

Terrorism Offences Consultation

October 2021

Terrorism Offences

Consultation

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The consultation will end on 11 January 2022

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 20 October 2021 to 11 January 2022
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- 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
A series of consultation meetings is also taking place. For more information, please use the “Enquiries” contact details above.
- 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.
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The Need for Further Changes to the Terrorism Guidelines

In March 2018 the Sentencing Council published the first package of terrorism sentencing guidelines. They came into force on 27 April 2018 and covered the following offences:

- Preparation of Terrorist Acts (Terrorism Act 2006, section 5)
- Explosive Substances (Terrorism Only) (Explosive Substances Act 1883, section 2 and section 3)
- Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2)
- Proscribed Organisations – Membership (Terrorism Act 2000, section 11)
- Proscribed Organisations – Support (Terrorism Act 2000, section 12)
- Funding Terrorism (Terrorism Act 2000, sections 15 - 18)
- Failure to Disclose Information about Acts (Terrorism Act 2000, section 38B)
- Possession for Terrorist Purposes (Terrorism Act 2000, section 57)
- Collection of Terrorist Information (Terrorism Act 2000, section 58)

On 12 February 2019, less than a year after the new guidelines came into effect, the Counter - terrorism and Border Security Act 2019 received Royal Assent. This Act made significant changes to terrorism legislation, some of which affected the guidelines listed above. The Council therefore sought to amend the relevant guidelines to ensure that they took account of the new legislation.

2019 Consultation

In October 2019 the Council published a consultation paper seeking views on amendments to some of the guidelines to reflect the new legislation. The changes were as follows:

- Changes to the culpability factors within the Proscribed Organisations – Support (Terrorism Act 2000, section 12) guideline to provide for a new offence (section 12A), of expressing an opinion or belief supportive of a proscribed organisation, reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.
- Changes to the wording in the culpability factors of the Collection of Terrorist Information (Terrorism Act 2000, section 58) guideline to account for changes in legislation which ensure that offenders who stream terrorist material (as opposed to downloading or physically being in possession of it) would be captured by the offence.
- In addition, changes were proposed to the sentence levels within the following guidelines to reflect an increase to the statutory maximum sentences:

- Collection of Terrorist Information (Terrorism Act 2000, section 58). From 10 years to 15 years.
 - Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2). From 7 years to 15 years.
 - Failure to Disclose Information About Acts of Terrorism (Terrorism Act 2000, section 38B). From 5 years to 10 years.
- Finally, an additional aggravating and mitigating factor was added to the funding guideline, not as a result of a change in legislation but as a result of case law. The new factors were aimed at addressing the extent to which an offender knew or suspected that the funds would or may be used for terrorist purposes.

The Terrorism (revised guidelines) consultation closed on 3 December 2019. 13 responses were received. The Council considered the issues from consultation in December 2019 and again in March 2020 and drafted some further changes in light of the responses received.

However, the Council was by this time aware that further terrorism legislation was about to be introduced which would have a significant impact on the guidelines. For this reason, the Council chose to pause the publication of the revised guidelines to await this new legislation.

In May 2020 the Counter–Terrorism and Sentencing Bill was introduced. At the end of April 2021, the Bill received Royal Assent and subsequently came into force.

It is proposed that the 2019 revised guidelines will be published alongside the revisions made under this consultation process.

The Current Project

The Council has now had the opportunity to consider the Counter–Terrorism and Sentencing Act 2021 and how it affects the terrorism sentencing guidelines.

This consultation proposes changes to accommodate the legislation and seeks views on those proposals. The consultation makes proposals for changes to the following guidelines:

- Preparation of Terrorist Acts (Terrorism Act 2006, section 5)
- Explosive Substances (Terrorism Only) (Explosive Substances Act 1883, section 2 and section 3)
- Proscribed Organisations – Membership (Terrorism Act 2000, section 11)
- Proscribed Organisations – Support (Terrorism Act 2000, section 12)

In addition, the Council is seeking views on two further areas:

- Proposed changes to the Preparation of Terrorist Acts and Explosive Substances guidelines to provide assistance to judges in assessing the culpability and harm of a case that has Law Enforcement Authority involvement to the extent that the terrorist act was unlikely to ever take place.

