Sentencing Council

Terrorism Guidelines

Response to consultations

July 2022

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Foreword

On behalf of the Sentencing Council I would like to thank all those who responded to one or both of the consultations on revisions to the terrorism guidelines held in 2019 and 2021-2022. I am also grateful to the members of the judiciary who participated in the research exercise undertaken in 2021 to test the revised guidelines.

The Council carefully considered the range of views represented in responses to the consultations and the findings from the research with judges and as a consequence changes have been made to the proposals. The detail of those changes is set out in this document.

The changing nature of the offending covered by these guidelines and the various amendments to legislation in response to those changes has made developing and revising these guidelines challenging for all concerned. I hope that the revised guidelines will provide judges with comprehensive guidance in the often difficult sentencing exercises that result from this offending.

Lord Justice Holroyde

Chairman, Sentencing Council

Introduction

In March 2018 the Sentencing Council published a package of nine 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 of terrorism (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 proposed 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 12(1A)), 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 terrorism 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. The Council considered the issues raised in responses to the 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 and to publish all of the changes together.

2021-2022 Consultation

The Counter-Terrorism and Sentencing Act 2021 received Royal Assent in April 2021 and the Council considered how this legislation would affect the guidelines. In October 2021 the Council published the second consultation on revisions to the terrorism guidelines.

This consultation proposed changes to accommodate the legislation and made proposals for changes to the following guidelines:

- Preparation of terrorist acts (Terrorism Act 2006, section 5); introduction of the 'serious terrorism sentence'
- Explosive substances (terrorism only) (Explosive Substances Act 1883, section 2 and section 3); introduction of the 'serious terrorism sentence'
- Proscribed organisations – membership (Terrorism Act 2000, section 11); increase in maximum sentence from 10 to 14 years
- Proscribed organisations – support (Terrorism Act 2000, section 12); increase in maximum sentence from 10 to 14 years

In addition, the Council sought 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 substances (terrorism only) guidelines are compatible with case law and any forthcoming legislation.

Summary of research

As noted above, the changes consulted on in 2021 included guidance on:

- how to approach cases where, due to the involvement of undercover law enforcement agents (LEAs), there is no/minimal likelihood of the terrorist act being committed; and
- minimum terms, serious terrorism sentences and exceptional circumstances

To examine how the proposed guidance would be interpreted and the impact on sentencing practice, small-scale qualitative road testing took place in September and October 2021, with 11 judges ticketed for terrorism offences. Two hypothetical scenarios were developed, each testing different elements of the draft amended guideline. Each judge sentenced both scenarios, using both the existing and draft amended guidelines for the first scenario, and the draft amended guideline only for the second scenario, as this related specifically to the new minimum statutory sentence.

The findings from the research are covered in the relevant sections below.

Summary of responses

The first consultation which closed on 3 December 2019 received 14 responses, the second which closed on 11 January 2022 also received 14 responses. A full list of respondents is provided at Annex A.

Breakdown of respondents

Type of respondent	2019	2021/22
Charity/not for profit organisations	1	1
Legal professionals	3	3
Judiciary	3	4
Other	1	2
Academics	3	1
Government	2	1
Parliament		1
Prosecution	1	1
Total	**14**	**14**

The detailed changes to the individual guidelines are discussed below.

Collection of terrorist information guideline

Culpability factors

Section 58 Terrorism Act 2000 makes it an offence to collect, make a record of, or be in possession of information of a kind likely to be useful to a person committing or preparing an act of terrorism. The Counter-Terrorism and Border Security Act 2019 introduced new provisions to extend the offence to cover those who view material over the internet, streaming or downloading it. For this reason, changes were made to the culpability factors to include the phrase 'viewed or otherwise accessed over the internet.'

All respondents to the 2019 consultation agreed with the proposed amendments and the Council has therefore made the proposed changes to the guideline.

Sentence levels

The Counter Terrorism and Border Security Act 2019 increased the statutory maximum sentence for this offence from ten to 15 years.

The 2019 consultation paper included proposals to increase some sentences within the sentence table to reflect this increase. Seven out of the ten respondents who answered this question agreed with the increased sentences within the amended guideline. This included the Independent Reviewer of Terrorism Legislation, the Justices' Clerks Society, Crown Prosecution Service (CPS), Criminal Bar Association, and three magistrates.

Of those who disagreed, only one felt that the sentences should be higher:

> I believe that deterrence must be the primary effect considered in the sentencing of this offence because the potential for harm is so high and the national resources available to act to intercept potential offenders are limited. For deterrence to be effective therefore, sentencing levels should be increased across all harm categories. **Magistrate**

The other two felt they ought to be reduced:

> We welcome the fact that the Council is proposing a more limited range of increases to sentence ranges than it had originally suggested. However, even the more limited changes the Council is proposing at the higher end of seriousness will add to the increasing number of people in prison serving long sentences. This, together with the significant increases in sentences across the board for other offences included in this draft guideline, will exacerbate existing problems of overcrowding in the prison estate without any proven benefits in terms of deterrence or desistance from crime. **Prison Reform Trust**

The first general point is that the Sentencing Council should be much more hesitant about furthering so enthusiastically the general policy of longer and harsher sentences. The impact and fairness of this approach are unproven. So far as the mechanics have been tested, major problems have been found with issues of categorisation, prisoner disengagement, and the inability to devise suitable exits from particularly harsh and unsustainable prison regimes. Some attempts have now been made to research these issues … No solutions have been offered to the endemic problems of measuring impact and fairness. **Clive Walker (academic)**

The sentences included within the proposed sentence table continue to include community order options within the sentence range for offences falling into the lowest level of seriousness. However, the Council maintained that for serious offences of terrorism, custody is clearly going to be the most appropriate sentence.

