useful but raised the concern that this may in certain circumstances lead to a “ridiculous sentence.”¹⁵ A magistrate raised similar issues with regard to driving offences: “even with totality, the guidance can lead you to too high a sentence in terms of fines and their affordability”.¹⁶
- 76% of respondents agreed with what was said in the General Principles section and 22% somewhat agreed. 48% agreed the section offered practical help with 35% somewhat agreeing.
- The General Approach section drew positive comments with some sentencers querying particular examples in it to include the sentencing of robbery with a firearm.¹⁷ This particular example will be picked up in section 3 below.

¹⁰ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.9.

¹¹ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 9.

¹² B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 11.

¹³ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 11.

¹⁴ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 11.

¹⁵ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 11-12.

¹⁶ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 12

¹⁷ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.16.

- Four interviewees raised concerns over explaining the final sentence when there is more than one victim.¹⁸
- Nine interviewees agreed that there is a problematic perception amongst the public and victims that totality results in overly lenient sentences.¹⁹ Five interviewees agreed the guideline should contain a reminder that the court should describe how the sentence was constructed. The Court of Appeal judge and a circuit judge supported adding a short, standardised, statement to the Guideline that could be incorporated into multiple offence sentencing remarks.

In light of these findings, the Council announced it will review the Totality Guideline prior to a consultation on proposed changes in 2022. In its later Strategic Objectives document, the Council specified that it aims to consult on a draft guideline by October 2022 with the aim of promoting “consistency and transparency in sentencing”.²⁰ More will be said on the relationship of clearer and more detailed general principles and consistency of approach at the end of section 3 below.

The focus of this article is on the general approach to sentencing multiple offenders as opposed to methodological enquiry, but two brief points can be made. First, the topic of totality was once underexplored in the academic literature but there have been valuable recent developments to include an edited collection on the subject.²¹ Unfortunately, *Exploring Sentencer’s Views* though only cites work that has appeared in this Review.²² This may limit the capacity of well thought out doctrinal and theoretical criticisms of the current law to inform what the Council consults on. Secondly, the sample for the research was drawn from the Council’s “research pool” and only one High Court judge responded.²³ This may raise questions about whether the sample was sufficiently representative.²⁴

If the new totality guideline is to be a success, it will require a sentencing process that can be applied in practice informed by appropriate principles. Such a process could answer Ashworth’s call for the adoption of rule of law values in the Guideline and meet the Council’s objectives of promoting consistency and transparency. Yet clear processes and principles alone would be insufficient; disproportionate and “ridiculous” sentences must be avoided. With these

¹⁸ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 12.

¹⁹ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 18-19.

²⁰ Sentencing Council, *Strategic Objectives 2021-2026* (2021) https://www.sentencingcouncil.org.uk/wp-content/uploads/6.7742_SC_Strategic_Objectives_Report_2021-2026_Final_WEB.pdf [Accessed 04 March 2022] p. 7.

²¹ J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017).

²² B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.7. Citing L. Harris’ comment on *DJ* [2015] EWCA Crim 563; [2015] Crim. L.R. 2015, 650 and A. Ashworth: “The Evolution of English Sentencing Guidance in 2016” [2017] Crim. L.R. 511.

²³ B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p. 7.

²⁴ I am grateful to Professor Roberts for flagging this concern.

aims in mind, we can turn to examine how harm and culpability may be incorporated into a remodelled guideline.

3. The case for incorporating harm and culpability

What is clear then is that the Totality Guideline will be reconsidered. It is less clear though what will be proposed by the Council. In this section I make the case for explicit incorporation of harm and culpability into a remodelled guideline.²⁵ As a starting point incorporation would require added text under the first general principle, the relevant part of which reads: “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.” After this the following, or similar, would be added:

In assessing the proportionality of a sentence, courts should determine the seriousness of the total offending with 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.²⁶

This section is in three parts. The first considers how harm and culpability can inform setting an appropriate total sentence. The second suggests the concepts may also have a role in deciding the form of the sentence imposed, be it consecutive or concurrent. The third draws together the findings of parts one and two to offer a process for sentencing multiple offenders.

A. Sentence length

Arriving at an appropriate sentence is a difficult task when the offender has been convicted of only one offence. Have all, and only, relevant factors been considered? Have those factors been weighted appropriately? Has double counting been avoided? Harm and culpability frame the assessment of offence seriousness. The concepts are familiar: they form the basis of establishing offence seriousness in offence-specific guidelines,²⁷ the Imposition Guideline,²⁸ and the General Guideline.²⁹ The Sentencing Code also requires sentencers to consider harm and culpability when assessing the seriousness of an offence.³⁰ On its face then it appears odd that the concepts are not relied on in the more complex domain of sentencing multiple offenders. I will examine three challenges from this domain to draw out the value of centring harm and culpability. These challenges are 1. the risk of double counting; 2. sentencing a single

²⁵ See also the work of J. Roberts and J. de Keijser on totality and culpability: “Sentencing the Multiple-Conviction Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017). For strong response, see Z. Hoskins, “Multiple-Offense Sentencing Discounts” in the same collection, pp.84-88.