- Whether the life sentence minimum terms that are included in the existing sentence table of the Preparation of Terrorist Acts and Explosive Substance (terrorism only) guidelines are compatible with case law and any forthcoming legislation.

Publication of All Guidelines

It is proposed that at the conclusion of this consultation, the Council will consider the responses and make any further changes required to this package of guidelines. Once that work is completed a package of up to date terrorism guidelines will be published which will incorporate both the 2019 revisions and the revisions made under this consultation process.

A consultation response document will also be published alongside the guidelines which will incorporate both the 2019 changes and these changes.

Preparation of Terrorist Acts Guideline (Terrorism Act 2006, section 5)

The proposed new draft guideline for Preparation of Terrorist Act offences can be found [here](#).

There were around 20 adult offenders sentenced between 2018 and 2020 for this offence, of whom 78 per cent were sentenced to immediate custody.¹ The average custodial sentence length (ACSL) was 11 years 5 months, after any reduction for a guilty plea.

The Legislation

The 2021 Act creates a new category of terrorism offence called a 'serious terrorism offence'. There is a schedule which sets out which offences this new provision applies to. It is separated into terrorism offences and other serious offences where there is a terrorist connection. Preparation of terrorist acts (Terrorism Act 2006, section 5) is included in the first part of the schedule and explosive substance (terrorism only) offences (Explosive Substances Act 1883, sections 2 and 3) in the latter part. The Explosive Substances (Terrorism only) guideline is discussed in the next chapter of this paper.

Where an offender commits a serious terrorism offence a 'serious terrorism sentence' must be imposed (where the criteria set out below are met). Where the criteria are not met, or there are exceptional circumstances, the court can impose an extended sentence with an extension period of up to 10 years. If neither are imposed but the court is minded to impose a custodial sentence, they must impose a special custodial sentence for offenders of particular concern.

The 'serious terrorism sentence' comprises a period of imprisonment (or detention in a young offender institution for those aged 18-21) for a minimum period of 14 years, and an extension period to be served on licence (between 7 and 25 years). The sentence applies where:

- the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences,
- the court does not impose a sentence of custody for life, and
- the serious terrorism offence or the combination of the offence and one or more offences associated with it was very likely to result in or contribute to (whether directly

¹ The remaining 22 per cent were otherwise dealt with. The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for the statistics in this document.

or indirectly) the deaths of at least two people as a result of an act of terrorism (the “risk of multiple deaths condition”).

The court *must* impose a serious terrorism sentence unless the court is of the opinion that there are exceptional circumstances which relate to the offence or to the offender and justify not doing so.

In a case where the court imposes a life sentence (because the dangerousness criteria are met and a life sentence is justified), but a serious terrorism sentence would have been given but for the fact that a life sentence was imposed (i.e. the remaining criteria for a serious terrorism sentence were met), then this is called a ‘serious terrorism case’ and the minimum term of that life sentence must be 14 years unless exceptional circumstances apply.

The Guideline

The legislative changes have significant implications for the Preparation of Terrorist Acts guideline.

The existing Preparation of Terrorist Acts guideline can be seen [here](#). In order to provide for the changes, the Council proposes amending and expanding the text that currently appears above the sentence table as follows:

Offenders committing the most serious offences are likely to be found dangerous and so the table below includes options for life sentences. However, the court should consider the dangerousness provisions in *all* cases, having regard to the criteria contained in [section 308 of the Sentencing Code](#) to make the appropriate determination. (See STEP 6 below). The court must also consider the provisions set out in s323 (3) of the Sentencing Code (minimum term order for serious terrorism offenders). (See STEP 3 below).