With regard to the increase in sentences proposed by the revision, Parliament has introduced higher statutory maximum sentences and the Council has chosen to reflect this using a nuanced approach. The Council considered that it had to reflect the will of Parliament by introducing some increases to sentences however chose to do so in a limited way, not across all sentences within the relevant sentencing tables. This has resulted in only sentences at the upper end of seriousness being increased.

The Council, having considered the responses, has chosen to retain the sentences proposed in the 2019 consultation.

Encouragement of terrorism guideline

The Counter Terrorism and Border Security Act 2019 increased the statutory maximum sentence for this offence (contrary to sections 1 and 2 of the Terrorism Act 2006) from seven to 15 years. As this was such a significant increase to the sentencing powers of the court the Council considered that it justified changes across a wider number of sentences.

In response to its question for views on the proposed changes the Council received the same responses as those received for the Collection of terrorist information guideline changes.

The Council therefore took the same view that the proposals were a necessary approach to responding to the will of Parliament, whilst reflecting a nuanced approach and retaining the option of a community sentence for the least serious offences.

For that reason the Council has made no further changes to those proposed in the 2019 consultation.

Failure to disclose information about acts of terrorism guideline

The Counter Terrorism and Border Security Act 2019 increased the statutory maximum sentence for this offence (contrary to section 38B of the Terrorism Act 2000) from five to ten years. The Council considered that the five-year statutory maximum was particularly low for offending of this nature, especially in the most serious scenarios. The Council therefore proposed increases for the most serious offences, namely those falling into categories A1, A2 and B1.

Eight out of ten respondents agreed with the proposed sentences. The two respondents who disagreed were the same respondents who had disagreed with the changes in the Collection of terrorist information guideline (and for the same reasons). The Council has, therefore decided to keep the sentences proposed in the 2019 consultation.

Funding terrorism guideline

At the time of the 2019 consultation the Council was aware of a number of cases concerning section 17 Terrorism Act 2000 which focused on the extent to which the offender knew or suspected that the money (or property) would or may be used for the purposes of terrorism.

The current guideline did not include specific factors to cover this consideration. The Council therefore proposed adding an aggravating factor; 'Knowledge that the money or property will or may be used for the purposes of terrorism', and a mitigating factor; 'Offender did not know or suspect that the money or property will or may be used for the purposes of terrorism' to assist judges sentencing cases where these factors arise.

All respondents agreed with the factors, but the CPS also made the following comment:

> The CPS welcomes the further clarity provided by the aggravating factor: 'Knowledge that the money or property will or may be used for the purposes of terrorism'.
>
> For the mitigating factor we suggest 'reasonably' is added to factor in when explicit warnings may have been provided to an offender in advance:
>
> 'Offender did not reasonably know or suspect that the money or property will or may be used for the purposes of terrorism'. **Crown Prosecution Service**

As a result of these comments the Council decided to keep the proposed aggravating factor and amend the wording of the proposed mitigating factor to read:

- Offender did not know or reasonably suspect that the money or property will or may be used for the purposes of terrorism.

Proscribed organisations – membership guideline

Section 11 of the Terrorism Act 2000 states:

> (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.

The 2021 consultation proposed changes to the sentence levels for this offence to reflect the change in the statutory maximum sentence from 10 to 14 years.

Existing sentence table:

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

Proposed sentence table:

Culpability	A	B	C
	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** High level community order - 4 years' custody

There were several responses to this proposal:

> Parliament increased the maximum sentence, therefore, there should be provision for judges to impose the maximum sentence in cases where there is high level of seriousness, as opposed to limiting the maximum sentence for exceptionally serious cases. This will address the unintended issue where a defendant who falls in the highest category of offending could escape the maximum sentence after mitigating factors are applied. **Anonymous**

> As stated in the impact assessment of the legislation, the policy intention behind the legislation is that "serious and dangerous terrorism offenders spend longer in custody". However, the draft guidance as it is currently worded will result in offenders whose offending is less serious and dangerous also receiving longer custodial sentences. The

absence of an additional harm category and the narrow category ranges adopted in the draft guidance makes the contrast between the existing and proposed new guidance particularly stark. In particular, according to the revised guidance, offenders in culpability B and C will spend longer in custody then they would under the previous guidance. This is not the stated intention of the legislation and the guidance should be amended accordingly:

Culpability C: The starting point should remain 2 years. 3 years is illogical when the midpoint is 2 years.

Culpability B: The lower category threshold should remain 3 years. The starting point could be adjusted to the midpoint of 6 years.

Culpability A: The lower category threshold should remain 5 years. The starting point could be adjusted to the midpoint of 9 years. **Prison Reform Trust**

A magistrate disagreed with having a community order option at the bottom of the range for category C. Other respondents who commented, agreed with the proposed sentence levels. The Justice Committee specifically agreed with the inclusion of a non-custodial sentence in category C.

An issue that was not specifically addressed in the consultation was raised:

Given the new maximum sentence (14 years), it is worth considering that the offence under section 11 can be committed in two ways: by belonging to a proscribed organisation or by professing to belong. In Attorney General's Reference No 4 of 2002; Sheldrake v Director of Public Prosecutions, Lord Bingham observed that the meaning of profess in section 11 was far from clear, including whether the profession of membership had to be true; although Professor Clive Walker QC considers that the truth of the assertion is beside the point. In any event, the second aspect of the section 11 offence appears to capture conduct which is probably (a) less culpable and (b) a different harm from that caused by actual membership.

