

Consultation Stage Resource Assessment

Terrorism Offences

Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.¹

Rationale and objectives for new guideline

The Sentencing Council has previously produced guidelines covering 14 offences related to terrorism. This initial set of guidelines were consulted on in 2017 and then published in March 2018 to come into effect on 27 April 2018.² Less than a year after these new guidelines came into force, terrorism legislation was changed through the Counter-Terrorism and Border Security Act 2019.³ This Act made significant changes to the legislation, some of which impacted upon the existing guidelines, for example by changing the statutory maximum for three offences.

In October 2019, the Council launched a consultation on a revised set of guidelines covering the subset of nine terrorism offences affected by the Act, taking into account these legislative changes, in addition to some other amendments reflecting changes to case law. However, before these draft guidelines were finalised, the Council was made aware of further changes to terrorism legislation which would potentially have an impact on the guidelines. The Council made the decision not to publish guidelines which might soon be superseded, so guideline development was paused in March 2020.

The Counter-Terrorism and Sentencing Act 2021⁴ (the '2021 Act') received Royal Assent on 29 April 2021 and affects a slightly different subset of terrorism offences to those consulted on in 2019. The Council will now be consulting afresh on draft guidelines for the affected terrorism offences, to take into account the legislative changes resulting from the 2021 Act. In addition, one of these draft guidelines (Proscribed organisations – support) will also include amendments made following the 2019 consultation.

¹ Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

² <https://www.sentencingcouncil.org.uk/publications/item/terrorism-offences-definitive-guideline/>

³ <https://www.legislation.gov.uk/ukpga/2019/3/contents>

⁴ <https://www.legislation.gov.uk/ukpga/2021/11/contents>

The aim of these draft guidelines is to ensure sentencers have relevant and up-to-date guidance for this very serious type of offending, whilst also ensuring consistency of approach to sentencing.

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guidelines on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences:

- Preparation of terrorist acts (Terrorism Act 2006, section 5);
- Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property ('Explosive substances offences') (Explosive Substances Act 1883, sections 2 and 3);
- Membership of a proscribed organisation (Terrorism Act 2000, section 11); and
- Support for a proscribed organisation (Terrorism Act 2000, section 12).

The other offences covered by the existing terrorism guidelines are not being revised at the moment and, consequently, are not covered in this resource assessment.

These revised terrorism guidelines apply to sentencing adults only; they will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guidelines are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical and research work in support of them.

The intention is that the new guidelines will reflect the latest changes to terrorism legislation and also provide additional guidance for situations concerning the involvement of law enforcement authorities.⁵ The guidelines are intended to encourage consistency of sentencing and ensure that the most serious offenders receive appropriate sentences, acknowledging the latest legislation.

In order to develop successful guidelines, knowledge of recent sentencing was required. Sources of evidence have included the analysis of sentencing transcripts of 33 cases, and references to case law and news articles. Knowledge of the sentencing starting points, ranges and factors used in previous cases has helped the Council to create guidelines that should encourage consistency of sentencing and reflect the serious nature of the offending.

Some small-scale research will also be conducted with a group of sentencers with the Preparation of terrorist acts guideline (Terrorism Act 2006, section 5) to check that the draft guideline will work as anticipated in practice.

⁵ Relevant for the Preparation of terrorist acts and Explosive substances offences guidelines.

Detailed sentencing statistics for terrorism offences covered by the draft guidelines have been published on the Sentencing Council website at the following link:

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

The offences covered by the draft revised terrorism guidelines are mostly low volume, with around 80 adult offenders⁶ sentenced in total across all of the relevant offences over the period 2018 to 2020 (the period since the current guidelines have been in force).^{7,8} However, this figure should be treated with caution; between 2018 and 2020, a little over half (55 per cent) of these offenders were sentenced for the offences of causing explosion likely to endanger life or property/ attempt to cause explosion, or making or keeping explosive with intent to endanger life or property ('explosive substances offences'). This figure includes all adult offenders sentenced under this legislation as it is not possible to separate these cases in the data and, from transcript analysis undertaken on these offences,⁹ we can conclude that a high proportion will not be related to terrorism. Therefore, the true number of terrorist offenders sentenced between 2018 and 2020 for the offences covered by the draft guidelines is likely to be far fewer.¹⁰

The majority of offenders (91 per cent over the period 2018 to 2020) were sentenced to immediate custody. Average custodial sentence lengths vary across the different offences, due to their different statutory maximum sentences.

Preparation of terrorist acts (Terrorism Act 2006, section 5)

There were around 20 adult offenders¹¹ sentenced between 2018 and 2020 for this offence, of whom 78 per cent were sentenced to immediate custody. The average custodial sentence length (ACSL)¹² was 11 years 5 months.¹³

⁶ Offenders aged 18 or over at the time of conviction.