Where the dangerousness provisions are met but a life sentence is not justified, the court should consider whether the provisions for the imposition of a serious terrorism sentence have been met, having regard to the criteria contained in s268B (adult offenders aged under 21) or s282B (offenders aged 21 and over) of the Sentencing Code. If the criteria are met, a minimum custodial sentence of 14 years applies. (see STEP 3 below).

Where the dangerousness provisions are not met the court must consider the provisions set out in sections [265](#) and [278](#) of the Sentencing Code (required special sentence for certain offenders of particular concern). (See STEP 7 below).

The proposed text includes information relevant to serious terrorism offences including the relevant legislative references.

This new expanded text also cross refers to a new STEP 3 of the guideline on minimum terms. It explains that some sentences may need adjustment if the criteria for a serious terrorism sentence are met, or if a life sentence of below 14 years is imposed in a serious terrorism case.

The benefit of adding this text is that the sentencing table can remain largely as it is and ensures that sentencers base the sentence on the seriousness of the specific case in front of them following the usual analysis of culpability and harm.

The guideline has now been in force since April 2018, and there have been no indications from the cases we have looked at that the guideline is not working well.

When might a judge need to make an adjustment to the sentence?

If a serious terrorism sentence is to be imposed but the sentencing table would lead to a custodial term of below 14 years then at Step 3, once the seriousness has been determined, the judge will need to increase the sentence to the minimum unless exceptional circumstances apply.

There are not many sentences within the table that might require adjustment in this way. The serious terrorism sentence criteria includes the multiple deaths condition (i.e. that the offence was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism). This means that category 2 and 3 harm cases are unlikely to ever be eligible for a serious terrorism sentence, and so no adjustment would be necessary.

D1 includes a sentence of less than 14 years within the sentencing range. However, whilst cases falling into this category *may* meet the criteria for a serious terrorism sentence and if so might need adjusting at step 3, there are just as likely to be cases that do not meet the criteria. Many cases falling into this category will not meet the first main test (that the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences) and in those cases it is helpful for the sentencer to be given a suitable starting point and range that is based on the offence seriousness.

The only other adjustment that might be needed would be in those instances where a life sentence is imposed, but the 'serious terrorism case' criteria is met (i.e. this would have been a serious terrorism sentence but for the imposition of a life sentence). In these situations, the minimum term must be at least 14 years. C1 currently includes a life sentence minimum term of less than 14 years within its range. However it is hard to imagine a C1 scenario where the serious terrorism sentence criteria would not have been met, given that harm category 1 is 'multiple deaths risked and very likely to be caused', and the guideline assumes that in the majority of cases the dangerousness criteria would be met, and a life sentence imposed. The Council therefore propose amending the range so that the minimum term starts at 14 years (rather than 10 years as is currently the case).

Question 1: Do you agree with the addition of the guidance text above the sentencing table within the Preparation guideline?

Question 2: Do you agree that the existing sentencing table should remain as it is (subject to question 3 below)?

Question 3: Do you agree that the lower end of the sentencing range for category C1 offences should change to 14 years?

Minimum Terms, Serious Terrorism Sentences and Exceptional Circumstances

The Council propose the addition of a new step in the Preparation guideline (Step 3). This step sets out when a minimum sentence or serious terrorism sentence will apply and provides guidance on when exceptional circumstances might apply.

Including this guidance at Step 3 ensures that any adjustments that are needed to the sentence are made at the correct stage, in order to comply with the legislation. The new step is set out below:

Step 3 – Minimum terms, Serious Terrorism Sentences and exceptional circumstances

Life Sentence Minimum Terms

For serious terrorism cases the life sentence minimum term must be at least 14 years' unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify a lesser period.

A "serious terrorism case" is a case where, but for the fact that the court passes a life sentence, the court would be required by section 268B(2) or 282B(2) to impose a serious terrorism sentence (s323(3) of the Sentencing Code).

