Sentencing Council

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31 March 2022

Dear Members

Meeting of the Sentencing Council – 8 April 2022

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1st Floor Mezzanine at the Royal Courts of Justice.** This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **As mentioned at the last meeting, this meeting will likely run slightly shorter than has been the norm recently. The meeting is Friday 8 April 2022 and will from 9:45 to 14:30**.

As you will know all legal restrictions relating to Covid come to end on 1 April 2022. Although we have yet to have sight of any revised guidance on meeting room use from HMCTS, our understanding from them is that, with the restrictions formally ending on 1 April we should be able to proceed use the room without distancing as long as we ensure adequate ventilation (which will become part of their standard health and safety guidance going forward anyway).

As previously, if you have any concerns regarding these arrangements then we are continuing to retain the hybrid option so please do not feel that you need to attend in person if you would feel uncomfortable.

If you are not planning on attending in person please do let me know ASAP so Jess and I can plan accordingly.

Notwithstanding the end of legal restrictions, we feel it would be prudent to retain some additional safety measure. After discussing with Tim we feel the following are appropriate:

- Only a core of council members and essential office staff depending on each agenda item are to attend in person. Any observers, whether external or members of the office are to attend virtually.
- Anyone who currently has Covid, or who recently had Covid within the last 7 days and is yet to be testing negative, is asked not to attend in person.
- Anyone with respiratory illness symptoms is similarly asked not to attend in person.
- Anyone who has had recent close contact with someone who has tested positive (within 72 hours of contact, or a test result) is asked not to attend in person.

- All in person attendees are encouraged to consider taking a lateral flow test if they can, although we recognise that this may not be possible now Government provision of tests has ceased for most people.
- The room will be kept as well-ventilated as possible.
- We ask that people bring their own lunch again but we will provide tea / coffee and wrapped snacks at the table as per the last meeting
- Finally, to reiterate that if anyone feels uncomfortable attending on the above basis, they are free to attend remotely and provision for that is being made.

A **security pass is needed** to gain access to this meeting room. Members who do not know how to access this room can, after entry head straight to the Queen's Building where Jessica and Gareth will meet members at the lifts and escort them up to the meeting room. If you have any problems getting in or finding the Queen's Building, then please call the office number on 020 7071 5793.

The agenda items for the Council meeting are:

▪ Agenda	SC(22)APR00
▪ Minutes of meeting held on 4 March	SC(22)MAR01
▪ Child Cruelty	SC(22)APR02
▪ Totality	SC(22)APR03
▪ Business Plan and Risk Register	SC(22)APR04
▪ Terrorism	SC(22)APR05

Refreshments

Tea, coffee and water will be provided on the day but, due to the current existing RCJ safety guidance, a buffet style lunch will not be provided. Members are welcome either to bring lunch with them (the kitchen area next door contains a fridge) or to avail themselves of the local lunch options. The lunch break is 30 minutes.

Members can access papers via the members' area of the website. As ever, if you are unable to attend the meeting, we would welcome your comments in advance.

The link to join the meeting is: Click here to join the meeting

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

Sentencing Council

COUNCIL MEETING AGENDA

8 April 2022
Royal Courts of Justice
1M Judges Conference Room
Queens Building

09:45 – 10:00	Minutes of the last meeting and matters arising (paper 1)
10:00 – 11:00	Child cruelty - presented by Ollie Simpson (paper 2)
11:00 – 11:15	Break
11:15- 12:15	Totality - presented by Ruth Pope (paper 3)
12:15 – 12:45	Business Plan and Risk Register - presented by Ollie Simpson (paper 4)
12:45 – 13:15	Lunch
13:15 – 14.30	Terrorism - presented by Ruth Pope (paper 5)

Sentencing Council

COUNCIL MEETING AGENDA

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

4 MARCH 2022

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Representatives:	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Observers:	Kate Chanter, Criminal Appeal Office
Members of Office in attendance:	Steve Wade Mandy Banks Ruth Pope Zeinab Shaikh Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 28 January 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed members to the first hybrid meeting of the Council after two years of fully remote meetings and noted that this was likely to be the format for the next few months.