⁷ The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Data on average custodial sentence lengths presented in this resource assessment are those after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying data tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>.

⁸ Figures presented for 2020 include the time period since March 2020 in which restrictions were placed on the criminal justice system due to the COVID-19 pandemic. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

⁹ Of the 20 cases sentenced in 2019, reading through the transcript of the judge's sentencing remarks indicates that all 20 were non-terrorism related offences.

¹⁰ As a result of these issues, this terrorism consultation and resource assessment are not accompanied by a separate statistical bulletin, however, sentencing data for these offences can still be found in the data tables, published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

¹¹ Figures may not appear to sum to totals, due to rounding. The volumes of offenders presented in this report have been rounded to the nearest 10 offenders.

¹² The average custodial sentence lengths presented in this report are mean average custodial sentence length values for offenders sentenced to determinate custodial sentences, after any reduction for guilty plea. The ACSLs in this section relate to the estimates using Court Proceedings Database (CPD) data.

¹³ Due to a data issue currently under investigation, there are a small number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. This will impact upon the proportion of sentencing outcomes, sentence distributions and ACSLs for this offence, which should therefore be treated with caution.

Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property (Explosive Substances Act 1883, sections 2 and 3)

There were around 40 adult offenders sentenced for these offences between 2018 and 2020. However, as previously stated, it is likely that a high proportion of these cases were non-terrorist related and the guideline would not have been applicable.¹⁴

Membership of a proscribed organisation (Terrorism Act 2000, section 11)

Between 2018 and 2020, around 20 adult offenders were sentenced for membership of a proscribed organisation and 94 per cent received an immediate custodial sentence. The ACSL over this period was 5 years and all offenders received a sentence length of 8 years or less.

Support for a proscribed organisation (Terrorism Act 2000, section 12)

Since the existing guideline came into force in 2018, no offenders have been sentenced for the offence of support for a proscribed organisation (section 12, Terrorism Act 2000), where this was the principal offence.¹⁵

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guideline and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guidelines are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions thus have to be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the proposed new guideline, and an assessment of the effects of changes to the structure and wording of the guideline where a previous guideline existed.

The resource impact of the new guidelines is measured in terms of the change in sentencing practice that is expected to occur as a result of them. Any future changes in sentencing practice which are unrelated to the publication of the new guidelines are therefore not included in the estimates.

¹⁴ As such, sentence outcomes and ACSLs have not been provided for these offences in this report. They are still available from the data tables published alongside this resource assessment.

¹⁵ When a defendant has been found guilty of two or more offences this is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence selected is the offence for which the statutory maximum penalty is the most severe.

In developing sentence levels for the different guidelines, existing guidance and data on current sentence levels has been considered, where available, as well as consideration of the impact of the legislative changes, for example increases in the statutory maxima, for the relevant offences.

While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the new guidelines, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guidelines.

It therefore remains difficult to estimate with any precision the impact the guidelines may have on prison and probation resources. To mitigate against the risk of the guidelines having an unintended impact and to support the development of the definitive guidelines and the final resource assessment, interviews will be undertaken with sentencers using the Preparation of terrorist acts draft guideline.

Resource impacts

This section should be read in conjunction with the draft guidelines available at: <http://www.sentencingcouncil.org.uk/consultations/>.

Summary

Overall, the guideline is anticipated to increase sentences in some cases. These increases are mainly expected to affect offenders categorised at the highest levels of harm and culpability, where the sentence levels have been driven by the changes to legislation introduced in the 2021 Act. In addition, there may be increases to cases sentenced using the Preparation of terrorist acts and Explosive substances guidelines where there was Law Enforcement Authority (LEA) involvement.

There has been little evidence on which to base any estimates of the impact of these guidelines, due to the infrequent nature of these offences, and so no attempt has been made to quantify the prison impacts. However, given that very few offenders overall are sentenced for these terrorism offences (since few offenders are prosecuted), it is expected that any anticipated longer sentences imposed as a result of the guidelines will have only a minimal impact on prison and probation services.

Preparation of terrorist acts (Terrorism Act 2006, section 5)

The legislative changes introduced by the 2021 Act create a new category of terrorism offence called a 'serious terrorism offence' which has implications for the current Preparation of terrorist acts guideline. As a result, expanded wording has been proposed above the sentencing table in the new draft guideline and an additional step 3 has been added which sets out when a minimum sentence or serious terrorism sentence will apply, and also provides guidance on when exceptional circumstances might apply. Furthermore, in the case of a category C1 offence (category C culpability, highest harm level), the category range has been amended so that the minimum term (within the range) starts at 14 years, rather than the current 10 years. These changes have been proposed so that the guideline will comply with the latest legislation.