Serious Terrorism Sentence - Minimum Custodial Sentence

Where the criteria for a serious **terrorism sentence are met, as set out in s268B (adult offenders aged under 21) or s282B (offenders aged 21 and over) of the Sentencing Code, then** the court must impose the serious terrorism sentence **unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.**

Where a Serious Terrorism Sentence is imposed, the appropriate custodial term is a minimum of 14 years' custody. (s282C Sentencing Code).

Exceptional circumstances

In considering whether there are exceptional circumstances that would justify not imposing the minimum term (in the case of a life sentence), or not imposing the Serious Terrorism Sentence where the other tests are met, the court must have regard to:

- the particular circumstances of the offence **and**
- the particular circumstances of the offender.

either of which may give rise to exceptional circumstances

Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see [Criminal Practice Directions](#) VII: Sentencing B.

Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

Circumstances are exceptional if the imposition of the minimum term (in the case of a life sentence), or not imposing the Serious Terrorism Sentence would result in an arbitrary and disproportionate sentence.

The circumstances must truly be exceptional. It is important that courts do not undermine the intention of Parliament and the deterrent purpose of the provisions by too readily accepting exceptional circumstances.

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

The mere presence of one or more of the following should not *in itself* be regarded as exceptional:

- One or more lower culpability factors
- One or more mitigating factors
- A plea of guilty

Where exceptional circumstances are found

If there are exceptional circumstances that justify not imposing the minimum term (in the case of a life sentence) then the court **must impose a shorter minimum**.

If there are exceptional circumstances that justify not imposing a Serious Terrorism Sentence, then the court must impose an alternative sentence.

Note: a guilty plea reduction applies in the normal way if a Serious Terrorism Sentence is not imposed (see step 5 – Reduction for guilty pleas).

Question 4: Do you agree with the guidance in Step 3?

Additional Changes

Other minor changes have been made to the guideline to bring it in line with the legislative changes.

The following wording has been added to the front page of the guideline:

For offences committed on or after 29 June 2021, this is a serious terrorism offence listed in Part 1 of Schedule 17A for the purposes of sections 268B and 282B (serious terrorism sentence), section 323 (minimum term order: other life sentences), and section 268(4)(b)(iii) and 281(4)(b)(iii) (increase in extension period for serious terrorism offenders) of the Sentencing Code.

In addition, the following changes have been made to Step 5 of the guideline:

Step 5 – Reduction for a guilty plea

The court should take account of any potential reduction for a guilty plea in accordance with section 73 of the Sentencing Code and the Reduction in Sentence for a Guilty Plea guideline.

Where a serious terrorism sentence has been imposed the court must ensure that any reduction for a guilty plea does not reduce the sentence to less than 80 per cent of the statutory minimum.

Explosive Substances (Terrorism only) Guideline (Explosive Substances Act 1883, sections 2 and 3)

The proposed new draft guideline for explosive substances (terrorism only) offences can be found [here](#).

The above guideline largely replicates the Preparation of Terrorist Acts guideline discussed in the earlier chapter. All of the proposals relating to that guideline set out above are also made in relation to this guideline.

Question 5: Do you agree with the changes proposed to the Explosive Substances (Terrorism only) guideline?

Changes to Statutory Maximum Sentences

The Counter - Terrorism and Sentencing Act 2021 has increased the statutory maximum sentence for two offences, membership of a proscribed organisation (Terrorism Act 2000, section 11), and support for a proscribed organisation (Terrorism Act 2000, section 12) from 10 to 14 years.

The attacks at Fishmongers' Hall on 29 November 2019 and in Streatham on 2 February 2020 were the main impetus for the Government to make changes to terrorism legislation. In the Government's impact assessment for the Bill they indicated their reasons for why intervention was necessary:

The [terrorist attacks] demonstrate the risk to public safety that we are facing from known terrorist offenders who are released having spent insufficient time in custody. The terrorism threat level in the UK remains "substantial" – meaning an attack is likely – and there have been 25 attacks foiled since March 2017. Government intervention to ensure that serious and dangerous terrorism offenders spend longer in custody and are monitored more effectively upon release is necessary to keep the public safe and requires primary legislation.