²⁶ Kelly argues that harm intended is better understood as a culpability factor: R. Kelly, “Sentencing Terrorism Offences: No Harm Intended?” [2019] Crim. L.R 764.

²⁷ E.g., Sentencing Council, *Preparation of Terrorist Acts* (2018) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/preparation-of-terrorist-acts/> [Accessed 04 March 2022].

²⁸ Sentencing Council, *Imposition of Community and Custodial Sentences* (2017) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/imposition-of-community-and-custodial-sentences/> [Accessed 04 March 2022].

²⁹ Sentencing Council, *General Guideline: Overarching Principles* (2019) <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> [Accessed 04 March 2022].

³⁰ Sentencing Act 2020, s 63.

incident made up of multiple offences; and 3. sentencing above the offence range or maximum for the most serious offence.

A particular risk of double counting is raised in the context of multiple offenders. Sometimes offences will cause distinct harms and the offender in committing them will have distinct culpabilities (manslaughter of V1 and theft from V2). On other occasions, the guidelines for one offence will allow the harm and culpability for two offences to be dealt with fully (robbery and possession of a firearm). At other times still, the guideline for one offence will cover some, but not all, of the harm and culpability factors for another offence (section 18 grievous bodily harm and criminal damage). Harm and culpability may work as lenses through which to examine whether the sentencer has considered all the factors that affect the seriousness of the offences and has not relied on any factor twice. An accurate construction of total seriousness of the offending is a vital prerequisite to setting a proportionate total sentence. Too much seems to be expected of the judge if they must establish total seriousness without such a framework. This is already recognised in the context of sentencing single offences where analysis of harm and culpability is centred and methodical.

The current Totality Guideline is correct to state that it is usually impossible simply to add up notional sentences for each offence to achieve a proportionate total sentence.³¹ To do so would risk double counting because the harm and culpability factors for one offence may overlap with or be encompassed by those of another offence. A more explicit focus on harm and culpability may have the substantive advantage of safeguarding against the risks of double counting. It may also have the procedural advantage of making the route to a total sentence clearer.³² In *Mattis*, the offender committed multiple robberies as part of one incident.³³ As part of the incident, *Mattis* showed a knife in his waistband to one of the victims. The recorder imposed concurrent sentences of three years' imprisonment for the robberies and a consecutive sentence of one year for the bladed article. On appeal it was argued that there was a suggestion of double counting because the presence of a knife had been accounted for in aggravating the robbery sentences. Giving the judgment of the Court of Appeal, HHJ Kinch observed that the possession offence reflected the fact that *Mattis* was armed with a knife generally; not just that he possessed it at the time of the robbery.³⁴ However, the total sentence was reduced to three years to better reflect the "overall criminality involved in all of the offences".³⁵ This approach is not easy to reconcile with the Totality Guideline, which specifies concurrent sentences will ordinarily be appropriate where possession of a weapon is ancillary to a robbery.³⁶

By comparison, a more explicit focus on harm and culpability would add clarity to the exercise. The total sentence had to account for 1. the harm and culpability of the robbery offences, which were aggravated by showing a knife, and 2. any unaccounted-for harm and culpability in possessing the knife around the robberies. As a point of substance, such a framing may have benefited the sentencer because it would make clear that they had to consider whether any

³¹ Sentencing Council, *Totality* (2012) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/> [Accessed 04 March 2022].

³² A further example is given in section 4 part 3 below.

³³ [2016] EWCA Crim 151; [2016] 1 Cr.App.R.(S.) 67 [1]

³⁴ *Mattis* [2016] EWCA Crim 151; [2016] 1 Cr.App.R.(S.) 67 [7].

³⁵ *Mattis* [2016] EWCA Crim 151; [2016] 1 Cr.App.R.(S.) 67 [10]-[11].

³⁶ Sentencing Council, *Totality* (2012) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/> [Accessed 04 March 2022].

additional harm or culpability arose from the surrounding possession. General possession was a prerequisite to the production of the knife at the time of the robbery. As such, an adequate total sentence could likely have been imposed without the need for a consecutive sentence for possession. This is not to doubt the outcome on appeal. Instead, as a point of clarity, considering the relationship of the harm and culpability in the offences may have been preferable to the approach adopted by the Court of Appeal. That was, drawing a narrow distinction between general possession around the robbery and aggravation for production during the robbery before reducing the overall sentence with elusive reference to “overall criminality”.