3. DISCUSSION ON MOTORING – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered sentencing levels for dangerous and careless driving offences, draft guidelines for motoring offences committed whilst disqualified, unlicensed and uninsured, and a draft guideline for the offence of wanton or furious driving, which can be charged for incidents involving bicycles

4. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council signed off revised guidelines for animal cruelty offences under sections 4-9 of the Animal Welfare Act 2006, for public consultation in the spring. The Council confirmed it was broadly content with proposed updates to step 1 factors and to splitting the guideline into two, with one guideline covering section 4-8 offences and the other covering the section 9 offence.

4.2 The Council also considered a draft resource assessment to accompany the proposed guidelines at consultation

5. DISCUSSION ON BURGLARY – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council discussed the draft guidelines for the final time ahead of publication of the definitive guidelines in the spring. The Council reviewed all the changes that had been made to the guidelines following consideration of the consultation responses, and agreed a couple of further minor amendments.

5.2 The Council also considered a draft of the resource assessment which would accompany publication of the guidelines, and made some slight changes.

6. DISCUSSION ON TOTALITY – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council agreed proposed changes to the format of the Totality guideline in which the examples were placed in dropdown boxes and

the remaining key text was kept together. The Council also agreed some small changes to the key text to aid clarity. The content in the table on 'fines in combination with other sentences' was updated in line with current legislation.

6.2 The Council discussed whether the footnotes referencing legislation and caselaw should be retained. It was agreed to embed statutory references in the text and to consider extracting the relevant information from key cases.

6.3 Consideration was given to the suggestion that the guideline should remind sentencers to explain how the sentence has been constructed. It was suggested that this could be addressed in the 'General approach' section.

7. DISCUSSION ON UNDERAGE SALE OF KNIVES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

7.1 The Council agreed that the scope of guidelines should be limited to the type of offences that are actually being prosecuted and that this should be made clear on the face of the guidelines.

7.2 The Council considered the culpability factors for sentencing individuals and agreed some changes to the factors proposed to improve clarity. It was agreed that one level of harm was appropriate and the wording was amended to include a reference to the harm caused to the wider community by this offending.

7.3 The Council agreed the revised sentence levels for organisations and discussed the proposed levels for individuals. It was agreed to consult on the proposed levels but to invite views on whether the fine band for the lowest level of culpability was sufficient.

7.4 The Council agreed to consult on the two guidelines for this offence.

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Sentencing Council

Sentencing Council meeting:	**8 April 2022**
Paper number:	**SC(22)APR02 – Child cruelty**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson**
	Ollie.Simpson@sentencingcouncil.gov.uk

1 ISSUE

1.1 The approach to revision of child cruelty guidelines in light of the change to the maximum penalties.

2 RECOMMENDATIONS

2.1 That Council consults on revised sentence levels for child cruelty offences, proposing a new higher culpability level on top of the current levels.

3 CONSIDERATION

The offences

3.1 The Police, Crime, Sentencing and Courts Bill is raising the maximum penalties for two offences:

- section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16) – maximum raised from 10 to 14 years' imprisonment;
- section 5 of the Domestic Violence, Crime and Victims Act 2004 (causing or allowing a child or vulnerable adult to die or suffer serious harm) – maximum for causing/allowing to die raised from 14 years to life imprisonment; maximum for causing/allowing to suffer serious harm raised from 10 to 14 years' imprisonment.

3.2 The section 1 offence covers a range of possible harms which could be relatively low. In practice this is charged more in everyday cases where inadequate parents or carers have been neglectful of the children in their care. The section 5 offence in contrast requires either death or the GBH standard of physical harm to have been caused (although the guidelines do also allow for psychological, developmental and emotional harm to be taken into account in sentencing).

3.3 The section 5 offence was created (at first for cases of death, but later broadened to capture cases of serious injury) to allow cases to be brought against defendants where it is unclear who has actually inflicted the injury. This may be because two defendants blame each other, or refuse to name the perpetrator. Under the terms of the offence, an offender has either caused the harm or knew there was a risk of serious harm and failed to take steps to prevent it. The prosecution does not have to prove which was which. At least in principle, no distinction is drawn in terms of seriousness between the alternatives.