The policy objectives are to better protect the public from terrorism by strengthening the law which governs the sentencing, release, and monitoring of terrorism offenders. The intended effect of this will be that serious and dangerous terrorism offenders will spend longer in custody, which provides better protection for the public, more time in which to support the offender's disengagement and rehabilitation through the range of tailored interventions available while they are in prison, and ensures the length of sentence reflects the seriousness of the crime. It will also strengthen the ability of the Government and operational partners, including HM Prison & Probation Service (HMPPS) and the police, to monitor and manage the risk posed by terrorist offenders and individuals of terrorism concern outside of custody.

Specifically, in relation to the increased statutory maximum sentences the Government provided the following reasoning:

This means that where the courts see appropriate, they would be able to impose longer sentences. The preferred option gives the courts scope to impose longer custodial sentences where appropriate and brings the maximum penalties for these ... offences more closely into line with the penalties for other similar serious offences.

Parliament has endorsed these changes by enacting them in legislation.

The Council is now proposing amendments to the relevant guidelines in order to ensure they comply with the will of Parliament.

Proscribed Organisations – Membership (Terrorism Act 2000, section 11)

The proposed new draft guideline for the offence of membership of a proscribed organisation can be found [here](#).

The legislation has increased the statutory maximum from 10 to 14 years.

The current guideline can be seen [here](#).

Over the period 2018 to 2020, there were around 20 offenders sentenced for this offence, of which 94 per cent received an immediate custodial sentence. The mean average custodial sentence length (ACSL) was 5 years (median was 5 years 6 months), after any reduction for guilty plea.

This guideline separates offending into just three categories based on differing levels of culpability. When drafting the original guideline, the Council agreed that there should only be one level of harm. The Council considered that membership of any terrorist organisation is harmful, even where the offender is not particularly active, as the organisation gains strength from its increased numbers. The Council reflected upon whether membership of some organisations is more harmful than membership of others, i.e. those that carry out significant terrorist atrocities. However, they concluded that it would be inappropriate to require judges to rank terrorist organisations.

Therefore, due to the structure of the guideline there are just three sentencing levels and the Council propose an increase to each, as seen below:

Existing sentence table:

Culpability	A	B	C
	Starting point 7 years' custody	Starting point 5 years' custody	Starting point 2 years' custody
	Category range 5-9 years' custody	Category range 3-7 years' custody	Category range High level community order - 4 years' custody

Proposed sentence table:

Culpability	A	B	C
	Starting point 10 years' custody	Starting point 7 years' custody	Starting point 3 years' custody
	Category range 8 - 13 years' custody	Category range 5-9 years' custody	Category range High level community order - 4 years' custody

The range in category A has been broadened to cover a 5-year period which allows Judges greater discretion to adjust the sentence according to any relevant aggravating or

mitigating factors. The range in category C remains the same as the current guideline as the Council felt it important to ensure that it was still possible for the least serious type of case to receive a non-custodial sentence. Such a case might include an offender who was neither prominent nor active in the organisation, and who had a significant amount of mitigation.

The highest sentence within the proposed table is 13 years, which still provides a small amount of headroom for sentencing exceptionally serious cases outside of the guideline. This may include a particularly serious case in the highest category with multiple aggravating factors.

Question 6: Do you agree with the proposed sentences for the offence of membership of a proscribed organisation?

Proscribed Organisations – Support (Terrorism Act 2000, section 12)

The proposed new draft guideline for the offence of support for a proscribed organisation can be found [here](#).

The legislation has increased the statutory maximum from 10 to 14 years.

The current guideline can be seen [here](#). However, this guideline has already been the subject of some amendments (related to factors, rather than sentence levels) that the Council consulted on in 2019. The revised factors, amended in 2019 (and yet to be published) are set out below:

Culpability demonstrated by one or more of the following:

A

- Intentional offence - Offender in position of trust, authority or influence and abuses their position
- Persistent efforts to gain widespread or significant support for organisation
- Encourages activities intended to cause endangerment to life

B

- Reckless offence - Offender in position of trust, authority or influence and abuses their position
- Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation
- Intended to gain widespread or significant support for organisation
- Encourages activities intended to cause widespread or serious damage to property, or economic interests or substantial impact upon civic infrastructure

C

- Lesser cases where characteristics for categories A or B are not present
- Other reckless offences

Harm

The court should consider the factors set out below to determine the level of harm.

Category 1

- Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life
- Significant support for the organisation gained or likely to be gained

Category 2

- Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life

Category 3

- All other cases

Since 2018, when the current sentencing guideline came into force, up to 2020 inclusive, there have been no offenders sentenced for this offence as their principal offence.

The Council proposes the following changes to the sentence table:

Existing sentence table:

	A	B	C
1	Starting point* 7 years' custody Category range 6-9 years custody	Starting point* 5 years' custody Category range 4-6 years custody	Starting point 3 years' custody Category range 2-4 years custody
2	Starting point* 6 years' custody Category range 5-7 years custody	Starting point 4 years' custody Category range 3-5 years custody	Starting point 2 years' custody Category range 1-3 years custody
3	Starting point* 5 years' custody Category range 4-6 years custody	Starting point 3 years' custody Category range 2-4 years custody	Starting point 1 years' custody Category range High level community order – 2 years custody

Proposed sentence table:

	A	B	C
1	Starting point* 10 years' custody Category range 8-13 years custody	Starting point* 7 years' custody Category range 5-9 years custody	Starting point 3 years' custody Category range 2-4 years custody

2	Starting point* 8 years' custody Category range 6-9 years custody	Starting point 4 years' custody Category range 3-6 years custody	Starting point 2 years' custody Category range 1-3 years custody
3	Starting point* 6 years' custody Category range 4-7 years custody	Starting point 3 years' custody Category range 2-4 years custody	Starting point 1 years' custody Category range High level community order – 2 years custody

It is not proposed that all sentences should be increased within the sentencing table. The Council considers that the will of Parliament can be met by ensuring that the most serious offenders receive tougher sentences.

The categories with an asterisk next to them have had their starting point raised and their ranges broadened to give sentencing judges greater discretion to move around the starting point where the facts of the case require it. Category B2 has similarly had its range broadened, although its starting point remains the same.

Question 7: Do you agree with the proposed sentences for the offence of support for a proscribed organisation?

Additional Guidance to Assist Judges sentencing cases which include the involvement of Law Enforcement Authorities

On 13 May 2021 the Council published a consultation paper seeking views on proposed changes to the sexual offences' guidelines. Following recent cases before the Court of Appeal, the Sentencing Council decided to update the relevant sexual offences guidelines to set out the approach the courts should take when sentencing cases where sexual activity with a child has been incited but ultimately did not take place, or the child did not exist. These cases presented a difficulty for Judges in assessing harm.

In revising the Preparation of Terrorist Acts guideline, the Council reflected that similar scenarios arise when sentencing some terrorist cases. In a terrorist case there are two likely scenarios; one where the law enforcement authorities have the offender under surveillance and would step in before the terrorist act could be carried out; and secondly where a law enforcement authority poses as a terrorist jointly involved in the terrorist activity who takes steps to ensure the terrorist activity does not go ahead (for example they may provide a fake explosive device, or intervene before the activity goes ahead).

Such scenarios present difficulties for Judges in assessing the likelihood of harm. They may also present difficulties when assessing culpability, as many of the factors within the preparation guideline relate to how far preparations were advanced to the extent that the activity was likely to have been carried out.