In *Mattis*, the robberies occurred during a single incident. Would a different sentence have been appropriate if the robberies had happened over a longer period? As above, the Totality Guideline provides that concurrent sentences tend to be more appropriate when the offences arise out of a single incident.³⁷ Whether the offences occur during one incident or more should presumably then affect the form of the sentence and not its length. Yet Ashworth and Wasik suggest that consideration of the number of incidents should also affect the total sentence imposed.³⁸ They compare carrying a weapon during a robbery, with committing a robbery then a week later carrying a weapon; and conclude the latter should presumptively receive a higher sentence. Much would, of course, turn on the detailed facts that made up the incidents.

The single incident principle appears to work as a proxy for establishing whether there is any overlap in the harm and culpability factors of each offence.³⁹ This may be why the Totality Guideline specifies consecutive sentences will be appropriate for “offences that are unrelated because, whilst they were committed simultaneously, they are distinct and there is an aggravating element that requires separate recognition”. The Council gives the example of making threats to kill during an indecent assault. In the example there would clearly be the possibility of at least distinct harm factors in the threats that would need to be accounted for such as the possibility of very serious distress caused to the victim. Perhaps it is more likely that the culpability factors for offences will be overlapping when they are committed as part of a single incident.⁴⁰ But this will not always be the case and there may be distinct harms for which account must be taken. The analysis of whether offences took place during one incident or more may thus distract from the central aim of establishing the overall seriousness of the offending.⁴¹ A more direct focus on the harm and culpability for each offence and their relatedness seems preferable. In section 3(C) I examine how the sentencing process could be structured to allow for such direct consideration.

A magistrate interviewed for *Exploring Sentencers’ Views* commented that it was “jarring” (in their words) that they could not go “outside the sentencing limits for offences” (as put in the

³⁷ This follows earlier case law such as *Noble* [2002] EWCA Crim 1713; [2003] 1 Cr.App.R.(S.) 65 [15]; *Attorney General’s Reference No.57 of 2009 (Ralphs)* [2009] EWCA Crim 2555; [2010] 2 Cr.App.R.(S.) 30 [27]-[28].

³⁸ A. Ashworth and M. Wasik, “Sentencing the Multiple Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp. 214-215.

³⁹ A. Manson has suggested, that in Canada the principle allows for a useful focus on overall culpability for related offences but that the principle may have inappropriately driven up sentences for unrelated offences: “Multiple-Offense Sentencing” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017), p. 228-229.

⁴⁰ J. Roberts and J. de Keijser, “Sentencing the Multiple-Conviction Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp. 145-148.

⁴¹ Wasik is a stern critique of the principle, which he describes as “unworkable”. M. Wasik, “Concurrent and Consecutive Sentences Revisited” in L. Zedner and J. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) pp. 294-297.

Review).⁴² The claim appears questionable. The total sentence for multiple offences can go above the category range and indeed the maximum sentence for the most serious offence at issue. For example, in *Clifford* a total sentence of eight years was upheld by the Court of Appeal for eight counts of indecent assault when the relevant maximum for each incident was then two years.⁴³ This is also recognised in the Theft Guideline:

“Where multiple offences are committed in circumstances which justify consecutive sentences, and the total amount stolen is in excess of £1 million, then an aggregate sentence in excess of seven years may be appropriate.”⁴⁴

The approach in the Theft Guideline is sensible. First, it recognises the possibility that multiple offences may go above the maximum sentence for the most serious offence even where all the offences are of the same type. Consider a very serious incidence of funding terrorism that would fall to be sentenced in the top category range of 10-13 years’ imprisonment. If the offender was also found to have committed another serious offence - be it another funding offence or something else - a proportionate total sentence may require the sentencer to go above not only the category range of 13 years but also the offence maximum of 14 years.⁴⁵ Otherwise, the sentence would not reflect the additional harm and culpability in committing the further serious offence. Secondly, the Theft Guideline makes clear that it will be exceptional for a total sentence to go above the maximum sentence for the lead offence. This is sensible because many lead offences will not be at the top of the offence range. In addition, even where a lead offence is at the top of the range, there may be significant headroom between the top of the offence range and the available maximum sentence.⁴⁶ For example, the top category range for production of a class B controlled drug extends to eight years but the maximum sentence is fourteen years.⁴⁷ There will thus likely be sufficient space below the maximum in which to deal with the harms of any less serious offences and the offender’s relevant culpability in committing them.

The explicit focus on harm and culpability in sentencing multiple offenders has thus far been suggested to have important explanatory value. It can help to avoid double counting, improve on the single incident principle, and show why the maximum sentence of the most serious offence should not be a hard limit where other offences have been committed. But what of the

⁴² B. Brewer and E. Cardale, *Exploring Sentencers’ Views of the Sentencing Council’s Totality Guideline* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/exploring-sentencers-views-of-the-sentencing-councils-totality-guideline/> [Accessed 04 March 2022], p.19. The analysis here develops on A. Ashworth and M. Wasik, “Sentencing the Multiple Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp.221-222.

⁴³ [2014] EWCA Crim 224; [2015] 1 Cr.App.R.(S.) 32. As explained in the judgment, the maximum for the offending increased after the events occurred: [28], [31] and [34]. See also, *Jamieson* [2008] EWCA Crim 2761; [2009] 2 Cr.App.R.(S.) 26 [22].

