

Terrorism Guideline

Response to consultation

March 2018

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Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on the draft Terrorism sentencing guideline. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guideline, as well as the groups who hosted and attended feedback events.

As with all Sentencing Council consultations, the views put forward by all respondents were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline. As a result of those views a number of changes have been made across the package of guidelines including the inclusion of a non-custodial option in six of the nine guidelines; and a more complex consideration of harm in some guidelines, which now also considers the likelihood of harm. The Council has also made significant changes to individual guidelines to address the issues raised. The detail of those changes is set out within this document.

At the time of the consultation, in October 2017, the Council was aware that the Government was contemplating changes to terrorism legislation which could impact on our guideline. The Government has yet to announce the introduction of a Bill which might take forward these changes and for that reason the Council has decided to go ahead and publish this guideline to ensure it can be used by sentencers in court as soon as possible. If, in the future, the legislation does change in a way that impacts the guideline, the Council will endeavour to respond in a timely manner.

Terrorism offences are amongst the most serious offences that come before the court. In some cases they involve the endangerment of life, but also, they challenge the way our society operates. The set of guidelines being published today includes a wide variety of offences and represents a comprehensive package that will provide vital assistance to sentencers across England and Wales.

Lord Justice Treacy
Chairman, Sentencing Council

Introduction

In October 2017 the Sentencing Council published a consultation on a package of draft guidelines for terrorism offences.

There are no existing guidelines for sentencing terrorism offences. However, in 2016, the Court of Appeal gave guidance for sentences imposed under section 5 Terrorism Act 2006 (Preparation of Terrorist Acts) in the case of *R v Kahar & Others*¹ (*Kahar*). The guidance was intended to assist courts to achieve consistency when sentencing these very serious cases which vary hugely in nature. This guidance has worked effectively for sentencing preparation cases up until now, but the changing nature of offending requires that the guidance be reconsidered, and that a comprehensive package of guidelines be produced to cover a wider number of offences.

The Council's aim throughout the drafting of this package of guidelines has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

The package was produced with the assistance of statistical data, case transcripts and Court of Appeal cases, and during consultation the draft guideline was tested by judges who hear this type of case.

The Council considered statistical data from the Ministry of Justice Court Proceedings Database for the offences covered in the guideline. However, many of the offences have such low volumes that for some offences it is difficult to establish an accurate picture of current sentencing levels.

The Preparation of Terrorist Acts guideline is expected to result in an increase in sentencing practice for offences at the lower end of seriousness. The Council considered the sentences as set out in the guideline case *Kahar* alongside the details of recent cases, and agreed that sentencing practice should be increased for these offences. In *Kahar* the lowest level offence will fall into Level 6 which has a sentencing range of 21 months to 5 years, whereas the lowest sentence range within the proposed guideline is 3 years to 6 years.

The cases that will fall into the lower categories of the new guideline are ones where preparations might not be as well developed or an offender may be offering a small amount of assistance to others.

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

¹ [2016] EWCA Crim 568

offences are more serious than they have previously been perceived. The Council believes that its proposals take account of the need to punish, incapacitate and deter.

The Council consulted on the draft guideline between 12 October 2017 and 22 November 2017. During the consultation period the Council attended events to discuss the consultation. This included an event organised by Professor Julian Roberts, Professor of Criminology at the University of Oxford and member of the Sentencing Council. The event involved a round table discussion on the draft guidelines and was well attended by a number of key academics in this field.

The guideline will apply to all those aged 18 or over who are sentenced on or after 27 April 2018, regardless of the date of the offence.

Summary of research

Several research exercises were carried out to support the Council in developing the guideline.

To help understand the nature of these types of case, a content analysis of over 40 transcripts of Crown Court sentencing remarks was undertaken for the offences of Preparation of Terrorist Acts (s5 Terrorism Act 2006), Encouragement of Terrorism (s.1 and s.2 Terrorism Act 2006), Support (s.11 Terrorism Act 2000), Possession (s.57 Terrorism Act 2000) and Collection of Terrorist Information (s.58 Terrorism Act 2000). The aim was to understand more about the nature of offences receiving sentences of different lengths, and to help determine what factors differentiated offences of varying levels of seriousness. In addition, to gather more evidence on the characteristics of these offences, the Council drew on a comprehensive piece of research by Hannah Stuart². This report identifies and profiles all Islamism-inspired terrorism convictions and suicide attacks in the UK between 1998 and 2015.