A number of cases have come before the courts involving these types of scenarios and the Council considered that guidance is necessary to assist judges to sentence these cases in a consistent manner.

The Council, therefore, propose the following additional text, which will appear at Step 1 of the guideline before the culpability and harm factors are set out:

Notes for culpability and harm

In some cases, Law Enforcement Authorities (LEA) may be involved, either posing as terrorists jointly involved in the preparations for terrorist activity, or in keeping the offender under surveillance. Their involvement is likely to ensure that the terrorist activity could never be successfully completed. Irrespective of this, the court should approach the assessment of the offender's culpability and harm as follows:

Culpability

Where an undercover LEA is involved in the preparations for the terrorist activity, the culpability of the offender is not affected by the LEA's involvement. Culpability is to be assessed as if the LEA was a genuine conspirator.

Where the LEA is surveilling the offender and prevents the offender from proceeding further, this should be treated as apprehension of the offender.

Harm

In any case that involves LEA, the court should identify the category of harm on the basis of the harm that the offender intended and the viability of the plan, and then apply a downward adjustment at step two.

The extent of this adjustment will be specific to the facts of the case. In cases where, but for the LEA involvement, the offender would have carried out the intended terrorist act, a small reduction within the category range will usually be appropriate.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.

In either instance, it may be that a more severe sentence is imposed where very serious terrorist activity was intended but did not take place than would be imposed where relatively less serious terrorist activity did take place.

Question 8: Do you agree with the additional guidance for sentencing terrorist cases with law enforcement authority involvement?

Life Sentences in Terrorism Cases

The way in which the minimum term is to be calculated when imposing a life sentence for certain terrorism, violent and sexual offences has been the subject of a number of recent Court of Appeal cases. The considerations within those cases centre around the fact that amendments made by the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020, and the Terrorist Offenders (Restriction of Early Release) Act 2020 have changed the release provisions so that for certain offences offenders must now serve two thirds of their determinate sentence before they can be considered eligible for release, as opposed to half of their sentence. The Court of Appeal cases have explored the extent to which the sentencing Judge should have regard to these release provisions when determining any relevant life sentence minimum term. The most recent Court of Appeal case of *McWilliams*² concluded that the minimum term for such offences should be calculated as two thirds rather than one-half of the notional determinate term.

In addition, there is currently legislation before Parliament under the Police, Crime, Sentencing and Courts Bill which, if enacted, would prescribe the approach that Judges should take in setting the minimum term. At present the Bill proposes that the starting point would be to impose a term that is two thirds of the notional determinate sentence. This starting point can then be adjusted as the court considers appropriate, taking into account (amongst other things) the seriousness of the offence(s).

The current Preparation of Terrorist Acts and Explosive Substances (terrorism only) guidelines include life sentences with specified minimum terms within the sentencing table. The Council has taken the opportunity to consider whether these minimum terms comply with the case law and any future legislation.

To consider this issue it is important to look at how these figures were reached. As with the development of most sentence levels, the Council considered statistical data from the Court Proceedings database and analysed first instance transcripts and Court of Appeal sentencing remarks. The Council also considered the guidance given by the then Lord Chief Justice in the case of *R v Kahar & Others*³. After considering this information, the Council reflected on the current nature of terrorist offending and whether the existing sentence levels were appropriate. The Council concluded that they were not and stated in its original consultation, that it was going to raise sentence levels for some types of offending above those levels set out in the leading Court of Appeal case of *Kahar*:

The Council determined that, when considering these actions in the current climate, where a terrorist act can be planned in a very short time, using readily available items as weapons, combined with online extremist material on websites which normalise terrorist activity, and creates a climate where acts of terrorism can be committed by many rather than a few highly organised individuals, these offences are more serious than they have

² [2021] EWCA Crim 745

³ [2016] EWCA Crim 568

previously been perceived. The Council believes that its proposals take account of the need to punish, incapacitate and deter.