⁴⁴ Sentencing Council, *Theft – General* (2016) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/> [Accessed 04 March 2022].

⁴⁵ Sentencing Council, *Funding Terrorism* (2018) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/funding-terrorism/> [Accessed 04 March 2022].

⁴⁶ A. Ashworth and M. Wasik, “Sentencing the Multiple Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp. 221-222. Note also that many serious offences have a maximum sentence of life imprisonment such as manslaughter, rape, robbery, and criminal damage with intent / recklessness as to endangering life.

⁴⁷ Sentencing Council, *Production of a Controlled Drug / Cultivation of Cannabis Plant* (2021) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/production-of-a-controlled-drug-cultivation-of-cannabis-plant-2/> [Accessed 04 March 2022].

sentencing of a significant number of separate low-level offences? Say, 40 thefts or incidences of minor criminal damage. A potential concern here is that a more explicit focus on harm and culpability may lead to higher sentences. If that occurred, clarity would be purchased at the cost of increased severity.⁴⁸ The purpose of the proposed reforms is not to increase sentencing levels but to add clarity to the process of sentencing multiple offenders. With this purpose in mind, section 4 details the role that the principle of parsimony could have in limiting the sentences for certain multiple offenders and reflects on possible wider reform. For now, we can turn from sentence length to assess how reference to harm and culpability may assist in determining the form of custodial sentence imposed.

B. Sentence form

The total sentence imposed on a multiple offender may be made up of concurrent or consecutive sentences. Is the choice between concurrent and consecutive sentences one of form (affecting only how the total sentence is presented) or is it one of substance (affecting the total sentence length)? Under the present Guideline the choice is presented as one of form; the substantive principle is totality. The Guideline states “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.”⁴⁹

Due to the structure of the Guideline, there remains some uncertainty as to whether so clean a divide can be drawn between form and substance. The sentencer must choose between a concurrent and a consecutive sentence at step two of the general approach (described in section one above). This is after they have established what the sentence for each offence would have been if sentenced independently at step one. The sentencer must thus choose the form of the sentence and at least a presumptive total sentence in a single step. These choices are no doubt related: they both turn on the relationship of the offences to each other. Yet under the present Guideline there appears at least some risk that what should be a choice of form becomes one of substance in practice. This is of some concern because of the absence of detailed guidance around the choice between imposing concurrent and consecutive sentences.⁵⁰ How should all relevant seriousness factors be accounted for at this stage without double counting? And if they cannot be, is the later totality check, at step three, a sufficient safeguard? The present choice between concurrent and consecutive sentences appears problematic because it stands in for assessing the relationship of the offences as opposed to following from such an assessment.

How then could harm and culpability inform the choice between consecutive and concurrent sentences? When the harm and culpability factors for the less serious offence can be dealt with whilst sentencing the lead offence, the sentences should be concurrent. Take for example the

⁴⁸ On the intended and unintended consequences of other guidelines on severity, see Amber Isaac, *Estimating the Changes in Sentencing Severity and Requirements for Prison Places associated with the Sentencing Council’s Guidelines* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Changes-in-sentencing-severity-and-prison-places-associated-with-SC-guidelines.pdf> [Accessed 04 March 2022].

⁴⁹ Sentencing Council, *Totality* (2012) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/totality/> [Accessed 04 March 2022]. See also *Bailey* [2020] EWCA Crim 1719; [2021] 2 Cr.App.R.(S.) 15 [37]. *Cordle* [2016] EWCA Crim 1793; [2017] 1 Cr. App. R. (S.) 36 [30]. A reviewer rightly noted that there are some strong conventions such as imposing consecutive sentences where an offence has been committed whilst the offender was serving a suspended sentence. The rationale given in the Guideline for this position is that the incidents will likely be unrelated.

⁵⁰ Empirical research could usefully be done on whether the choice to structure sentences as concurrent or consecutive has an independent effect on sentence length.

robbery of a dwelling with a knife. Here the lead offence would be the robbery and the other offence would be the possession of a bladed article. The possession offence may be dealt with when sentencing for the robbery because the guideline for robbery of a dwelling specifies that production of a bladed article is a high culpability factor.⁵¹ By comparison, when the harm and culpability factors cannot be accounted for whilst sentencing the lead offence, the sentences should be consecutive. For example, a person commits a robbery of a dwelling without a knife and some days later is found in possession of a knife in town. Unlike in the first example, here the appropriate structure would be concurrent sentences. The later possession could not be dealt with whilst sentencing the robbery because it would not increase the culpability of the lead offence and the *Robbery – Dwelling Guideline* does not provide sufficient information to deal with it elsewhere. The proposed approach emphasises the choice between concurrent and consecutive sentences is one of form, which follows from an appraisal of harm and culpability. It aims to make it clearer when a seriousness factor has already been considered and thus to reduce the risk of double counting. There would also be clarity on why concurrent sentences could be proportionate to the overall offending: the harm and culpability factors of the less serious offence would have impacted the total sentence already when they uplifted the sentence for the lead offence.