During the consultation stage of guideline development, qualitative research was carried out to help gauge how the guideline might work in practice, and to help establish whether there were any issues with implementation that should be addressed prior to issuing the definitive version. Three draft guidelines were used in this research: Preparation of Terrorist Acts; Encouragement of Terrorism; and Collection of Terrorist Information.

In particular, the Council wanted feedback on step one of the three guidelines: how well the culpability and harm factors were working and judges' opinions of the starting points and ranges. To this end, 16 in-depth interviews were carried out with 17³ Crown Court and High Court judges who had experience of hearing terrorism offence cases. A range of scenarios were presented which represented offending at high, medium and low levels of seriousness, and judges were asked to sentence these up to the point of choosing a starting point sentence; they were then asked to reflect on this process.⁴

As a result of this research, in combination with consultation responses, a number of changes were made to the draft guidelines, including: small changes to the wording of some culpability factors;

² Stuart, H. (2017). *Islamist Terrorism: Analysis of Offences and Attacks in the UK (1998-2015)*. The Henry Jackson Society

³ One interview involved two judges participating.

⁴ The sample size was small and self-selecting, which means that the findings cannot be taken as representative of all judges (although in this particular case, we did speak to a high proportion of the small number of judges currently hearing terrorism cases). They provide an insight into how these groups may use and respond to the guideline, but we cannot be sure that these findings are typical of the wider group.

changes to the factors and process for determining the level of harm; and the addition of particular mitigating factors.

In this way, research and analysis played an important part in the development of the guideline.

Summary of responses

The consultation sought views from respondents on the nine separate guidelines. Views were sought on three main areas: the principal factors that make the offence more or less serious; the additional factors that should influence the sentence; and the sentencing tables. The consultation also included a number of case studies to obtain detailed responses on the workability of each draft guideline and whether any difficulties arose.

In total, 26 responses to the consultation were received of which 24 provided email or paper responses and 2 responded online.

Breakdown of respondents

Type of respondent	Number
Charity/not for profit organisations	2
Legal professionals (both are collective responses)	2
Judiciary (including 1 collective response)	4
Other	2
Academics	7
Government	4
Youth justice representatives	1
Police/law enforcement	2
Parliament (a collective response)	1
Prosecution	1
Total	26

Feedback received from the Council's consultation events and interviews with sentencers during the consultation period is reflected in the responses to individual questions below.

In general, there was a positive response to the proposals. However, the Council was also grateful for constructive criticism and considered suggestions for amending parts of the nine draft guidelines.

The substantive themes emerging from the responses to all guidelines included:

- The guidelines should include more non-custodial sentencing options at the lower levels of seriousness;

- The guidelines should *all* include a degree of ‘headroom’ to allow sentencers to sentence outside of the guideline in exceptional cases;
- The mitigating factors should include consideration of the age or level of maturity of the offender where this is relevant to the offence;
- The standard mitigating factor ‘Sole or primary carer for dependent relatives’ should be included across all guidelines;
- The guidelines should include an expanded mitigating factor to cover concerns around coercion of the offender into committing the offence.

The Council has responded to these comments by:

- Including high level community orders as an option within the Encouragement of Terrorism; Membership; Support; Funding; Failure to Disclose Information; and Collection guidelines;
- Reducing the top of the sentence range in the Funding and Failure to Disclose Information guidelines. All other guidelines already included a degree of ‘headroom’;
- Including ‘Age or level of maturity of the offender’ in the mitigating factors of all nine guidelines;
- Including ‘Sole or primary carer for dependent relatives’ in the mitigating factors of all nine guidelines;
- All nine guidelines now include a factor, ‘Offender involved through coercion, intimidation or exploitation’.

In addition, the Council made a number of changes to each individual guideline. These changes included a change to the harm model of the Preparation of Terrorist Acts, Explosive Substances, Possession for Terrorist Purposes and Collection of Terrorist Information guidelines to include consideration of the likelihood of harm. This change was made in response to a number of comments that the initial draft harm models were too simplistic.

The detailed changes to the individual guidelines are discussed below.

Preparation of Terrorist Acts

Culpability factors

Proximity to the attack

Whilst many respondents agreed with the culpability factors there were a number of respondents who raised concern about the prominence given to the proximity of the act being carried out.