If the purpose of the sentencing guideline is to deal with sentencing for membership only, then it should say so. If it is intended to capture profession as well, then the distinction between membership and profession of membership should be reflected in some way within the guideline. **Jonathan Hall QC, independent reviewer of terrorism legislation**

The Council considered all of these responses carefully. On the issue of the offence being committed by professing to belong to an organisation, the Council noted that an offender who professes to belong to a proscribed organisation (but does not) would fall into culpability C: 'All other cases'. The Council was satisfied that this was the appropriate level. Taking account of all the responses the Council decided to retain the sentence levels consulted on.

Proscribed organisations - support guideline

Culpability factors

The offence of inviting support for a proscribed organisation (section 12 Terrorism Act 2000) was amended by the Counter Terrorism and Border Security Act 2019 to create a new additional offence (section 12(1A)) 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.

Prior to the introduction of section 12(1A), a person was guilty of the section 12 offence only if they *directly* invited support for a proscribed organisation.

In the 2019 consultation the Council proposed amendments to the culpability factors at Step 1 of the guideline to accommodate this new offence. The Council reflected that the existing culpability factors mainly involved intentional acts and that most section 12(1A) offences would, therefore, fall into culpability C (Lesser cases where characteristics for categories A or B are not present). However, there was one exception to this which was the first factor in culpability A (Offender in position of trust, authority or influence and abuses their position). The Council felt that this factor would now apply whether the offender's actions were intentional or reckless and that it was not desirable that both offenders should be treated alike.

For that reason the proposal within the consultation paper was to separate out this factor into intentional and reckless acts, with intentional acts appearing at the highest level of culpability (culpability A), and reckless acts at culpability B.

The majority of respondents agreed with the proposals however some concerns were raised.

The effect of the proposed amendment is to steer the sentencing judge from ever including an offender who has been convicted of the section 12(1A) offence in the highest Culpability bracket (A). This is because the offence will not qualify as an Intentional Offence, and the second ("persistent efforts to") and third ("encourages activities intended to") also appear to require intention.

The background to the enactment of the section 12(1A) Terrorism Act 2000 offence is the case of R v Choudhary and Rahman [2016] EWCA Crim 61 (see Counter Terrorism and Border Security Act 2019, Explanatory Notes, paragraph 25). Where individuals in positions of significant influence persistently express opinions or belief, reckless as to whether those in the audience will be encouraged to support a proscribed organisation (which the Court of Appeal in Choudhary and Rahman considered would not be an offence, leading to the enactment of the new offence), sentencers ought not to be discouraged from treating suitable cases as falling within Culpability A.

The section 12(1A) Terrorism Act 2000 offence requires proof of subjective recklessness. An outcome of the proposed change is that, even for cases in Harm Category 1, for

example where there is evidence that individuals have acted on or been assisted by the encouragement to carry out activities endangering life, the starting point will be limited to 5 years.

It is therefore suggested that the Culpability factor "Offender in position of trust, authority or influence and abuses their position" should not be split between "Intentional Offence" and "Reckless Offence". Instead, the fact that the offender has been convicted of the recklessness offence contrary to section 12(1A) Terrorism Act 2000 should be reflected in mitigating factors. This is not inconsistent with what the Council proposes in relation to the section 17 Terrorism Act 2000 offence. **Jonathan Hall QC, independent reviewer of terrorism legislation**

We believe that the addition of recklessness as a factor in culpability should be approached with extreme caution. We do not believe that the current draft guideline meets this test. Indeed, the addition of recklessness to culpability B speaks precisely to the concern highlighted by the JCHR of an academic speaking out in favour of the deproscription of proscribed organisations. Under the current draft guideline, this individual could potentially face a maximum of six years in prison.

The current draft guideline also fails to take account of the range of aggravating and mitigating factors which ought to apply when someone is deemed to have committed a reckless – as opposed to an intentional – offence. Relevant factors ought to include:

• Whether or not the defendant knew if the organisation was on the proscribed list

• The context for and motivation of the offence – eg support expressed for a proscribed organisation in the context of an educational setting and in the interests of furthering open debate and democratic accountability and scrutiny should at least be subject to mitigation, and arguably exempt from criminal prosecution entirely

• The extent to which the defendant took steps to mitigate or reverse the original reckless offence eg by deleting and / or retracting a tweet made in support of a proscribed organisation.

Therefore, rather than seeking to integrate the new recklessness offence into the existing guideline, we recommend that the new offence is drawn up as a separate guideline, so that the full range of factors relating to both culpability and aggravation / mitigation can be properly outlined. This should be subject to separate consultation, with a particular focus on understanding the implications for civil liberties and freedom of expression. **Prison Reform Trust**

The Council considered the responses and concluded that separating reckless and intentional acts so as to treat intentional acts as more serious within culpability is common to sentencing guidelines and an important factor in assessing seriousness. However, in seeking to address some of the concerns raised by the consultees, the Council agreed that some additional step 2 factors should be included.

For that reason, the Council has maintained the approach set out in the consultation at step 1 of the guideline, but has added the following factors to step 2 of the guideline:

Aggravating factors

- Used multiple social media platforms to reach a wider audience (where not taken into account at step one)
- Offender has terrorist connections and/ or motivations

Mitigating factors

- Offender has no terrorist connections and/ or motivations
- Unaware that organisation was proscribed

Sentence levels

The 2021 consultation proposed changes to the sentence levels to reflect the change in the statutory maximum sentence from 10 to 14 years.

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

The Council did not propose increasing all sentences on the basis that the intention of Parliament could be met by ensuring that the most serious offenders receive higher sentences. The categories marked with an asterisk* 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 similarly had its range broadened, although its starting point remained the same.

Responses to the proposed new sentence levels were generally supportive, including from the Prison Reform Trust. An anonymous respondent thought that the range for category A should go up to the statutory maximum for this offence as well and a magistrate objected to a community option at C3. The Council of HM Circuit Judges agreed with all sentences apart from C1 on the grounds that the discrepancy between the starting points in C1 and B1 is too great.