What of the tougher cases where some, but not all, of the harm and culpability factors of the less serious offence can be dealt with whilst sentencing the more serious offence? If concurrent sentences were employed, the sentencing for the lead offence would be difficult because the sentencer would have insufficient guidance on how to incorporate some of the harm and culpability factors related to the less serious offence. By comparison, if a consecutive sentence model was applied, the lead offence may be dealt with more easily by applying the relevant offence-specific guideline. When the sentencer then sentenced the less serious offence, they would know which harm and culpability factors they had already considered and which they had not. They could then lower the sentence for the less serious offence accordingly. It would seem easier to discount some factors knowing you had already considered them than to impose a sentence proportionate to the total offending without full guidance. I provide an example of such discounting in the next part of this section. A risk of the proposed approach may be that the victim, or the wider public, would perceive the notional sentence for the less serious offence as too short when it had been made subject to reductions for any overlapping harm or culpability factors. In the following part I propose a form of words to mitigate against this risk.

Sentencing Process

This part builds on the above work on sentence length and form by setting out a general process for sentencing multiple offenders and an example of its application before providing some commentary.⁵²

1. *Consider the nature of the lead offence and the other offence(s).*

⁵¹ Sentencing Council, *Robbery – Dwelling* (2016) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/robbery-dwelling/> accessed 16 April 2022.

⁵² For an alternative process, see J. Roberts and J. de Keijser: “Sentencing the Multiple-Conviction Offender” in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp.156-158.

- Establish which offence is the lead offence. This will typically be the most serious offence.
- Assess whether the harm of the other offence(s) and the offender's culpability in committing them can be dealt with whilst sentencing for the lead offence or whether those offences must be addressed separately. This assessment will require consideration of the sentences available for the lead offence in addition to whether the offence-specific guideline for the lead offence offers sufficient guidance for sentencing the other offence(s).
- If the other offence(s) can be wholly accounted for whilst sentencing the lead offence, impose a concurrent sentence applying the method at 2.
- If the other offence(s) cannot be wholly accounted for whilst sentencing the lead offence, impose consecutive sentences applying the method at 3.

2. *Concurrent sentencing method.*

- Sentence the lead offence using the relevant offence specific guideline. Account for the impact of the other offence(s). The other offence(s) may affect sentencing at step 1 (determining the offence category) and step 2 (starting point and category range).
- Sentence the other offence(s) with reference to the relevant offence specific guidelines. Account for all relevant harm and culpability factors.
- Set a sentence for the other offence(s) to run concurrently to the sentence for the lead offence.

3. *Consecutive sentencing method.*

- Sentence the lead offence with reference to the relevant offence-specific guideline. Account for all harm and culpability factors of relevance for the lead offence. Do not account for any harm and culpability factors related only to other offences.
- Sentence the other offences with reference to the relevant offence specific guidelines. If a culpability or harm factor has already been accounted for when sentencing for the lead offence (or another offence), do not consider it again.
- Set a sentence for the other offence(s) to run consecutively to the sentence for the lead offence.

4. *Reassess the total sentence.*

- Assess the overall sentence against the requirement that it be just and proportionate.
- It may be useful to consider other offences which, if standing alone, would be likely to attract a comparable sentence.

5. *Explain the process of sentencing and the final sentence.*

- Where a concurrent sentence has been imposed under step 2, explain the process of sentencing and the final sentence reached. The below paragraph may assist in structuring your remarks.

“The offender has committed multiple offences. They are sentenced to ___ for the lead offence of ___ and a concurrent sentence of ___ for the offence of ___. The total sentence is ___. The decision to impose concurrent sentences relates to the nature of the sentencing exercise. I emphasise that the harm of both offences and the overall culpability of the offender are accounted for in the sentence for the lead offence. The length of the total sentence that the offender will serve is thus proportionate to the seriousness of all their offending.”

- Where a consecutive sentence has been imposed under step 3, explain the process of sentencing and the final sentence reached. The below paragraph may assist in structuring your remarks.

“The offender has committed multiple offences. They are sentenced to ___ for the lead offence of ___ and a consecutive sentence of ___ for the offence of ___. The total sentence is ___. The decision to impose consecutive sentences relates to the nature of the sentencing exercise. The length of the total sentence that the offender will serve is proportionate to the seriousness of all their offending.”

An example will help to draw out how the process would apply. D has a vendetta against V. To settle it, D attacks V with a bat. V, seeing D starting to swing, covers his face. The first strike is glancing, doing no real harm to V but breaking his expensive watch irreparably. The second strike breaks V’s leg. V is left in considerable pain and is distraught because the watch was a family heirloom. D is convicted of section 18 and criminal damage. The section 18 is the more serious offence so would be treated as the lead offence. It has a maximum sentence of life imprisonment and an offence range extending to 16 years.