... I do have some concerns, the most significant of which is the association between culpability and how advanced the plot may be... It is the Police view that there is a clear public policy concern that this linkage may lead to a perverse outcome. The overriding focus of the police is, of course, public safety. Public safety is promoted in part by disrupting terrorists which, in turn, is assisted by the imposition of lengthy prison sentences for those convicted. To have a sentencing regime that encourages the police to delay a disruption and allow a plot to run on, so as to increase the eventual likelihood of a substantial sentence, runs the risk of putting public safety at risk. Given the nature of the current threat, terrorists can escalate unsophisticated plots extremely quickly, sometimes in a matter of hours. – **Assistant Commissioner, Mark Rowley**

Turning to culpability: whilst the extent of the completion of the plan is clearly an important factor in determining culpability, I would hesitate to say that it is the sole determining factor. It is a slightly surprising outcome that an offender sentenced for a less sophisticated and less pre-meditated offence is more likely to be determined to be of higher culpability than those engaged for perhaps many months in a complex and sophisticated plan, simply because, by definition, the unsophisticated plan is far more likely to be complete or near complete. Someone could hatch an unsophisticated plan in a matter of minutes and find themselves assessed as Culpability A whereas the offender plotting a sophisticated and devastating attack for months could be assessed as Culpability B because some parts of the plan are yet to be finalised. In the sentencing of an inchoate offence, there is a strong argument that the more sophisticated planner should be held to have a higher degree of culpability. – **Jonathan Bild (academic)**

The Council reconsidered the factors relating to the proximity of the attack and amended them to include a new element: 'but for apprehension the activity was very likely to have been carried out'. This new element ensures that in cases where there is a clear plan that is likely to succeed, even if all the preparations are not yet in place, the offender should fall into a higher level of culpability.

The guideline now requires the court to consider role, the extent of the preparations and this new element, for culpability levels A-C.

State of advancement

In addition to this concern, a number of respondents and a number of judges at interview questioned the difference between 'nearly complete' and 'well advanced'. They felt that they were too close and would lead to arguments in court, where the sentencing outcome could differ hugely depending on which choice the court made.

The Council therefore changed 'well advanced' to 'advanced' to allow there to be a greater distinction between the two.

Role

Finally, the role of the offender had previously been described as either a 'significant participant' or a 'lesser participant', however, by linking role to participation the Council realised that there was a risk of sentence inflation. When judges who were testing the guidelines at interview examined scenarios designed to demonstrate a case of 'lesser participation' or an offender who provides 'significant' or 'lesser assistance' to others, they frequently placed the offenders into the higher culpability categories on the basis of their level of participation. The judges deemed any significant action of an offender that contributed toward the act of terrorism as significant to the terrorist plot, therefore making them a 'significant participant', irrespective of the offender's overall level of participation and knowledge. This was not the intention, so the Council has reverted to the more traditional terms of 'leading role', 'significant role', and 'lesser role' which are more readily understood by sentencers.

Travelling or attempting to travel abroad for terrorism

A number of respondents queried the addition of the following two culpability factors:

- Offender travels abroad for terrorist purposes
- Determined attempt(s) to travel abroad to engage in terrorist activity (whether in the UK or elsewhere)

They raised concerns that the presence of these factors may lead to either harsher or lesser sentences for those preparing to carry out a terrorist act abroad, and this was inappropriate.

The Council decided to remove these factors to allow such cases to be sentenced according to the actions taken by the offender. The court will now be required to consider why the offender was travelling or attempting to travel abroad and how far they had come in their preparations.

The Council agreed that the risk of leaving these factors in is that it restricts all such cases to a specific culpability level, when the range of activity that an offender may be involved in could be huge. In some cases, an offender might have travelled abroad and actively engaged in armed combat risking the lives of many, which should justify their case falling into a high culpability category, whereas another offender might simply have engaged in training, or not even made it abroad.

In addition to removing these factors the Council added a new additional culpability C factor: 'Offender acquires training or skills for purpose of terrorist activity (where not falling within A or B)'. This should capture some of the 'travelling abroad' cases.

Harm factors

Likelihood of harm being caused

Most respondents were content with the harm factors, however there were some significant comments. The main concern was that the top harm factor 'Endangerment of life' was too broad and that almost any act of terrorism could ultimately lead to endangerment of life. This was particularly apparent in the testing of the guidelines, where judges frequently placed offenders into harm category one in cases where categorisation at a lower level had been expected.

A couple of the academic respondents proposed linking harm to the *likelihood* of harm being caused:

If the Council want to retain reference to 'harm' in how they structure the seriousness of these offences, the approach in the guidelines could be improved through reference to the likelihood of harm occurring. An incidence of a pre-inchoate offence seems more serious if it is substantially more likely to lead to harm than an otherwise similar incidence of the offence. Yet the guideline does not allow for these more serious incidences to be recognised when harm is assessed. By way of example, Terrorist A intends to cause serious loss of life and has prepared a plan that will almost certainly cause this result if it is executed. Terrorist B, with the same intent, has created a plan that may or may not be actionable, and if actioned it is unlikely to cause a loss of life. If harm is to be assessed by intended harm only, then the guidelines could not distinguish between Terrorists A and B. – **Rory Kelly (academic)**

The benefit of considering likelihood of harm is that it ensures a more appropriate sentence for an offender who may have fallen into a high category of culpability on the basis that they had a clear intention and had embarked on a terrorist plan, but where the reality is that they are not capable or

their plans are not credible and the likelihood of them successfully carrying out an attack is very small.

Multiple deaths

A number of respondents queried the fact that when assessing harm at step one, the consultation version of the guideline treated the endangerment of life as the same, regardless of the scale of intended casualties, and it was only at step two, due to the aggravating factor 'Many lives endangered', that the difference was reflected. Some consultation respondents and some judges at interview felt that the difference was more significant and should be dealt with in the initial assessment of seriousness.

The Council reflected on this issue and agreed that multiple deaths should result in the highest possible sentence, and such a case should be differentiated from others. To that end the harm model was changed.

Sentence table

Guidance

The Parole Board raised a concern about the sentence table where an extended determinate sentence (EDS) is included:

... A prisoner serving an EDS is only eligible for release after he has served two thirds of the sentence. While some allowance seems to have been made for this, on the present ranges there could be injustice. For example, ... 1B gives a range of life imprisonment with a minimum term of 15 to 25 years or an extended sentence of 30 to 40 years. The actual term that has to be served by the prisoner serving EDS before he is eligible for release is 20 to- 26.7 years. That is longer than the person sentenced to life imprisonment. – **Parole Board**

In addition, a number of judges at interview felt that the table should not include EDS options at all as this should be left entirely to the judge.

The Council agreed and removed the EDS sentences from the sentence table, and made the guidance at the top of the table clearer, in stating that the court should consider the dangerousness provisions in *all* cases, before imposing either a life sentence or an extended sentence.

Sentence levels

Whilst the Council agreed to remove EDS from the table, references to life sentences have remained. The reason is that the Council feels that in some of the category ranges, where an

offender has played a significant role and life (or multiple lives) have been endangered, a dangerousness finding is likely to be made, justifying a life sentence, and it is more appropriate to include such a sentence in the table rather than extremely lengthy determinate sentences. However, the guidance above the table makes clear that the court must make a dangerousness finding before such sentences become available.

Due to the changes made to the harm factors, the sentence levels have also been amended so that those offenders now falling into harm category 2 receive appropriate sentences. The original sentence table was drafted on the basis that only those falling into harm category 1 had endangered lives, and those falling into harm category 2 had either intended to cause widespread serious damage to property or economic interest, or had intended to cause substantial impact to civic infrastructure. Thus, the sentences for harm category 2 were significantly lower. The amendments have increased the sentences in A2 and B2. In addition, the sentences in B1 have also increased to bring them closer to A1. The Council concluded that the sentences in A1 were sufficiently high to cater for a case where multiple lives are risked and harm is very likely to be caused.

Aggravating and mitigating factors

The majority of respondents agreed with the aggravating and mitigating factors, however there were some proposals for change.

Aggravating factors

The Council added the following aggravating factors:

- Offender attempted to disguise their identity to prevent detection

This was a proposal made by a couple of respondents and the Council agreed that it was a useful addition.

- Offence committed whilst in prison

A number of respondents raised concerns about offenders becoming radicalised in prison. The Council has reflected on this concern and has added this factor into a number of the guidelines to ensure that, where offenders have engaged in terrorist activity in prison, they receive higher sentences.

The Council removed the following factors:

- Many lives endangered

Due to the amendments made to the harm model, this factor is no longer required.

- Taking or preparing to take equipment abroad to be used in violent action

The Council removed this factor as it considered that, depending on the circumstances of the case, this factor may already have been considered in the assessment of culpability, and its inclusion risked double counting. As the aggravating factors list is non-exhaustive a sentencer could still consider this element in sentencing if they have not already done so at step one.

Mitigating factors

A number of respondents were concerned about offenders who are coerced into carrying out terrorist acts, and felt that this was not sufficiently dealt with by the guideline. The Council therefore broadened the factor 'Offender coerced' to 'Offender involved through coercion, intimidation or exploitation'. This change has been made across the package of guidelines.

The Council also added the following mitigating factors to all of the guidelines in the package: -

- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

A number of respondents and judges at interview commented on the absence of these standard factors, and the Council agreed they are both important to all guidelines and should specifically be included even though the list of factors is non-exhaustive.

Explosive Substances

This guideline largely replicates the Preparation of Terrorist Acts guideline and so the changes that have been made to the earlier guideline have been replicated here.

Encouragement of Terrorism

Culpability factors

The culpability factors were liked by most respondents, but a small number of changes have been made in light of the comments received.

The first minor change was to the second culpability factor in A which has been amended to 'Intended to encourage others to engage in **any form of** terrorist activity', due to a comment made by the Home Office:

The narrative and culpability factors helpfully make clear that this offence can be committed intentionally or recklessly, and that the encouragement of terrorism can include its glorification. Although I appreciate that this is implicit, I thought it may be helpful to also make explicit that the offence need not be linked to any particular act of terrorism (as opposed to acts of terrorism generally), and that it is irrelevant whether any person is in fact encouraged or induced to commit, prepare or instigate an act of terrorism. – **Home Office**

The second change was to culpability B as a result of CPS comments. The CPS felt that the factor needed to better capture the type of dissemination that could take place. Dissemination to a large audience may be harmful as, if an offender shares information encouraging terrorism widely enough they are likely to find someone who will respond or react to it. However, dissemination to a smaller but select group might be just as damaging. For example, where an offender uses social media to disseminate information and shares it with a small group of likeminded supporters of terrorism there is an increased possibility of someone in that group being encouraged to take action than there would be if the material was shared with a small number of the general population. For that reason, the Council amended the factor to:

'... published statement/ disseminated publication widely to a large or targeted audience (if via social media this can include both open or closed groups)'.

Harm factors

The harm factors had included the factor 'Evidence that others have acted on or been assisted by the encouragement' in the top category of harm. On reflection the Council decided that this factor should be amended to reflect the type of activity that the other person had been engaged in, as activities that endanger life are clearly more serious than other types of activity. The Council

therefore amended the top factor to 'Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life', and added a new factor into Harm category 2: 'Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life'.

Further changes were made to the harm factors due to a concern raised by the Assistant Commissioner, Mark Rowley, that the existing harm factors did not sufficiently relate to the severity of the material. The Assistant Commissioner spoke about material which provided direct instructions about how to carry out an act, as opposed to other content which simply encouraged support for terrorism. The Council thought that these were helpful considerations and so made appropriate changes to the guideline.

Sentence table

A number of respondents suggested that more of the guidelines should include non-custodial sentencing options at the lower end of seriousness, as community based interventions may be more appropriate than short custodial sentences and may better rehabilitate offenders. The Council agreed with this point and has included a high level community order to the bottom of the range for this guideline.

Aggravating and mitigating factors

Aggravating factors

The Council has added the following factors to the guideline:

- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/ or avoid or impede detection

This factor was already in the Preparation of Terrorist Acts guideline and the Explosive Substances guideline. A number of respondents felt that it would be equally as relevant in this guideline.

- Offender attempted to disguise their identity to prevent detection
- Offence committed whilst in prison

These two factors have been added for the same reasons as set out under the Preparation for Terrorist Acts guideline (see page 17).

Mitigating factors

The following three factors have been added across all of the guidelines, as discussed above (see page 18):

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Proscribed Organisation – Membership

Culpability and harm factors

There was widespread agreement amongst respondents with the culpability and harm factors in this guideline, and therefore no changes were made.

Sentence table

A number of respondents suggested that more of the guidelines should include non-custodial sentencing options at the lower end of seriousness (see page 21). The Council agreed with this point and included a high level community order option at the bottom of the range for this guideline.

In addition, a number of respondents commented that the sentence for culpability B cases should be amended so that the starting point sits evenly within the range. For that reason, the Council raised the upper part of the range from 6 years to 7 years.

Aggravating and mitigating factors

The only amendments made to these factors are those that have been made to all of the guidelines in this package.

The Council has added 'Offence committed whilst in prison' to the aggravating factors, and added the following mitigating factors:

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

A couple of respondents queried the inclusion of the mitigating factor 'Unaware that organisation was proscribed' on the basis that ignorance of the law does not amount to a defence. However, the Council considered that it was a factor relevant to seriousness and thus should mitigate a sentence, where the court can be satisfied that the offender was truly unaware.

Proscribed Organisations – Support

Culpability factors

A number of the changes made to culpability were minor, aimed at making the factors a little clearer. The factors in culpability B had previously included:

- Specifically targeted audience in an attempt to gain significant support for organisation
- Targeted a wide audience in an attempt to gain significant support for organisation

On reflection the Council felt whether the offender targeted a wide audience or targeted a specific, perhaps more receptive group, was irrelevant. The issue was that they were intending to gain significant support for the organisation, so the factors were removed and replaced by one factor: Intended to gain widespread or significant support for organisation.

Harm factors

The Council added the following harm factors to harm category 1 and 2:

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

These factors appear in the 'Encouragement' guideline, and could equally apply to this type of offence, where an offender is encouraging the activities of a proscribed organisation.

The addition of the second factor described above has led to an expansion of the harm model into three levels of harm.

Sentence table

The majority of respondents agreed with the sentences, but the sentence table has been amended to reflect the change to the harm model from two to three levels.

In addition, for the reasons set out above, the Council has amended the bottom of the range to include a high level community order.

Aggravating and mitigating factors

The only amendments made to these factors are those that have been made to all of the guidelines in this package.

The Council has added 'Offence committed whilst in prison' to the aggravating factors, and added the following mitigating factors:

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Funding

Culpability factors

The majority of respondents agreed with the culpability factors and so no changes have been made.

Harm factors

Only minor changes have been made to the harm factors. The main change was the removal of the factor 'Use or provision of false or fraudulent identification' from step one. This factor is now at step two. The Council considered that the initial assessment of seriousness should focus on the purpose of the funding, and any other matters should be dealt with as a step two consideration.

Sentence table

The Justice Select Committee queried the reason why the Council had gone to the statutory maximum in the sentencing table for this guideline, rather than following our usual approach of allowing a degree of 'headroom' for sentencers to sentence outside of the range in exceptionally serious cases.

In a departure from its normal approach, the Council proposes sentencing ranges that are up to the statutory maximum for the offences of funding terrorism and failure to disclose information about acts of terrorism. In contrast, for five other offences, the proposed sentencing ranges are slightly below the statutory maximum, to allow the courts a small amount of "headroom" to sentence above the range in exceptionally serious cases. For example, the offences of membership of a proscribed organisation and support for a proscribed organisation both carry a maximum sentence of 10 years' custody, while the guideline proposes a sentencing range up to nine years' custody. We believe that the latter approach is preferable, as it gives more flexibility to sentencers in dealing with particularly grave offences where the culpability and harm factors go beyond circumstances that have been envisaged by the guideline. We recommend that the Council reconsider the upper limit of the sentencing ranges for the two offences where the statutory maximum is currently proposed. **Justice Select Committee**

The Council reflected on this point and reduced the top of the range to 13 years.

In addition, for the reasons set out above, the Council has amended the bottom of the range to include a high level community order.

Aggravating and mitigating factors

Aggravating factors

One respondent requested a further aggravating factor:

In relation to these offences, the act often occurs where individual members of the public are duped into believing that they are donating to a bona fide charity, only for the money to be sent to further the cause of terrorism. I am of the view that this dishonesty should be reflected as an additional aggravating feature in the table. – **Umar Azmeh (Academic)**

The Council agreed with this point and added the factor, 'Misrepresenting nature of organisation'.

In addition, the Council added the following aggravating factors to the guideline:

- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/ or avoid or impede detection
- Indoctrinated or encouraged others

Both of these factors appear in other guidelines within the package and a number of respondents queried their omission from this guideline.

Mitigating factors

As with the other guidelines in this package, the Council has added the following mitigating factors;

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Failure to Disclose

Culpability factors

A number of respondents queried the culpability factors, and suggested that they should give greater consideration to either the type of information held by the offender or the extent of the offender's knowledge.

“For example, an offender who has seen his brother looking at websites on bombmaking, compared with case study 11 in the consultation paper where the offender knew that his brother was planning a major terrorist attack. The latter is obviously much more significant, but no differentiation is made by the guideline.” – Academic at roundtable consultation event

Section 38B of the Terrorism Act 2000 provides that where a person has information which he knows or believes might be of material assistance in either preventing the commission by another person of an act of terrorism, or in securing the apprehension, prosecution or conviction of another person, in the UK, for an offence involving the commission, preparation or instigation of an act of terrorism he commits an offence if he does not disclose the information as soon as reasonably practicable.

The Council therefore agreed that the extent of the offender's knowledge will already have been considered as a relevant factor in the conviction, given that the offender must have had knowledge that the information was useful, or of material assistance in order to be convicted. The Council concluded that the significance of the information withheld should be the main consideration when deciding the appropriate level of culpability, and so changed the culpability factors accordingly.

This change to the culpability factors led to a change in the culpability model as it now has three rather than two levels.

Harm factors

The majority of respondents agreed with the harm factors and so no changes have been made.

Sentence table

The sentence table had to change due to the change in the culpability model from two levels to three.

In addition to these changes the Council, having considered the points raised by the Justice Select Committee, set out above at page 26, also reduced the top of the sentencing range from the statutory maximum of 5 years down to 4 years 6 months.

The Council also, for the reasons set out above, amended the lowest range to include a high level community order.

Aggravating and mitigating factors

The only amendments made to these factors are those that have been made to all of the guidelines in this package.

The Council has added 'Offence committed whilst in prison' to the aggravating factors, and added the following mitigating factors:

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Possession for Terrorist Purposes

Culpability factors

The London Criminal Courts Solicitors' Association proposed that the first factor in culpability C should read 'Possession of article(s) indicates that offender has engaged in limited preparation toward terrorist activity' rather than 'very limited'. The Council agreed and has made the change.

No further changes have been made to the culpability factors as the majority of respondents agreed with these.

Harm factors

Many of the guidelines treat endangerment of life as a more serious harm factor than substantial damage to property, the economy or the civic infrastructure, however this guideline had included both types of harm in the top category. When reflecting on this guideline the Council concluded that a greater gradation of harm was appropriate. For that reason, the Council has added a third harm category and separated harm into endangerment of life and other types of serious harm, leaving the third category for other cases.

In addition, having added the consideration of 'likelihood of harm' to the Preparation of Terrorist Acts guideline, the Council decided that it would also fit well in this guideline. Offenders convicted of these offences must have been in possession of an article in circumstances that suggest that their possession is for a purpose connected with an act of terrorism. It seems appropriate, therefore, to consider how likely that offender was to cause harm, as the 'Preparation' guideline now does.

Sentence table

The change to the harm model to include an additional level has required a change to the sentence table. The Council has increased the starting point of A1 on the basis that these cases now only include those where life has been endangered.

Aggravating and mitigating factors

Aggravating factors

The Council has added a number of factors that are present in the Preparation of Terrorist Acts guideline, and will equally apply to this guideline:

- Communication with other extremists
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/ or avoid or impede detection
- Offender attempted to disguise their identity to prevent detection
- Indoctrinated or encouraged others.

Mitigating factors

As with the other guidelines in this package, the Council has added the following mitigating factors;

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Collection of Terrorist Information

Culpability factors

A number of changes were made to the culpability factors in this guideline as a result of the respondents' comments. The CPS expressed concern that many of the factors were so serious that offences involving those levels of culpability would more likely have been charged with an offence of Preparation of Terrorist Acts or Possession for Terrorist Purposes.

The Council also reflected on comments by a number of other respondents who were concerned that the culpability factors were too closely linked to the proximity of a specific act of terrorism.

Harm factors

Having made the changes to the harm model in the Possession for Terrorist Purposes guideline the Council decided that similar changes would be appropriate here. The Council, therefore, expanded the model to include three levels of harm, separating out harm which endangers life and making that the most serious. The Council also added in the concept of 'likelihood of harm'. The Council considered it particularly important for this guideline as the offence does not require an offender to have gathered the information for terrorist purposes. There may, therefore, be offenders without terrorist motivations who gather information out of curiosity, who are highly unlikely to ever use or allow the information to be used for a terrorist purpose. This ought to be reflected in the sentence that is received.

Sentence table

In expanding the harm model to three levels the sentencing table had to also be amended.

In addition to this change the Council has also, for the reasons set out above, amended the lowest range to include a high level community order.

Aggravating and mitigating factors

Aggravating factors

The Council has added the factor 'Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/ or avoid or impede detection' to this

guideline as a number of respondents commented that it appears in others within the package and would also be relevant to this guideline. In addition, the Council added the factor; 'Offence committed whilst in prison'.

Mitigating factors

The Council added the following standard mitigating factors:

- Offender involved through coercion, intimidation or exploitation
- Age and/ or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives.

Additional Guidance

There are no changes to the additional guidance section of the package. Almost all respondents agreed with its inclusion and content.

Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses received from a variety of sources informed changes made to the definitive guideline.

The guideline will apply to all adults aged 18 or over sentenced on or after 27 April 2018, regardless of the date of the offence.

Following the implementation of the definitive guideline, the Council will monitor its impact.

Annex A: consultation questions

Q1: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q2: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q3: Do you agree that the higher sentences proposed by this table are justified? Do you have any other comments?

Q4: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q5: Do you have any views on the application of the guideline to case 1?

Q6: Do you have any views on the application of the guideline to case 2?

Q7: Do you have any views on the application of the guideline to case 3?

Q8: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q9: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q10: Do you have any comments on the sentence starting points or ranges in this guideline?

Q11: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q12: Do you have any views on the application of the guideline to case 4?

Q13: Do you have any views on the application of the guideline to case 5?

Q14: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q15: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q16: Do you have any comments on the sentence starting points or ranges in this guideline?

Q17: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q18: Do you have any views on the application of the guideline to case 6?

Q19: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q20: Do you agree with the proposed approach to the assessment of harm? Please give reasons where you do not agree.

Q21: Do you have any comments on the sentence starting points or ranges in this guideline?

Q22: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q23: Do you have any views on the application of the guideline to case 7?

Q24: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q25: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q26: Do you have any comments on the sentence starting points or ranges in this guideline?

Q27: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q28: Do you have any views on the application of the guideline to case 8?

Q29: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q30: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q31: Do you have any comments on the sentence starting points or ranges in this guideline?

Q32: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q33: Do you have any views on the application of the guideline to case 9?

Q34: Do you have any views on the application of the guideline to case 10?

Q35: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q36: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q37: Do you have any comments on the sentence starting points or ranges in this guideline?

Q38: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q39: Do you have any views on the application of the guideline to case 11?

Q40: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q41: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q42: Do you have any comments on the sentence starting points or ranges in this guideline?

Q43: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q44: Do you have any views on the application of the guideline to case 12?

Q45: Do you agree with the proposed culpability factors? Are there any that should be added or removed?

Q46: Do you agree with the proposed harm factors? Are there any that should be added or removed?

Q47: Do you have any comments on the sentence starting points or ranges in this guideline?

Q48: Do you have any comments on the increased sentence starting points or ranges in the table above?

Q49: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons.

Q50: Do you have any views on the application of the guideline to case 13?

Q51: Do you agree with the Council's proposed approach in the event of any future increase in sentencing powers?

Q52: Do you have any views on the guidance to be included with this package of guidelines?

Annex B: consultation respondents

1. Parole Board
2. Mr Justice Andrew Edis
3. HHJ Greg Dickinson QC
4. Mark Rowley, Assistant Commissioner, Counter-Terrorism Policing
5. CPS
6. Lyndon Harris
7. Lord Chancellor
8. Attorney General
9. Candre FiaCandre, member of the public
10. Leah Simms, Interserve Citizens Service
11. Legal Committee of HM Council of District Judges (magistrates' courts)
12. HHJ Rebecca Poulet QC
13. Transition to Adulthood Alliance
14. Home Office
15. Professor Peter Hungerford-Welch
16. Dr Jonathan Bild
17. Youth Justice Board
18. Professor Mike Hough
19. Criminal Law Solicitors Association
20. David Jamieson, Police and Crime Commissioner
21. Rory Kelly, Editor, Oxford Human Rights Hub Blog
22. Professor Nicola Padfield
23. London Criminal Courts Solicitors' Association
24. Professor Clive Walker
25. Umar Azmeh
26. Justice Select Committee