Two respondents suggested that the sentence levels for this offence (section 12) should be more closely aligned to the levels for the membership offence (section 11).

We have considered carefully the Sentencing Council's proposed amendments to the relevant sentencing guidelines for the offences at sections 11 and 12 of the Terrorism Act 2000 (membership of a proscribed organisation and support for a proscribed organisation, respectively) and would ask the Council to consider whether the sentence levels within these guidelines should be more closely aligned. The invitation and expression of support for proscribed organisations can pose a significant threat to national security, including through the effect this can have on others, for example by influencing individuals to travel abroad to fight for such an organisation. This remains the case even when that support is expressed recklessly by the offender. Under the Council's current proposals, some of the starting points and category ranges for the offence of support of a proscribed organisation remain unchanged from the existing guidelines, potentially including cases where there is evidence that others have acted on or been assisted by the encouragement to carry out activities. We believe closer alignment with the section 11 guideline will help avoid potential inconsistencies in sentences imposed for these two offences and better reflect the potential threat behind all forms of such offending, including so-called 'lesser' categories of support. **Ministry of Justice**

The sentence table for "support" includes nine categories and the Council proposes to not increase all of the categories but rather to focus on the most serious offenders receiving tougher sentences. The Committee would suggest that the consultation should have included a more detailed explanation of why the Council was taking a different approach to reflecting the change in the statutory maximum for "support" as opposed to "membership" of proscribed organisations. We support the Ministry of Justice's position set out in its response that it would be preferable to align the two offences and to increase the starting point and category ranges for all categories other than the least serious type of case. In the least serious type of case we agree that the category range should stay the same and that a non-custodial sentence should remain available. **Justice Committee**

The Council gave very detailed consideration to these points. The Council noted that although the legislation draws a distinction between support and membership, in reality that distinction is not always clear cut. Nevertheless, the Council felt that it was difficult to see how the sentences for these two guidelines could be aligned more closely when they are structured differently (one has three levels of harm and the other only one). The Council considered that the concern raised by the Ministry of Justice seemed to relate to

cases of medium harm and felt that this could be addressed by broadening the range for B2 to 3-7 years. The Council also decided to broaden the range for C1 to 2-5 years to avoid a gap between B1 and C1.

The revised sentence table will therefore read:

	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** 2-5 years custody
2	**Starting point** 8 years' custody **Category range** 6-9 years custody	**Starting point** 4 years' custody **Category range** 3-7 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

Preparation of terrorist acts guideline

This offence is contrary to section 5 of the Terrorism Act 2006. In the 2021 consultation the Council proposed:

- adding guidance for judges in cases where the involvement of law enforcement authorities means that the terrorist act could not be completed,
- expanding and extending the text above the sentencing table to provide for the introduction of 'serious terrorism sentences', and
- some changes to the sentence table

Guidance on the involvement of law enforcement

The Council proposed the addition of guidance to assist judges sentencing cases which feature the involvement of law enforcement authorities. 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).

The Council consulted on additional text to appear at Step 1 of the guideline before the culpability and harm factors.

Most respondents were generally content with the proposals but there were some disagreements and suggestions for changes.

The problem is that the current formulation has a myopic focus on the offender and fails to take account of other circumstances, especially the role of state agents. To see this purely through the prism of culpability and harm on the part of the offender is too narrow, especially as the draft guideline as to 'culpability' effectively dismisses LEA involvement as a relevant factor at all. Furthermore, the proposal with relevance to 'harm' includes the idea that any mitigation depends purely on timing and again ignores the nature of the involvement of the LEA.

Above all, and as a straightforward consideration which might be reflected upon for elaboration in the guidance, the other circumstances should include the ethical consideration of whether there has been compliance with the rules and regulations about Covert Human Intelligence Sources …

The wider perspective to be taken into account relates to the ends of criminal justice which surely should be served by sentencing. In this way, the behaviour of the LEAs remains of relevance even though the condemnation of the offender is the prime issue. Account should be taken of the common category of '"probabilistic offenders" who will in the future commit the offense outside an undercover operation with a probability less than one' (McAdams, R.H., 'The Political Economy of Entrapment' (2005) 96 Journal of Criminal Law and Criminology 107, 140). All efforts should be made to impose the rule of law and

respect for human rights on undercover LEAs. The executive and legislature have made a somewhat half-hearted effort earlier this year. Now is the turn of the Sentencing Council to consider further action in line with the expressed wishes of the judiciary. **Clive Walker (academic)**

We do not disagree but we do sound a note of caution about the juxtaposition of this passage within the Definitive Guideline. At the moment at Step One the shaded box entitled Harm states that "Harm is assessed based on the type of harm risked and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan". Where an LEA is involved there will now be a preceding box which will stipulate that the harm should be assessed not on the basis of the harm that was risked or that was likely to occur but on the basis of the harm the offender intended to cause and the viability of the plan. Is there a distinction between the harm intended and the harm risked? And if the viability of the plan is relevant to the risk of harm, why is it a separate consideration to the harm intended when an LEA is involved?

It might make more sense throughout Step 1 to refer to both the harm intended (subjective) and the harm that might foreseeably have been caused (objective) as both of these matters are specifically referred to in section 63 of the Sentencing Code as being relevant to an assessment of the seriousness of the offence in addition to any harm actually caused by the offender.

Alternatively, we wonder whether the passage in respect of LEA involvement might better read "in a case that involves an LEA, the harm should be assessed in the first instance by reference to the offender's intentions, followed by a downward adjustment at step 2 to reflect the fact that the harm did not occur. The extent of this adjustment will be specific to the facts of the case….[and so on as per the current draft]" Given the mens rea of the offence is one of intention anyway, might the box at the top of p.4 (the general harm guidance) read "Harm is assessed based on the type of harm intended and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan".

Also, the section in the new proposed box about the discount that will be available to an offender who voluntarily desists at an early stage should presumably apply whether an LEA has been involved or not. Why should the lone defend who abandons his preparations be denied the benefit of a discount when a defendant who has unwittingly allied himself with an LEA and who does likewise could receive a substantial discount? **Criminal Bar Association**

Jonathan Hall QC, the independent reviewer of terrorism legislation, agreed with the guidance but pointed out that the proposed wording would not apply to MI5 officers as MI5 is not a law enforcement authority. The CPS agreed and suggested that the guidance should apply to both law enforcement authorities and intelligence organisations.

The proposed wording was tested in research with judges. When sentencing a scenario involving undercover LEAs the assessment of harm was more consistent using the revised guideline compared to the existing version. Using the revised guideline, most judges assessed harm as category 1 – which was what was expected. The judges were generally positive about the proposed wording but there were suggestions for improved clarity.

The Council considered the findings from the research and the responses to the consultation and has modified the guidance to read:

Notes for culpability and harm

In some cases, law enforcement authorities or intelligence organisations (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. In such cases, 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 (disregarding the involvement of the LEA), 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 fact that a co-conspirator was an LEA or the offender was under surveillance, 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.

Serious terrorism sentences

This is a new type of sentence that carries a minimum penalty of 14 years' custody unless exceptional circumstances apply. The Council also proposed new guidance and principles for judges to follow when considering whether there may be exceptional circumstances that justify a departure from that sentence.

Respondents to the consultation were generally content with the proposed wording above the sentence table on serious terrorism sentences. The Prison Reform Trust referred to their opposition to the introduction of serious terrorism sentences and their concerns relating to the regime extending to the sentencing of children and young adults. The Council noted that these concerns were outside the ambit of the guideline which had to reflect the reality of the legislation. There were some suggestions from the Criminal Bar

Association to improve the clarity of the wording. The Council agreed with those suggestions.

The revised wording is:

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 must 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 impose a sentence in accordance with 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).

Sentence levels

The consultation recommended that the sentence table for this offence should remain largely unchanged. The only change recommended to sentence levels was to the category range for C1 from: life imprisonment with a minimum term of 10-20 years to: life imprisonment with a minimum term of 14-20 years. The consultation stated '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'.

Several respondents disagreed:

I do not agree that the range should start at 14 years (up from 10 years). The reasoning provided in the consultation document is that the harm category ('multiple deaths risked and very likely to be caused') is essentially the same as the statutory criterion for a serious terrorism sentence, and that it is 'hard to imagine' that a serious terrorism sentence will not be merited for a case falling within C1.

However, 'multiple deaths risked and very likely to be caused' is not the only criterion under section 282B(3) of the Sentencing Code. In addition, the offender must have been, or ought to have been aware, of that likelihood. It is possible that although the harm objectively risked by a plot is the same, the harm may have been differently foreseeable to different co-defendants. The fact that a 14-year minimum is imposed for those who satisfy the statutory criteria is not a reason for raising the bottom of the range for those who do not. **Jonathan Hall QC, independent reviewer of terrorism legislation**

> It is hard, but not impossible, to imagine such a scenario. The guideline should not assume away such cases, and the risk of imposing a disproportionate sentence as a consequence. We note that Jonathan Hall in his response to the consultation expresses similar reservations about this section of the draft guidance. We hope that Council will be persuaded to amend it. **Prison Reform Trust**

> Given that it is possible that a defendant may have met the criteria for a C1 sentence but not the statutory criteria for a Serious Terrorism Offence we would agree that it is sensible to keep the existing category range. **Justice Committee**

The Council was persuaded by these arguments and agreed to leave the range for C1 at life with a minimum term of 10 to 20 years.

The consultation noted that the way in which the minimum term is to be calculated when imposing a life sentence for certain terrorism, violent and sexual offences has changed to take account of changes to release provisions meaning 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. It was also anticipated that the Police, Crime, Sentencing and Courts Act would prescribe the approach that judges should take in setting the minimum term.

The existing Preparation of terrorist acts and Explosive substances (terrorism only) guidelines included life sentences with specified minimum terms within the sentencing table. The consultation document pointed out that 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 sentences given that, for the most serious cases, life sentences are generally inevitable. The Council put forward the view that the sentencing levels remain correct for these offences and the minimum terms in the existing sentence tables should not be amended to reflect the change to the approach that is now required when setting a life sentence minimum term for certain offences.

Aside from one anonymous respondent who stated that sentences should be increased, all those who responded to this question in the consultation agreed with the Council's proposed approach.

The Council has therefore decided not to alter the minimum terms within the sentence table.

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

The consultation proposed a new step 3 in the guideline to give guidance on minimum terms, serious terrorism offences and exceptional circumstances

There was general agreement from respondents with the proposed step 3. The Council of Her Majesty's Circuit Judges agreed with the guidance but noted an apparent error:

> the current wording of the first paragraph under the heading "Principles" appears to contain an error in the way in which a Serious Terrorism Sentence is considered – should this not read "Circumstances are exceptional if the imposition of the minimum term (in the

case of a life sentence), or the imposition of the Serious Terrorism Sentence would result in an arbitrary and disproportionate sentence" – rather than the current wording which is "or not imposing the Serious Terrorism Sentence would result in an arbitrary and disproportionate sentence."? **Council of HM Circuit Judges**

Several respondents commented on the reference to the intention of Parliament and deterrence:

I do not agree with the reference to deterrence in, "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". There is no evidence that the serious terrorism sentence provisions have a deterrent purpose and given the cohort of offenders in question (terrorist offenders who have risked multiple deaths) it is highly unlikely that they will be deterred by the prospect of a statutory minimum term of 14 years. It is much more likely that the provisions have an incapacitative purpose, by ensuring that offenders are held in prison for longer. **Jonathan Hall QC, independent reviewer of terrorism legislation**

Special consideration should be given in the guidance to age and / or lack of maturity as a factor which may indicate exceptional circumstances for not imposing an STS, particularly when an STS is being considered for an offender aged 18-25.

Furthermore, we recommend the removal of the following paragraph:

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.

Within the context of specific sentencing guidance, it seems inappropriate and potentially bias for the Sentencing Council to make a general warning about the constitutional position of the courts in relation to Parliament. A warning against 'too readily accepting exceptional circumstances' may have the impact of making courts too risk averse, and failing to accept exceptional circumstances in cases where it would otherwise be justified in doing so. In the absence of more specific guidance on what counts as 'truly' exceptional, it should be for the courts to decide what counts as exceptional circumstances and whether the imposition of an STS would result in an arbitrary and disproportionate sentence.

Furthermore, there is simply no evidence that mandatory minimum terms such as these have any kind of deterrent effect on offenders. Therefore, it would be highly unlikely that a ruling by a court in relation to a particular case would have any impact on the general deterrent purpose of the sentence. **Prison Reform Trust**

We support the inclusion of the guidance in Step 3 to remind the courts not to undermine the intention of Parliament by too readily accepting exceptional circumstances. We welcome the inclusion of reasoning that sets outs the principles that explain what should and should not count as exceptional circumstances. The consultation could have included a more detailed explanation of the reasoning behind the inclusion of this guidance in relation to this particular offence. A more detailed explanation would assist the Committee

in understanding the case for more detailed guidance on statutory criteria in other guidelines. The Council could also consider including examples in the guideline to illustrate what scenarios might count as exceptional. **Justice Committee**

We agree although we consider it would be best to remove the statement that one or more lower culpability factors or one or more mitigating factors cannot amount to exceptional circumstances on their own because that is too prescriptive. It is a mitigating factor that the offender has a mental disorder that substantially reduces his culpability for his offending but to say that a severe mental disorder on its own cannot amount to exceptional circumstances but it could if taken into account alongside any other relevant matter that does *not* appear in the list of the mitigating features could lead to unfairness. It could also lead to arguments over whether certain circumstances relied upon by the defence as exceptional fall within the rubric of one of the mitigating factors and are therefore outside the court's consideration unless they can be allied to other circumstances that do not. In making this suggestion we recognise that the changes referred to in the Consultation Paper reflect the structure of the Definitive Guideline for Firearms Offences where the issue of exceptional circumstances also arises. Nevertheless, we believe that as with sentencing exercises for other offences where there is an exceptional circumstances route away from a mandatory sentence the courts are well-placed to judge whether those circumstances exist without the benefit of this particular type of assistance. **Criminal Bar Association**

In research, judges were generally positive about the proposed step 3, although there were suggestions for changes.

The Council considered all of the points raised by respondents and the comments from judges in the research. Taking the various points in turn:

- The Council agreed that there was an error as pointed out by the Council of HM Circuit Judges (and by a judge in research) and has adopted the wording suggested;
- The Council agreed with Jonathan Hall QC and the Prison Reform Trust that deterrence is not a purpose of the provisions and has amended the wording to remove the reference to deterrence;
- The suggestion from the Prison Reform Trust that special consideration should be given to age and/or lack of maturity in the step 3 guidance was echoed by one judge in research who specifically said that step 3 should make some reference to age and immaturity. However, the Council noted that Parliament had explicitly applied the provisions to young adults and therefore chronological age alone could not amount to an exceptional circumstance.
- The Council noted the Justice Committee's suggestion that the guidance should include examples of what might amount to exceptional circumstances but felt that by its very nature it would not be possible to try to identify what amounts to 'exceptional'.
- The Council felt that the Criminal Bar Association's comment may be based on a misreading of the guidance – it does not say that a single factor cannot amount to exceptional circumstances, only that the mere presence of a low culpability factor or mitigating factor is not in itself exceptional. The guidance specifically says that 'a single striking factor may amount to exceptional circumstances'.

A further issue that arose from the research was that there was apparent uncertainty among some of the judges as to the exact requirements of a serious terrorism sentence which suggested that it would be useful to spell this out at step 3 (including a reference to the restrictions on the reduction for a guilty plea).

The revised version of step 3 is:

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** (section 323(3) of the Sentencing Code) **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) of the Sentencing Code to impose a serious terrorism sentence.

The minimum term cannot be reduced below 80 per cent of 14 years for a guilty plea (see step 5 – Reduction for guilty pleas).

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 and an extension period to be served on licence of at least 7 and no more than 25 years. (Sections 268C and 282C of the Sentencing Code). Where a serious terrorism sentence is imposed, the custodial term cannot be reduced below 80 per cent of 14 years for a guilty plea (see step 5 – Reduction for guilty pleas).

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

The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term (in the case of a life sentence), or imposing the serious terrorism sentence would result in an arbitrary and disproportionate sentence.

It is important that courts adhere to the statutory requirement and do not too readily accept 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).

Explosive substances (terrorism only) guideline

The 2021 consultation proposed the same changes to the Explosive substances (terrorism only) guideline and consultees repeated the points made above in relation to this guideline. The Council has therefore made the same changes to this guideline.

In addition, the Ministry of Justice made suggestions relating to this guideline:

> Regarding the explosives guidelines we would encourage the Council to consider adding an aggravating factor to the revised guidelines that would capture offenders who deliberately take steps to circumvent the legal controls in place for the purchasing of explosive precursors. We would also ask the Council to consider whether the guidelines adequately capture the harms caused by offences involving significant damage to infrastructure and recommend that the risks of substantial impact upon civic infrastructure, and widespread or serious damage to property or economic interests are designated a category 2 harm. Category 2 harm does not put these infrastructure target attacks above loss of life, but recognises the significant long lasting impact of these attacks on the economy and society. **Ministry of Justice**

The Council noted that the harm assessment for this guideline had been subject of considerable discussion and several revisions before the first (2017) consultation and again after consultation before the definitive guidelines were published in 2018. The Council was reluctant to make further changes that had not been consulted on and for which there were no cases on the issue. However, the Council considered the merits of the proposal relating to the harm assessment and concluded that cases where there was a high risk of (or actual) significant damage to infrastructure were likely to also represent a high risk of death and would therefore fall into at least category 2 in any event.

The Council considered the addition of an aggravating factor relating to explosive precursors and concluded that as the list of aggravating factors in non-exhaustive, in a case where this was a feature it would be open to the court on the facts of the individual case to take it into account and therefore no change was required.

Equality and Diversity

Both consultations invited comment on issues of equality and diversity. Most respondents did not comment on this point, but of those that did, two common themes emerged. One related to the paucity of reliable data on ethnicity of offenders for this offence and the other to the high proportion of terrorism offenders who are under the age of 30.

On the issue of data, respondents made suggestions that are largely outside the remit of the Sentencing Council. For example in response to the 2019 consultation:

> Recommendation 1: A cross-CJS approach should be agreed to record data on ethnicity. This should enable more scrutiny in the future, whilst reducing inefficiencies that can come from collecting the same data twice. This more consistent approach should see the CPS and the courts collect data on religion so that the treatment and outcomes of different religious groups can be examined in more detail in the future.
>
> Recommendation 2: The government should match the rigorous standards set in the US for the analysis of ethnicity and the CJS. Specifically, the analysis commissioned for this review – learning from the US approach – must be repeated biennially, to understand more about the impact of decisions at each stage of the CJS.
>
> Recommendation 3: The default should be for the Ministry of Justice (MoJ) and CJS agencies to publish all datasets held on ethnicity, while protecting the privacy of individuals. Each time the Race Disparity Audit exercise is repeated, the CJS should aim to improve the quality and quantity of datasets made available to the public.
>
> Recommendation 4: If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of 'explain or reform' should apply to every CJS institution.
> **Prison Reform Trust**

> As regards the more specific point about equality and diversity, even the Sentencing Council admits that the statistics regarding ethnicity should be 'treated with caution' (p.17). Indeed, it is highly dubious whether that particular table of data should be published at all, as it is so misleading given a 74% non-return rate. Further, to express with percentages a sample of 31 is also misleading. More work needs to be undertaken by the Sentencing Council before it can express any degree of confidence on the ethnicity point. In addition, there are two further related important inquiries which should be undertaken. On the surface, they seem to indicate discrimination, though without further work, one cannot be sure either way. One comparison relates to the practice of the CPS of charging white defendants (extreme right wing) with offences under the Public Order Act 1986 – especially s.29C (see https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016). On apparently similar facts, non-White defendants are charged with offences under the Terrorism Act 2006, ss.1 and 2, and so, with the help of the Sentencing Council, are sanctioned with much greater severity. The proscription of National Action shows that the boundaries of terrorism can encompass extreme right wing activities. The second comparison is between terrorism offenders in England and Wales (mainly for jihadist type offences) and those in Northern

Ireland (mainly for paramilitary offences relating to Northern Ireland politics). Several discrepancies have arisen over the years between these offenders, but they are becoming more evident now that the same changes are being laid. Until more solid work is undertaken, the claims by the Sentencing Council in Annex A will not be convincing.
Clive Walker (academic)

And in response to the 2021 consultation:

The overall increase in sentence lengths imposed by many of the provisions of the Counter-terrorism and Sentencing Act 2020 and the associated guidance will have disproportionate and negative impact on individuals from Asian/British Asian and Muslim individuals in particular.

The equality statement on bill acknowledges that "Asian/British Asian and Muslim individuals within the Criminal Justice System (CJS) have been disproportionately affected by terrorism legislation relative to the percentage of Asian/British Asian and Muslim individuals in the total population."[1] It puts this disproportionate impact down to trends which "reflect the terrorist ideologies prevalent in the UK, most notably Islamist Extremist and extreme Far Right terrorism." It concludes that the provisions of the bill are "unlikely to result in indirect discrimination within the meaning of the Equality Act as we believe they do not put people with protected characteristics at a particular disadvantage when compared to others who do not share those characteristics, and the overrepresentation of some groups within scope of this policy will reflect the nature of terrorism in the UK at any given point."

We believe this statement to be complacent in view of the increase in the number of Muslim prisoners in the last few years and the significantly more negative experience they report of their treatment by the prison authorities in comparison to other groups. We would urge the Council to do all that it can within its remit to mitigate the negative impact on Asian/British Asian and Muslim individuals the provisions of the Act are likely to have.

We are extremely concerned by the poor quality of the data provided on the ethnicity of terrorism offenders, particularly given the commitments made by the government in response to the Lammy review to improve the accuracy and transparency of data on ethnicity in the criminal justice system. The lack of data is particularly concerning because numbers involved are so low. It would have taken relatively little effort for the government to have examined each case to determine probable ethnicity in each case. It is hard to see how the Sentencing Council or any other agencies can provide adequate scrutiny of the impact of terrorism legislation and associated guidance on sentencing practice when the quality of data is so poor. We recommend urgent attention to this problem by the government.

Prison Reform Trust

Those proposed adaptations seem appropriate in accordance with the stated legislative policies which must of course be followed. It has, however, been pointed out in my earlier (2017) submissions to the Sentencing Council that its initial guidance as published in 2018 was unsatisfactory in various respects. Those still remaining defects include: its coverage

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886105/cts-equality-statement.pdf

in terms of offences; its faulty premises in terms of alleged seriousness or the inadequacy of contemporary judicial responses; and the failure to engage with the objectives of sentencing in regard to terrorism including in the light of prison and release regimes. The legislative policies themselves might also be criticised (and criticisms have been made by this author in Walker, C. and Cawley, O., 'De-risking the release of terrorist prisoners' [2021] Criminal Law Review 252-268), though it is recognised that the Sentencing Council has less room for manoeuvre.

Clive Walker (academic)

Some respondents were concerned about the sentencing of children and younger adult offenders for terrorism offences:

Furthermore, as highlighted in our answers above, we have particular concerns regarding the impact of the new provisions and associated guidance on young adults (aged 18-25) convicted of terrorism offences. We believe our proposals for how the guidance should be amended would go some way to mitigating the negative impacts on these groups.

Prison Reform Trust

Since the majority of terrorism offences committed by adults will be dealt with in the Crown Court, there is very little comment that I would wish to make on the proposed amendments to the guidelines for those offenders.

However, I feel it is important to draw the attention of the Sentencing Council to those youths who find themselves before the courts for involvement in offending under the Terrorism Acts. It is arguable that they represent both the most worrying cases and yet also those most likely to benefit from rehabilitative measures following a finding of guilt.

Whilst the proposed guidelines for adults will take all but the lowest level matters far beyond the powers of a magistrates' court, the Youth Court is likely to retain some severe cases due to the young age of the defendant having the effect of reducing the suggested sentence.

As has been previously recognised by the Senior Judiciary in the circumstances of serious sexual offending, it is generally considered more appropriate for young people to be dealt with in Youth Courts and subsequently monitored and supported by Youth Offending Teams. This letter does not seek to suggest that more cases should necessarily remain in the Youth Court but simply to pose the question whether the stark difference in sentencing regimes between it and the Crown Court is desirable in these most sensitive of cases?

As an example, there was recently an application by the Secretary of State in relation to a youth who was due to be released from a Young Offenders' Institute for the "training" portion of the Detention and Training Order imposed for terrorism offences. The application was to extend the period of detention on the basis that further work was required before the YOT could be satisfied that the risk posed to the community was reduced. In this case, the youth had been detained at a YOI as a radical supporter of far-right wing organisations but had become indoctrinated to Islamic extremism whilst incarcerated.

It is perhaps a matter for debate whether the resources and programmes available to the YOT or the Probation Service are more effective in these cases. However, the youth sentencing system appears to offer a more flexible safeguard in the form of the Secretary of State's ability to apply for a longer period of detention even after sentence where appropriate.

It is appreciated that the numbers of youths involved in such offending is relatively small, but perhaps a modified guideline would be of assistance to outline the very particular factors for consideration in the sentencing exercise for those under 18?

Paul Goldspring Senior District Judge (Chief Magistrate) of England and Wales

An individual respondent also suggested that a guideline for under 18s might be useful.

As noted on page 26 above, the Council noted that many of the concerns raised by the Prison Reform Trust relating to the application of serious terrorism sentences to young adults were outside the ambit of the guidelines which had to reflect the reality of the legislation.

The Council considered the point made by the Senior District Judge regarding a guideline for children and young people for terrorism offences. The volumes of cases sentenced involving under 18s are very low and the Council has only produced offence specific guidelines for sentencing children and young people for higher volume offences that have particular relevance to offenders under 18. The overarching Sentencing Children and Young People guideline would apply in the absence of an offence specific guideline. This states (at 6.46):

> When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.

The Council concluded that it could not justify developing a guideline for children and young people for terrorism offences.

Regarding the sentencing of young adults, the Council has made a small change to the relevant mitigating factor from:

- Age and/or lack of maturity where it affects the responsibility of the offender

To:

- Age and/or lack of maturity

This reflects the fact age and/or lack of maturity can affect both the offender's responsibility for the offence and the effect of the sentence on the offender. This is set out fully in the expanded explanation for the factor, but the Council felt it was important to remove the qualifying words from the factor on the face of the guidelines.

Conclusion and next steps

Following these two consultations the Council has revised eight of the nine terrorism guidelines:

- 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 of terrorism (Terrorism Act 2000, section 38B)
- Collection of terrorist information (Terrorism Act 2000, section 58)

The only guideline that has not been revised (save for the minor change to the mitigating factor relating to age/immaturity mentioned on page 33) is:

- Possession for terrorist purposes (Terrorism Act 2000, section 57)

As outlined above, the responses to the consultations have informed changes made to the guidelines.

The revised guidelines will be published on the Council's website (www.sentencingcouncil.org.uk) on 27 July 2022. They will apply to all adults sentenced for these offences on or after 1 October 2022 regardless of the date of the offence.

Following the implementation of the revised definitive guidelines, the Council will monitor their impact.

Annex A: consultation respondents

Alistair Borland

Anon

Anon

Criminal Bar Association

Criminal Sub-Committee of the Council of Her Majesty’s Circuit Judges

Crown Prosecution Service

Gary Knight

HM Prison and Probation Service

Individual

John Lawrence

Jonathan Hall QC

Justice Committee of the House of Commons

Justices' Legal Advisers and Court Officer's Service /Justices’ Clerks’ Society

Michael Taylor

Ministry of Justice

Prison Reform Trust

Professor Emeritus Clive Walker

Professor Lee Jarvis

Professor Nicola Padfield

Robert Wade

Senior District Judge