The Guideline for section 18 can account for some, but not all, of the seriousness factors related to criminal damage. As such, the consecutive sentencing method at step 2 would be used. This requires an application of the section 18 Guideline.⁵³ The section 18 offence has one high culpability factor – this was a revenge attack – and one medium culpability factor – use of a weapon. The offence also appears to be of medium harm – there is no threat to life, but the injury is grave. If the case was to be treated as medium harm and medium culpability it would have a starting point of 5 years’ imprisonment. Let us assume a sentence of 6 years because though D is remorseful, there was also a higher culpability factor present.

The judge would then sentence the other offence of criminal damage mindful of any seriousness factors they had already considered. The relevant high culpability factors are that it was a revenge attack and there was an intention to create a high risk of injury, but both should

⁵³ Sentencing Council, *Causing grievous bodily harm with intent to do grievous bodily harm / Wounding with intent to do GBH* (2021) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-grievous-bodily-harm-with-intent-to-do-grievous-bodily-harm-wounding-with-intent-to-do-gbh-2> [Accessed 04 March 2022].

be discounted because they have already affected the sentence for the lead offence.⁵⁴ The criminal damage is left with the medium culpability factor of “Recklessness as to whether very serious damage caused to property”. Given the attack caused serious distress and damaged a very valuable item, it would fit within harm category 1. The starting point for a medium culpability and high harm category one offence is 6 months’ imprisonment. This would again be reduced to account for remorse to, say, 5 months. This is not to double count remorse but to reflect D is remorseful about the whole incident and its consequences, not just the broken leg.

The presumptive total sentence to reflect the seriousness of both offences would be 6 years and 5 months. The sentencing judge would then reflect on this total sentence at step 4. Given the seriousness of the attack and the fact a section 18 offence that fell into the same category may have received a similar sentence, the total would be unlikely to change. More will be said on the purpose of reflection at step 4 in the following section. The judge would then be left to explain the total sentence and how it was reached at step 5.

With the reformed general process of sentencing multiple offenders detailed, five points can be made. First, the proposal requires the sentencer to use multiple guidelines: the totality guideline and the relevant offence specific guidelines. This does not add undue complexity. The current Totality Guideline already sets out a process which requires sentencers to rely on multiple guidelines. What is different is that the proposed model makes it clearer *how* these guidelines can be brought together to impose a proportionate total sentence. The proposed model would thus offer more support to judges in the difficult task of sentencing the multiple offenders.

Secondly, Martin Wasik has argued that consideration of totality should affect the whole of the sentencing process; it should not just be a check on the sentence imposed.⁵⁵ The proposed process aims to make clearer how sentencers arrive at a sentence that reflects the total seriousness of the offending. Totality imbues the process as opposed to just being a final check.⁵⁶ For instance, in the example above it affected the culpability classification of the criminal damage offence.

Thirdly, the proposed model sets out that the sentencer ought to explain both the process of sentencing and the final sentence.⁵⁷ This reflects the more general duty to give reasons for and explain the effect of a sentence in section 52 of the Sentencing Code. The indicative text aims to assist sentencers in explaining the distinction between the length of the total sentence (a question of substance) and the type of sentence imposed (a question of form). It is hoped this will mitigate against victims seeing concurrent sentences as unduly lenient. One cost of this method is that the victim of the lead offence will not know precisely what proportion of a concurrent sentence relates to that offence. This may be mitigated by the victim receiving acknowledgment that this offence was the most serious committed and in seeing it form the

⁵⁴ Sentencing Council, *Criminal damage (other than by fire) value exceeding £5,000 / Racially or religiously aggravated criminal damage* (2019) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/criminal-damage-other-than-by-fire-value-exceeding-5000-racially-or-religiously-aggravated-criminal-damage/> [Accessed 19 April 2021].

⁵⁵ M. Wasik, “Concurrent and Consecutive Sentences Revisited” in L. Zedner and J. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) pp. 290-293.

⁵⁶ Compare to the position in Australia: M. Bagaric and T. Alexander, “Rehabilitating Totality in Sentencing: From Obscurity to Principle” (2013) 36(1) *University of New South Wales L.J.* 139, 142-143.

⁵⁷ If the final step is thought inappropriate for a sentencing guideline, perhaps similar text could be included in the Crown Court Compendium.

centrepiece of the sentencing exercise. The victim would, of course, also know the total sentence imposed on the offender.

Fourthly, under the concurrent sentencing method, at step two of the process, the sentencer will have arrived at a presumptive total sentence when they sentence for the lead offence because the other offence(s) will be incorporated into this assessment. It may be queried then what is the value in proceeding to set out a sentence for each of the other offences? The value lies in the communication to the victims of the other offences that the crimes against them matter. Further, the additional work will make clearer to all parties that consecutive sentences would be inappropriate. When sentencing for the other offence, the judge would rely on harm and culpability factors already considered whilst sentencing the lead offence.