It is possible that these changes might increase sentence lengths in specific cases where the additional guidance applies, or for cases falling into category C1. However, given the very low number of offenders sentenced for this offence, any prison or probation¹⁶ impacts are expected to be small. Additionally, conducting small-scale research with sentencers will provide an indication of how sentencers might apply the new provisions and should hopefully mitigate against the risk of any unanticipated impacts of the draft guideline.

In addition to these changes driven by the legislation, there is a further change proposed in the draft guideline: additional guidance for sentencing terrorist cases concerning Law Enforcement Authority (LEA) involvement. The draft guideline recommends that the court should identify the category of harm on the basis of the harm that the offender intended and the viability of the plan, and then apply a downward adjustment at step two. Similarly, culpability is to be assessed as if the LEA was a genuine conspirator or, where the offender is under surveillance by LEA, thus preventing the offender from proceeding further, this should be treated the same as apprehension of the offender. It suggests that a small reduction within the category range will usually be appropriate in cases where, but for the LEA involvement, the offender would have carried out the intended terrorist act.

It cannot yet be estimated what the likely impact of this additional guidance will be on prison or probation resources, given the scarcity of relevant cases available to be analysed. However, it is hoped that the small-scale research taking place with sentencers will help to provide additional information to support the final resource assessment.

Causing explosion likely to endanger life or property/ Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property (Explosive Substances Act 1883, sections 2 and 3)

The current guideline for these offences is also affected by the 2021 Act in the same way as the Preparation of terrorist acts guideline. It is possible that these changes might increase sentence lengths in specific cases where the additional guidance applies, or for cases falling in the lowest culpability and highest harm category. However, given that the draft guideline applies only to those offences which relate to terrorism, and a large proportion of the offenders sentenced for explosive substances offences are understood to be non-terrorism related,¹⁷ any impacts on the prison and probation¹⁸ services are expected to be minimal.

¹⁶ Changes to licence provisions resulting from the new legislation are likely to have some additional resource implications for the probation service, as calculated in the published impact assessment: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886106/cts-impact-assessment.pdf.

¹⁷ Of the 20 cases sentenced in 2019, transcript analysis suggests that all 20 are non-terrorism related.

¹⁸ Changes to licence provisions resulting from the new legislation are likely to have some additional resource implications for the probation service, as calculated in the published impact assessment: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886106/cts-impact-assessment.pdf.

Membership of a proscribed organisation (Terrorism Act 2000, section 11)

The 2021 Act increased the statutory maximum for this offence from 10 years to 14 years. The draft guideline has been updated to ensure it complies with the will of Parliament.

The current definitive guideline for this offence contains three categories of culpability and one level of harm. The proposed draft guideline increases the starting points for all three culpability categories to reflect the increase in statutory maximum. It also broadens the category range for the highest culpability level and increases the sentence levels for the middle culpability, whilst maintaining a five year range, and retains the category range for the lowest culpability level so that the least serious cases can still receive a non-custodial sentence.

The estimated impact of these changes is that it may increase sentence lengths for this offence, particularly for the most serious type of offending. However, given the small volume of offenders sentenced for this offence, any prison or probation impact is not expected to be large.

Support for a proscribed organisation (Terrorism Act 2000, section 12)

A revised version of the existing Proscribed organisations – support guideline was consulted on in 2019. The 2021 Act has since increased the statutory maximum for this offence from 10 years to 14 years. The aim of the new draft guideline is to reflect this new legislative change and ensure that the most serious offenders receive tougher sentences, whilst incorporating the previously consulted-on changes. Thus, in the current draft guideline, within the sentencing table, the starting points in the highest culpability categories and harm levels have been raised and the sentence ranges broadened compared with the existing guideline, to give sentencers greater discretion.

It is possible that this change may increase the severity of sentences for this offence, particularly at the top end of seriousness. However, since no offenders have been sentenced for this offence on a principal offence basis since 2017, the impact of the draft guideline on prison and probation resources is estimated to be negligible.

Risks

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guidelines come into effect.

The low volumes for all of the terrorism offences make it difficult to determine average sentence lengths or to be confident that cases that have gone before the courts in the past few years are representative of the sorts of cases that will be sentenced in future.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes inviting views on the guidelines through the consultation exercise and research with sentencers using case scenarios, which are intended to explore whether the guideline has any unintended effects. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated.

Risk 2: Sentencers do not interpret the new guidelines as intended

If sentencers do not interpret the guidelines as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for 33 cases have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Planned research with sentencers should also enable any issues with implementation to be identified and addressed prior to the publication of the definitive guidelines.

Consultees can also feed back their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines.