
RESPONSE TO FURTHER SENTENCING COUNCIL CONSULTATION
ON TERRORISM OFFENCES GUIDELINE

1. My response to the Sentencing Council's further Consultation on the Terrorism Offences Guideline dated October 2021, is as follows.
2. As a general proposition, the fact that Parliament has legislated for mandatory sentencing consequences should not result in any lessening of a sentencer's discretion to impose the right sentence where the statutory criteria are not met.
3. Save as stated below, I agree with the proposals.

Question 3 (section 5 Terrorism Act 2006, adjustment to C1)

4. 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.
5. 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.

Question 4 (section 5 Terrorism Act 2006, Step 3 guidance)

6. 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.

Question 5 (Explosive substances offences)

7. The points made at Questions 3 and 4 above are repeated.

Question 6 (Section 11 Terrorism Act 2000)

8. 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.
9. In Attorney General's Reference No 4 of 2002; *Sheldrake v Director of Public Prosecutions*¹, 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 point². 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.
10. 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.

Question 8 (Section 5 Terrorism Act 2006, involvement of law enforcement authorities)

11. I assume that this guidance, which I agree with, is intended to apply to undercover MI5 officers who pose as terrorists. However, MI5 is not a law enforcement authority³.

JONATHAN HALL QC

INDEPENDENT REVIEWER OF TERRORISM LEGISLATION
10 NOVEMBER 2021

¹ [2004] UKHL 43, at para 48.

² Blackstone's Guide to the Anti-Terrorism Legislation, 3rd ed, at para 2.32.

³ See <https://www.mi5.gov.uk/faq/is-mi5-the-secret-police>, "We're a publicly accountable civilian intelligence organisation, not a law enforcement agency".