Fifthly, section 120 of the Coroners and Justice Act 2009 specifies that the Sentencing Council must have regard to “the need to promote consistency in sentencing” when preparing guidelines generally and a totality guideline in particular. The Council has interpreted consistency to mean consistency of approach as opposed to of outcome.⁵⁸ Consistency of approach requires the application of “a consistent method to the sentencing process”.⁵⁹ It is hoped the proposed process would promote consistency of approach. The present Guideline contains broad concepts such as the “single incident” principle; allows sentencers to adopt either concurrent or consecutive sentences; and does not provide means by which to assess if the final sentence is proportionate. Even where the Guideline is followed, quite distinct approaches to arriving at a sentence may be adopted. By comparison, the proposed model builds on the familiar concepts of harm and culpability whilst offering guidance on how judges should make use of both offence-specific guidelines and the principle of totality during sentencing. The extent to which consistency of approach would be promoted by this or any other model is an empirical question that the Sentencing Council may wish to investigate as they prepare an updated guideline.

Giving harm and culpability an explicit role in a redrafted totality guideline would thus offer insight into the length of sentences to be imposed, their form and the process of sentencing multiple offenders. But would the proposed reforms draw out underlying problems with proportionality? In examining this issue, I will explain the purpose of the yet undiscussed totality check at step four of the above process.

4. Impossible proportionality?

Imagine a theft offence of middling culpability and harm.⁶⁰ D undertakes a degree of planning and plays a significant role in a group. The theft is of a relatively valuable item, and it causes substantial inconvenience and emotional stress to the victim. The starting point for a culpability category B and harm category 2 offence is one year’s custody. Now bring to mind a serious incident of inflicting grievous bodily harm.⁶¹ D has high culpability and causes high harm.

⁵⁸ Sarah Poppleton, *A Review of Consistency in Sentencing* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas/> [Accessed 04 March 2022] p.10.

⁵⁹ Sarah Poppleton, *A Review of Consistency in Sentencing* (Sentencing Council 2021) <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas/> [Accessed 04 March 2022] p.10

⁶⁰ Sentencing Council, *Theft – General* (2016) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/> [Accessed 04 March 2022].

⁶¹ Sentencing Council, *Inflicting Grievous Bodily Harm/ Unlawful Wounding/ Racially or Religiously Aggravated GBH/ Unlawful Wounding* (2021) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/inflicting->

There was significant planning, the victim was vulnerable, and a weapon was used. The injury was life threatening and causes psychological harm that results in the need for lifelong care. The starting point for a culpability category A harm category 1 offence is 4 years' imprisonment.

With these two examples in mind, what sentence should a person who commits five thefts of middling seriousness receive? Five incidents of theft may be argued to be worth five times that of one offence: five years' imprisonment.⁶² That would be higher than the sentence for the very serious incident of inflicting GBH. As a point of intuition this seems problematic: the sentence for five middling thefts should not be higher than that for a serious offence of inflicting grievous bodily harm.⁶³ But then if we compressed the sentences for the five incidents of theft this would seem to draw the total sentence out of proportion to that given to an offender who had committed one such incident of theft.⁶⁴ There are two types of proportionality at play here: inter-offence proportionality and intra-offence proportionality. A more explicit focus on harm and culpability may emphasise the difficulties of achieving both forms of proportionality because the process of setting out factors of relevance to the sentence would become clearer. This makes it all the more important to examine what should be done when the two accounts of proportionality conflict. Can a total sentence for multiple less serious offences be proportionate to the sentences for both one incident of that offence and the sentence for a far more serious offence? I will briefly appraise two possible replies; the first draws on the principle of parsimony and the second reflects on wider reform.⁶⁵

Again, the challenge is not that an explicit focus on harm and culpability would cause difficulties with reconciling inter and intra offence proportionality, but instead that it may make these difficulties more apparent. Proportionality is already central to sentencing multiple offenders. But what is to be done if a sentencing judge arrives at a total sentence which seems in proportion to one count of the relevant offence but out of kilter with sentencing for more serious offences? An answer may be found in the principle of parsimony.⁶⁶ At its core the principle suggests that the least punishment needed ought to be imposed.⁶⁷ Sentencing is a system of inflicting harm. It is also an imperfect system as evidenced by inter and intra-offence

[grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/](#)
[Accessed 04 March 2022].

⁶² These figures are used for convenience. The relationship between sentence severity and sentence length is not necessarily linear. See *MAK* [2006] NSWCCA 381 [16]; *Paxton* [2011] NSWCCA 242 [16]; M. Bagaric and T. Alexander, "Rehabilitating Totality in Sentencing: From Obscurity to Principle" (2013) 36(1) *University of New South Wales L.J.* 139, 158-189 and 167.

⁶³ This intuition seems to hold for both judges and the general public. For discussion, see A. Ashworth and M. Wasik, "Sentencing the Multiple Offender" in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp. 214 and 217.

⁶⁴ There will be examples where the multiple offences are clearly more serious than the one serious offence: R. Lippke, "Parsimony and the Sentencing of Multiple Offenders" in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) p.217. This narrows the problem as opposed to solving it.

⁶⁵ An alternative approach would be to take issue with the intuition itself. Compare K. Ferzan, "Punishment, Proportionality, and Aggregation" (2021) 15 *Criminal Law and Philosophy* 481, 484 to J. Ryberg, "Retributivism, Multiple Offending, and Overall Proportionality" in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) pp. 24-27.

⁶⁶ For argument over the value of the principle, see R. Lippke, "Parsimony and the Sentencing of Multiple Offenders" in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) to M. Tonry, "Solving the Multiple-Offense Paradox" in the same collection at pp.260-261.

⁶⁷ A. Ashworth and R. Kelly, *Sentencing and Criminal Justice*, 7th edn (Hart Publishing, 2021), pp. 87-88.

proportionality pulling in opposite directions. In recognition of the human costs of sentencing and the system's imperfections, inter-offence proportionality ought to be pursued where it conflicts with intra-offence proportionality. This is not to value parsimony over proportionality but to recognise the value of parsimony when we cannot derive an appropriate total sentence from proportionality alone. In view of these considerations, I suggest the retention of an overall totality assessment in the sentencing process outlined in section three above. The judge should, as under the present Guideline, ask themselves whether the overall sentence they reach after initial analysis would be just and proportionate.⁶⁸ This does not collapse the proposed reforms. The judge until this step would have had clearer guidance. In addition, when they came to assess overall proportionality, they would know to have in mind examples of single offences that would attract a similar sentence to that which they were proposing. Where the sentence was proportionate against this comparator it should not change (as in the example in section 3 above). Where it seemed too severe it should be reduced.

An alternative, and more ambitious, way forward would be to rely on the principles of inter-offence proportionality and parsimony to inform a wider appraisal of sentencing levels. The above issue of reconciling the sentences for multiple less serious offences with those for a single serious offence may also plausibly be resolved, or mitigated, by reducing the sentencing levels for less serious offences. Should we have a starting point of one year for a theft of middling seriousness? Ashworth has argued for the abolition of imprisonment for pure property offences based on proportionality concerns: "for an offence that amounts to no more than a deprivation of property, it is difficult to justify a deprivation of such a fundamental right as that to personal liberty."⁶⁹ Even if the abolitionist argument is too ambitious, there is an important question of why sentences for less serious offences have a starting point of one year.⁷⁰ Over its first ten years, the Sentencing Council has created a wide range of offence specific guidelines. With this work done it appears an opportune time for cross-guideline thinking on sentencing levels.

Explicit reference to harm and culpability would add clarity to the Totality Guideline. It would not give rise to irresolvable issues within proportionality. Instead, the reform may draw out the difficulties of achieving both inter and intra-offence proportionality in sentencing multiple offenders. Where these accounts conflict, parsimony dictates the shorter sentence should be preferred. In the longer term, any divide between inter and intra-offence proportionality emphasises the value there would be in a wider review of sentencing levels in offence-specific guidelines.

Conclusion

The Sentencing Council should incorporate reference to harm and culpability into the general principles section of the Totality Guideline. Harm and culpability may guide both the length of sentences which should be imposed on multiple offenders and the form such sentences should

⁶⁸ The proposed approach seems to align to the comments of the Court of Appeal in the Unreported case of *Holderness* (1974) as discussed by D. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed, Heinemann Educational 1979) p. 58.

⁶⁹ A. Ashworth, "What if Imprisonment were Abolished for Property Offences?" (2013 The Howard League for Penal Reform) p. 4.

⁷⁰ Compare to J. Roberts and J. de Keijser on totality and culpability: "Sentencing the Multiple-Conviction Offender" in J. de Keijser, J. Roberts, and J. Ryberg (eds), *Sentencing Multiple Crimes* (Oxford University Press 2017) p. 139.

take, be it concurrent or consecutive. A focus on these factors would also allow for a clearer process of sentencing multiple offenders for the judge and a direction that may assist in their explanation of the sentence. The time is right to reform the Totality Guideline. Centring harm and culpability in a new guideline would make it both more principled and more practical.

Sometimes reform of one aspect of sentencing law will require reform of another to be effective. Perhaps sentencing levels for less serious offences should be reduced to allow for both inter-offence and intra-offence proportionality to be achieved. The Sentencing Council has done important work in creating a substantial bank of offence specific guidelines over its first ten years. With this work done it is an opportune time for cross-guideline thinking on sentencing levels. Sentencing for multiple offences pushes us to think across and beyond offence specific issues.