

Terrorism Offences Guideline Consultation

October 2019

Terrorism Offences Guideline

Consultation

About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From 22 October 2019 to 3 December 2019
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council
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- How to respond:** Please send your response by 3 December 2019 to:
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- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:
www.sentencingcouncil.org.uk
A series of consultation meetings is also taking place. For more information, please use the “Enquiries” contact details above.
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at:
www.sentencingcouncil.org.uk
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.
In addition, responses may be shared with the Justice Committee of the House of Commons.

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Why Terrorism Again?

The Sentencing Council issued a package of definitive terrorism guidelines in March 2018 which came into effect on 27 April 2018. At the time of developing the current guidelines, the Council was aware that the Government was contemplating changes to terrorism legislation which could impact on sentencing guidelines. At the time of publication, the Government was yet to announce the introduction of a Bill which might take forward the changes and for that reason the Council decided to go ahead and publish the current guidelines to ensure they could be used by sentencers in court as soon as possible.

The Council made clear then that if, in the future, the legislation did change in a way that impacts the guideline, the Council would endeavour to respond in a timely manner.

On 12 February 2019 the Counter Terrorism and Border Security Act received Royal Assent. This Act made significant changes to the terrorism legislation affecting the guidelines produced. The Council has, therefore, revised the relevant guidelines and seeks consultees' views on the proposed changes. The main changes include:

- Amendment to the culpability factors in the Proscribed Organisations – Support (section 12 Terrorism Act 2000) guideline to provide for offenders convicted of the new section 12(1A) offence of expressing supportive views for a proscribed organisation, reckless as to whether others will be encouraged to support it;
- Amendment to the culpability factors in the Collection of Terrorist Information (section 58 Terrorism Act 2000) guideline to provide for offenders convicted of the new offence of viewing/streaming terrorist information over the internet;
- Changes to the sentencing tables in the Encouragement of Terrorism (ss1 and 2 Terrorism Act 2006); Failure to Disclose Information About Acts of Terrorism (s38B Terrorism Act 2000), and Collection of Terrorist Information (s58 Terrorism Act 2000) guidelines to reflect the changes to the statutory maximum sentences;
- Additional guidance added to the Encouragement of Terrorism (sections 1 and 2 Terrorism Act 2006); Proscribed Organisations – Membership (section 11 Terrorism Act 2000); Proscribed Organisations – Support (section 12 Terrorism Act 2000); and Collection of Terrorist Information (section 58 Terrorism Act 2000) guidelines as

these offences now fall within scope for sentences for offenders of particular concern;

- Additional guidance added to the Preparation of Terrorist Act (s5 Terrorism Act 2006); Encouragement of Terrorism (sections 1 and 2 Terrorism Act 2006); Proscribed Organisations – Support (section 12 Terrorism Act 2000); and Collection of Terrorist Information (section 58 Terrorism Act 2000) guidelines as the new legislation made these ‘specified terrorism offences’ for which extended determinate sentences would apply.

In addition, the Council has chosen to make some minor changes to the Funding guideline to assist Judges to sentence cases where either the offender had knowledge that the money or property would or may be used for terrorism, or where the offender did not know or suspect that the money would or may be used for terrorism. This is an issue that has been raised in case law recently and so the Council has chosen to take this opportunity to assist sentencers by providing greater guidance.

During the development of the current guidelines the Council consulted widely on the broader principles of terrorism offences. The proposed revisions do not make changes to the approach taken in the current guidelines.

Culpability Factors

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

Section 12 Terrorism Act 2000 creates an offence of inviting support for a proscribed organisation. In addition, a person commits the offence if they arrange, manage or assist in arranging or managing a meeting which either supports a proscribed organisation; furthers the activities of a proscribed organisation; or includes an address from a person who belongs or professes to belong to a proscribed organisation. The offence can also be committed by an offender who addresses a meeting in order to encourage support for a proscribed organisation or to further its activities.

The Counter-Terrorism and Border Security Act 2019 introduced section 12(1A) which creates a new offence 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.

The culpability factors from the existing guidelines are set out below:

Culpability demonstrated by one or more of the following:

A

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

B

- Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation
- Intended to gain widespread or significant support for organisation
- Encourages activities intended to cause widespread or serious damage to property, or economic interests or substantial impact upon civic infrastructure

C

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

The full guideline can be seen here: <https://www.sentencingcouncil.org.uk/offences/crown-court/item/proscribed-organisations-support/>

Considering the existing culpability factors, most section 12(1A) offences would fall into culpability C as the majority of the factors include intentional rather than reckless acts.

The first factor in culpability A, 'Offender in position of trust, authority or influence and abuses their position', could however, apply to the new offence.

The Council therefore believes that this factor should be separated into two; one providing for offenders who use their position to directly invite support (culpability A), and one for offenders who use their position to express an opinion or belief in favour of a proscribed organisation and are reckless as to whether the audience will be encouraged to support the organisation. The Council believes the second factor should fall into culpability B as it indicates a less culpable offender. In addition, the Council has specifically included a second factor into culpability C; 'other reckless offences'. This will apply to other reckless offending where the offender is not in a position of trust authority or influence.

Culpability demonstrated by one or more of the following

A

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

B

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

C

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

Question 1: Do you agree with the change to the culpability factors in the Proscribed Organisations – Support guideline?

Collection of Terrorist Information (Terrorism Act 2000, section 58)

The existing guideline can be seen here:

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/collection-of-terrorist-information/>

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 have been made to the culpability factors to include the phrase 'viewed or otherwise accessed over the internet.'

In addition, the Council has chosen to remove the factor 'offender repeatedly accessed extremist material' from culpability B. The Council became concerned that those with no terrorist motivation, who simply clicked on extremist material on the internet out of curiosity, could now be prosecuted and might receive a disproportionately high sentence, especially once the sentences have been reviewed to accommodate the increased statutory maximum (as discussed from page 9 onwards). By removing this factor an offender who has repeatedly accessed extremist material will be sentenced in accordance with their motivation. For example, if the offender had accessed the material for use in a specific terrorist act they will fall into culpability A; whereas if they had no terrorist intent, and no terrorist connections or motivation they will fall into culpability C.

Question 2: Do you agree with the changes to the culpability factors in the Collection of Terrorist Information guideline?

Sentence Levels

The Government provided the following rationale for increasing the statutory maximum sentences:

The maximum penalties for a number of terrorism offences were established in the Terrorism Acts of 2000 and 2006. The terrorist threat has since changed, with individuals engaging in such conduct now likely to pose an increased risk of moving quickly on to attack planning, given the rapid trajectory of radicalisation now being observed. Increased maximum penalties better reflect the increased risk and the seriousness of these offences.

When the Council published its guideline in 2018 similar considerations were borne in mind. In the Council's consultation, published in October 2017, the Council stated that it was going to raise sentence levels for some types of offending above those levels set out in the leading Court of Appeal case of *R v Kahar & Others*¹:

The Council determined that, when considering these actions in the current climate, where a terrorist act can be planned in a very short time, using readily available items as weapons, combined with online extremist material on websites which normalise terrorist activity, and creates a climate where acts of terrorism can be committed by many rather than a few highly-organised individuals, these offences are more serious than they have previously been perceived. The Council believes that its proposals take account of the need to punish, incapacitate and deter.

For this reason, the Council is not proposing to increase sentence levels across the whole of the affected guidelines as it believes that the sentence levels were already set with the Government's aim in mind. Instead it is proposed to increase sentence levels for the most serious examples of offending, where there was no headroom to increase sentences before due to the statutory maximum.

¹ [2016] EWCA Crim 568

Collection of Terrorist Information (Terrorism Act 2000, section 58)

The existing guideline can be seen here:

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/collection-of-terrorist-information/>

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

Prior to the public consultation of the terrorism guidelines the Government announced its proposal to increase the statutory maximum for this offence from ten to 15 years. For that reason, at consultation, the Council included a second sentencing table with higher sentences in it to seek people's views. At that time the guideline looked quite different to how it ended up at publication, and had just two levels of culpability. The higher sentences table looked like this:

	A	B	C
1	Starting point* 10 years' custody	Starting point* 7 years' custody	Starting point 4 years' custody
	Category range 8-14 years custody	Category range 5-9 years custody	Category range 2 -6 years custody
2	Starting point* 6 years' custody	Starting point 4 years' custody	Starting point 2 years custody
	Category range 4-8 years custody	Category range 2-6 years custody	Category range 1-3 years custody

The changes made above represented an increase across all levels of seriousness. Not many of the consultees commented on the second sentencing table but a couple agreed, including the CPS and the Attorney General's Office. The London Criminal Courts Solicitors Association was the only respondent to provide any detailed feedback and they commented that an increase across the board does not necessarily reflect the will of Parliament and that we should have awaited the debate to see what the intention was.

The Council has now had the opportunity to consider the Government's purpose in increasing the statutory maxima as discussed above, and for that reason now proposes a more limited change to the sentence levels.

The Council proposes an increase to the sentence levels in A1, B1 and C1, which include cases where the offender was in possession of material which provides instruction for a specific terrorist activity endangering life where harm is very likely to be caused.

In addition, the Council proposes an increase to A2 which includes an offender who collected, made a record of, or was in possession of information for use in a specific terrorist act. The Council considers that these cases are sufficiently serious to justify an increase in sentence.

The proposed sentences can be seen below:

	A	B	C
1	<p>Starting point* 10 years' custody</p> <p>Category range 8 - 14 years custody</p>	<p>Starting point* 7 years' custody</p> <p>Category range 5-9 years custody</p>	<p>Starting point* 3 years' custody</p> <p>Category range 1-5 years custody</p>
2	<p>Starting point* 7 years' custody</p> <p>Category range 5-9 years custody</p>	<p>Starting point 4 years' custody</p> <p>Category range 3 - 5 years custody</p>	<p>Starting point 1 year 6 months custody</p> <p>Category range 6 months - 3 years custody</p>
3	<p>Starting point 5 years' custody</p> <p>Category range 3-6 years custody</p>	<p>Starting point 3 years' custody</p> <p>Category range 2 - 5 years custody</p>	<p>Starting point 1 years' custody</p> <p>Category range High level community order – 2 years custody</p>

Question 3: Do you agree with the change to the sentences in the Collection of Terrorist Information guideline?

Encouragement of Terrorism (Terrorism Act 2006, sections 1 and 2)

The existing guideline can be seen here:

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/encouragement-of-terrorism/>

The Counter Terrorism and Border Security Act 2019 increased the statutory maximum sentence for this offence from seven to 15 years. This is a significant increase to the sentencing powers of the court and justifies changes across a wider number of sentences.

The most significant change proposed by the Council is to A1 where the starting point has doubled from five to 10 years. An example of an A1 case is one where an offender, in a position of trust, authority or influence, intentionally abuses their position to encourage others and there is evidence that others have acted on, or been assisted by the encouragement to carry out activities endangering life. The Council considers that this is a very serious offence and warrants a significant sentence. This level of seriousness is similar to an A1 case of Collection of Terrorist Information (s 58 Terrorism Act 2000) or an A1 case of Possession for Terrorist Purposes (s 57 Terrorism Act 2000) which carry a starting point of 10 years (under the new proposals) and 12 years respectively. The Council, therefore considers this proposed change to be proportionate.

	A	B	C
1	Starting point* 10 years' custody Category range 7 - 14 years custody	Starting point* 7 years' custody Category range 4-9 years custody	Starting point 3 years' custody Category range 2-4 years custody
2	Starting point* 7 years' custody Category range 4-9 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* 4 years' custody Category range 3-5 years custody	Starting point 2 years' custody Category range 1-3 years custody	Starting point 1 years' custody Category range High level community order – 2 years custody

Question 4: Do you agree with the change to the sentences in the Encouragement of Terrorism guideline?

Failure to Disclose Information About Acts of Terrorism (Terrorism Act 2000, section 38B)

The existing guideline can be seen here:

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/failure-to-disclose-information-about-acts-of-terrorism/>

The Counter Terrorism and Border Security Act 2019 increased the statutory maximum sentence for this offence from five to ten years. The five-year statutory maximum was particularly low for offending of this nature. The current guideline goes up to 4 years 6 months to give sentencers as much sentencing range as possible whilst leaving a small amount of headroom for exceptionally serious cases.

Between 2008 and 2018 there were just ten offenders² sentenced for this offence. Of those two received the statutory maximum sentence of five years.

It is not proposed that all sentences across the guideline should be increased. The Council proposes an increase to just the upper levels of seriousness (A1, B1 and A2), and considers that the sentences in the other areas of the guideline are adequate for the level of offending being sentenced.

	A	B	C
1	<p>Starting point* 7 years' custody</p> <p>Category range 6 - 9 years custody</p>	<p>Starting point* 5 years' custody</p> <p>Category range 4 - 6 years custody</p>	<p>Starting point 2 years' custody</p> <p>Category range 6 months - 3 years custody</p>
2	<p>Starting point* 4 years' custody</p> <p>Category range 3-5 years custody</p>	<p>Starting point 2 years' custody</p> <p>Category range 6 months - 3 years custody</p>	<p>Starting point 1 year 6 months custody</p> <p>Category range High Level Community Order - 2 years custody</p>

² Where this was the principal offence. Source: Court Proceedings Database, Ministry of Justice.

The biggest proposed increase is to the sentence starting point and range in A1 as this includes cases where the information known was very significant (it could have prevented an act of terrorism) and relates to a terrorist activity endangering life. It is proposed that B1 is also increased, this would include a case where the information could be of some significance and relates to activity endangering life. Finally, an increase to A2 is proposed as this type of case involves one where the information is very significant, although it does not relate to loss of life or widespread damage etc.

Question 5: Do you agree with the change to the sentences in the Failure to Disclose Information about Acts of Terrorism guideline?

Additional Guidance

The Counter Terrorism and Border Security Act 2019 made amendments to bring further offences in scope for extended determinate sentences and sentences for offenders of particular concern.

In addition, those terrorism offences that were listed as violent specified offences for the purpose of Part 1 of Schedule 15 Criminal Justice Act 2003 are now in a new Part 3, listed as specified terrorism offences.

- **Section 11 TACT 2000** (proscribed organisations – membership)
Now an offence for which ‘a special custodial sentence for **offenders of particular concern**’ may be required by section 236A CJA 2003
- **Section 12 TACT 2000** (Proscribed organisations - support)
Now a ‘**specified terrorism offence**’ Schedule 15 CJA 2003 and subject to extended sentence s226A CJA 2003.
Now an offence for which ‘a special custodial sentence for **offenders of particular concern**’ may be required by section 236A CJA 2003
- **Section 57 TACT 2000** (Possession for terrorist purposes)
Now a ‘**specified terrorism offence**’ Schedule 15 CJA 2003 and subject to extended sentence s226A CJA 2003 (was already listed in Schedule 15B)
- **Section 58 TACT 2000** (Collection of terrorist information)
Now a ‘**specified terrorism offence**’ Schedule 15 CJA 2003 and subject to extended sentence s226A CJA 2003.
Now an offence for which ‘a special custodial sentence for **offenders of particular concern**’ may be required by section 236A CJA 2003
- **Section 1 TACT 2006** (encouragement of terrorism) and **Section 2 TACT 2006** (dissemination of terrorist publications)
Both now a ‘**specified terrorism offence**’ Schedule 15 CJA 2003 and subject to extended sentence s226A CJA 2003.
Both now an offence for which ‘a special custodial sentence for **offenders of particular concern**’ may be required by section 236A CJA 2003
- **Section 5 TACT 2006** (Preparation of terrorist acts)

Now a '**specified terrorism offence**' Schedule 15 CJA 2003 and subject to extended sentence s226A CJA 2003 (was already listed in Schedule 15B)

The Council has already added guidance to the start of the affected guidelines to make clear which provisions apply and from what date. It is also proposed to amend the steps at the end of the guideline to include further guidance.

Question 6: Do you agree with the additional guidance?

Funding Guideline

In recent Supreme Court³ and Court of Appeal⁴ cases concerning section 17 Terrorism Act 2000 there has been a focus 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 does not involve consideration of these factors at Step 1. In many cases the sentencing judge will be unable to determine such issues with certainty unless the offender admits that they had knowledge, or the facts surrounding the case make it obvious. The majority of cases would, therefore, fall into the lowest level of culpability which might not be a fair assessment of their seriousness. For that reason, the guidelines focus on other factors such as the level of sophistication or planning involved in providing the money or property, and the role that the offender played, where the offending involves group activity.

The Sentencing Council is, however, keen to provide guidance to sentencers to assist in cases where it is clear that the offender either did or did not have knowledge that the money or property would be used for terrorism. To that extent the Council has added 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'.

Question 7: Do you agree with the additional aggravating and mitigating factors in the Funding guideline?

In addition, the Sentencing Council has taken the opportunity to amend culpability B at Step 1 from; 'cases whose characteristics fall between A and C', to the new form of wording now used in other guidelines, and set out below. The Sentencing Council considers that this form of wording is clearer.

³ R v Lane (Sally) [2018] UKSC 36

⁴ R v Salim Wakil [2019] EWCA Crim 1351

Culpability demonstrated by one or more of the following:

A

- A significant role where offending is part of a group activity
- Involvement of others through pressure or influence
- Abuse of position of power, trust or responsibility
- Sophisticated nature of offence/ significant planning
- Activities took place over a sustained period of time

B

- Other cases that fall between categories A or C because:
 - Factors are present in A and C which balance each other out and/or
 - The offender's culpability falls between the factors as described in A and C

C

- Performed limited function under direction
- Very little or no planning

Annex A

Equality and Diversity

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

Complying with the duty involves having due regard to each of the three limbs: The first is the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act.

The second is the need to advance equality of opportunity between those who share a “protected characteristic” and those who do not.

The third is to foster good relations between those who share a “protected characteristic” and those who do not.

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

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

Data taken from the Ministry of Justice Court Proceedings’ Database on the demographics of offenders committing terrorist offences was considered during the development of the amended draft guidelines. Some of this data can be seen below.

The Terrorism guidelines are intended to apply equally to all demographics of offenders, and views are sought as to whether there are any other equality or diversity issues that the guideline has not considered.

Question 8: Are there are any other equality and diversity issues the guideline should consider?

For further details on these statistics please see the accompanying data tables published at <https://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

Table 1: Demographics of adult offenders sentenced for terrorism offences covered by the revised guideline, by gender, age and perceived ethnicity, 2008-2018¹

Terrorism Act 2000 (sections 12, 15-18, 38B, 58)

Terrorism Act 2006 (sections 1, 2)

Gender	Number of adults sentenced	Percentage of all adults sentenced
Male	102	86%
Female	16	14%
Total	118	100%

Age Group ²	Number of adults sentenced	Percentage of all adults sentenced
18 to 21 years	14	12%
22 to 29 years	47	40%
30 to 39 years	36	31%
40 to 49 years	15	13%
50 to 59 years	5	4%
60 years or older	1	1%
Total	118	100%

Perceived Ethnicity ^{3,4}	Number of adults sentenced	Percentage of all adults sentenced ⁵
White	5	16%
Black	3	10%
Asian	9	29%
Other	14	45%
Not recorded/not known	87	
Total	118	100%

Source: Court Proceedings Database, Ministry of Justice

Notes:

1) These statistics are provided for the period 2008-2018, rather than for a single year, due to the small number of offenders sentenced for these offences each year. For some of these offences, data were not available prior to 2011, so the period covered for those offences is 2011-2018. For more information please see tab 1_1 in the accompanying data tables:

<https://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data for this table.

3) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.

4) For a large proportion of adults sentenced for terrorism offences covered by the guideline (74%), their perceived ethnicity was either not recorded or it was not known. Therefore the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.

5) Percentage calculations do not include cases where the perceived ethnicity was unknown.

Annex B

Consultation Questions

1. Do you agree with the change to the culpability factors in the Proscribed Organisations – Support guideline?
2. Do you agree with the changes to the culpability factors in the Collection of Terrorist Information guideline?
3. Do you agree with the change to the sentences in the Collection of Terrorist Information guideline?
4. Do you agree with the change to the sentences in the Encouragement of Terrorism guideline?
5. Do you agree with the change to the sentences in the Failure to Disclose Information about Acts of Terrorism guideline?
6. Do you agree with the additional guidance?
7. Do you agree with the additional aggravating and mitigating factors in the Funding guideline?
8. Are there any other equality and diversity issues the guidelines should consider?