The sentence levels included within the final sentence tables were, therefore, based upon data but also increased on account of the Council members' collective judgement of the seriousness of the offences.

In calculating appropriate life sentence minimum terms the Council did not first decide upon a notional determinate sentence and then halve it. Indeed, the Council positively chose to include life sentences on the face of the guideline rather than unrealistic lengthy determinate sentence given that, for the most serious cases, life sentences are generally inevitable. The Council has considered these sentencing levels again and believes that they remain correct for these offences, regardless of the prospective changes to the law.

For these reasons the Council does not consider that the minimum terms in the existing sentence tables should be amended to reflect the change to the approach that is now required when Judges set a life sentence minimum term for certain offences.

Question 9: Do you agree that the life sentence minimum terms included in the Preparation of Terrorist Acts, and Explosive Substances (terrorism only) guidelines should remain the same?

Annex A: Public Sector Equality Duty

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.

The Council has considered data available in relation to the demographics of offenders sentenced for the terrorism offences covered by this consultation.

This includes volumes, outcomes, average custodial sentence lengths (ACSL) and the distribution of custodial sentence lengths for the adult offenders sentenced for the offences covered by the draft revised guidelines, grouped by sex, age and self-reported ethnicity, where volumes permit.⁴ This is available in the data tables published here:

<https://www.sentencingcouncil.org.uk/research-and-resources/publications?cat=statistical-bulletin&s&topic=terrorism>

It should be noted that there are limitations on the reliability of these demographic data given the low volumes involved and, therefore, the data should be regarded as indicative only. Despite the large proportion of offenders with 'unknown' ethnicity, this data source (i.e. the Court Proceedings Database) is still the best source of sentencing data for terrorism offences covered by our guidelines.⁵

⁴ The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Where the number of offenders sentenced is fewer than five for any demographic category, an average (mean) custodial sentence length has not been provided.

⁵ The Home Office also publish data on people convicted for terrorism-related offences, which includes various demographic breakdowns. These statistics can be found here: <https://www.gov.uk/government/collections/operation-of-police-powers-under-the-terrorism-act-2000>

There are many and varied reasons for the distribution of offender types and prevalence towards a particular type of offending, including wider social issues. The new and revised terrorism offence guidelines being consulted on are intended to apply equally to all demographics of offenders, and in drafting the guidelines the Council has taken care to guard against any unintended impact.

The Council recognises, however, that the draft guidelines could be interpreted in different ways. Additionally, the Council is aware that the high proportion of offenders where their ethnicity was either not recorded or not known will limit how useful these data can be in examining whether the guidelines operate fairly across all groups. We are therefore seeking views on whether any of the factors in the draft guidelines, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups.

We are also seeking views as to whether there are any other equality or diversity issues the guideline has not considered, so that we may consider these post-consultation.

Question 10: Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?

Question 11: Are there any other equality and diversity issues these guidelines and revisions should consider?

Annex B: Consultation Questions

Question 1: Do you agree with the addition of the guidance text above the sentencing table within the Preparation guideline?

Question 2: Do you agree that the existing sentencing table should remain as it is (subject to question 3 below)?

Question 3: Do you agree that the lower end of the sentencing range for category C1 offences should change to 14 years?

Question 4: Do you agree with the guidance in Step 3?

Question 5: Do you agree with the changes proposed to the Explosive Substances (Terrorism only) guideline?

Question 6: Do you agree with the proposed sentences for the offence of membership of a proscribed organisation?

Question 7: Do you agree with the proposed sentences for the offence of support for a proscribed organisation?

Question 8: Do you agree with the additional guidance for sentencing terrorist cases with law enforcement authority involvement?

Question 9: Do you agree that the life sentence minimum terms included in the Preparation of Terrorist Acts, and Explosive Substances (terrorism only) guidelines should remain the same?

Question 10: Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?

Question 11: Are there any other equality and diversity issues these guidelines and revisions should consider?