3.4 Of the two offences there are far more section 1 sentences imposed (around 330 adults sentenced in 2020) than for section 5 (fewer than 10 in 2020).[1] Volumes have decreased for both in recent years. A large proportion of all sentences imposed for section 1 offences are suspended (33 per cent in 2020), with one in five receiving immediate custody. The average custodial sentence length (ACSL) post-guilty plea was 2 years 3 months in 2020. For section 5, in 2020 63 per cent of offenders received immediate custody and 25 per cent a suspended sentence. Combining the years 2019 and 2020 (due to low volumes) the ACSL for all section 5 offences was 5 years 1 month. For causing/allowing death it was 6 years 7 months, and for causing/allowing harm it was 3 years 9 months.

3.5 The Government has described the increase in maximum penalties as "Tony's Law" following the case of Tony Hudgell whose parents' abuse when he was a baby led to him having both legs amputated. The offenders in that case were sentenced in 2018 to ten years' imprisonment, the maximum penalty available for causing or allowing a child to suffer serious physical injury. The judge said that he could not envisage a worse case than this, and gave the vague implication he would have wanted to exceed the maximum.

3.6 This led to a campaign by Tom Tugendhat MP for the maximum penalties for child cruelty cases to be raised, resulting in his introduction of a Private Member's Bill in 2019. While that Bill did not progress, the Government made an amendment to the Police, Crime, Sentencing and Courts Bill at Lords Report to achieve the same end.

The current guidelines

3.7 The Council issued guidelines for these offences (insofar as they relate to victims under 16) in 2018 which came into force on 1 January 2019. These can be found at **Annexes A and B.**

3.8 The culpability factors for the two offences are identical. Notably for the section 5 offence, no distinction is drawn in culpability between the perpetrator of violence and the person who failed to prevent it. The harm levels are different between the two offences.

[1] This could include cases where the victim is a vulnerable adult, although it is most likely in relation to children.

Category 1 for the section 5 offence is reserved for death. Broadly speaking, category 2 for the section 5 offence equates to category 1 for the section 1 offence, category 3 to category 2 respectively, and category 3 for the section 1 offence captures cases of little or no harm.

3.9 Sentence levels reflect the different types of harm which can be covered by the offences. Obviously the top level of harm for section 5, where a child has died is higher than the top level for section 1, extending up to the existing 14 year maximum. Beyond that the starting points and ranges for section 1 are generally the same or a little lower than their section 5 equivalents. However, following consultation the range for the section 5 2B centre box was lowered meaning the lower ends of the ranges for the section 1, high harm medium culpability and medium harm high culpability are a bit higher than for their section 5 equivalents.

3.10 The aggravating and mitigating factors are identical aside from an additional aggravating factor for section 5 “prolonged suffering prior to death”.

Options

1. *Do nothing*

3.11 With the increase in maximum penalty we will, in the immediate term, provide the usual caveat on the guidelines that sentencers should bear in mind that the maximum penalty has increased. Given the nature of the increases, we may consider that this is sufficient to allow the guidelines to stand (which would not be the case, for example, with the more significant increases in maximum penalties for animal cruelty or causing death by driving whilst disqualified). However, given these are such difficult and sad cases there may be an expectation that we should provide more detailed guidance. The Council would face a reputational risk that it was not being responsive to Parliament’s clear intent.

2. *Amend sentence levels only*

3.12 We could perform limited surgery on the sentencing levels in the current guidelines to reflect the changes, but there are options within this. Most straightforwardly, we could add a “very high culpability” level above the existing levels to reflect the very worst activity. As with manslaughter, this would include:

- the extreme character of one or more culpability B factors and/or
- a combination of culpability B factors

The rest of culpability and the sentencing tables would be unchanged, with an additional column added to the sentencing tables. Starting in the top left corner of section 5 with levels

from gross negligence manslaughter and applying some diagonals, sentencing levels could look like this:

Section 5 causing or allowing a child to die or suffer serious physical harm

	Culpability			
Harm	A	B	C	D
Category 1	**Starting point** 12 years' custody **Category range** 10 -18 years' custody	**Starting point** 9 years' custody **Category range** 7-14 years' custody	**Starting point** 5 years' custody **Category range** 3-8 years' custody	**Starting point** 2 years' custody **Category range** 1-4 years' custody
Category 2	**Starting point** 9 years' custody **Category range** 7 -14 years' custody	**Starting point** 7 years' custody **Category range** 5 – 9 years custody	**Starting point** 3 years' custody **Category range** 1 year 6 months – 6 years' custody	**Starting point** 1 year 6 months' custody **Category range** 6 months – 3 years' custody
Category 3	**Starting point** 7 years' custody **Category range** 5 – 9 years' custody	**Starting point** 3 years' custody **Category range** 1 year 6 months – 6 years' custody	**Starting point** 1 year 6 months' custody **Category range** 6 months – 3 years' custody	**Starting point** 9 months' custody **Category range** High level community order – 2 years' custody

Section 1 child cruelty:

	Culpability			
Harm	A	B	C	D
Category 1	**Starting point** 9 years' custody **Category range** 7 -14 years' custody	**Starting point** 6 years' custody **Category range** 4- 8 years' custody	**Starting point** 3 years' custody **Category range** 2- 6 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years 6 months' custody
Category 2	**Starting point** 6 years' custody **Category range** 4 – 8 years' custody	**Starting point** 3 years' custody **Category range** 2-6 years' custody	**Starting point** 1 year's custody **Category range** High level community order	**Starting point** High level community order **Category range** Medium level community order

			– 2 years 6 months' custody	– 1 year's custody
Category 3	**Starting point** 3 years' custody **Category range** 2 – 6 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years 6 months' custody	**Starting point** High level community order **Category range** Medium level community order – 1 year's custody	**Starting point** Medium level community order **Category range** Low level community order – 6 months' custody

3.13 An alternative approach could be to provide for a higher level of harm (to allow, for example, for severe cases of permanent disability). The judge in the Tony Hudgell case pointed to the "overwhelming degree of harm" associated with the victim's injuries. This would, however, require some consideration about the relationship between such cases and cases where death has occurred. The current section 5 guideline has the benefit of clearly demarcating the latter.

3.14 The other option for changing sentencing levels would be to provide an uplift across the board. This would not need to be purely arithmetical. In particular, we may not want to increase significantly lower culpability cases where the offender has been coerced, has a mental disorder, took some steps to protect the child, or where the offence was a brief lapse of judgement. Such tables could look like this (with proposed amendments in red):

Section 5 causing or allowing a child to die or suffer serious physical harm

	Culpability		
Harm	A	B	C
Category 1	**Starting point** ~~9~~ 12 years' custody **Category range** ~~7-14~~ 8 – 18 years' custody	**Starting point** ~~5~~ 8 years' custody **Category range** ~~3-8~~ 4 – 10 years' custody	**Starting point** ~~2~~ 3 years' custody **Category range** 1-~~4~~ 5 years' custody
Category 2	**Starting point** ~~7~~ 9 years' custody **Category range** ~~5 – 9~~ 7 – 14 years custody	**Starting point** ~~3~~ 5 years' custody **Category range** ~~1 year 6 months – 6~~ 3 – 8 years' custody	**Starting point** ~~1 year 6 months'~~ 2 years' custody **Category range** 6 months – ~~3~~ 4 years' custody
Category 3	**Starting point** ~~3~~ 5 years' custody	**Starting point** ~~1 year 6 months'~~ 3 years' custody	**Starting point** ~~9 months'~~ 1 year's custody

	Category range ~~1 year 6 months – 6~~ 3 – 8 years' custody	**Category range** ~~6 months – 3~~ 1 – 4 years' custody	**Category range** High level community order – 2 years' custody

Section 1 child cruelty:

	Culpability		
Harm	A	B	C
Category 1	**Starting point** ~~6~~ 8 years' custody **Category range** ~~4- 8~~ 6 – 14 years' custody	**Starting point** ~~3~~ 5 years' custody **Category range** ~~2- 6~~ 3 – 8 years' custody	**Starting point** ~~1~~ 2 year's custody **Category range** ~~High level community order – 2 years 6 months'~~ 6 months – 4 years' custody
Category 2	**Starting point** ~~3~~ 5 years' custody **Category range** ~~2-6~~ 3 – 8 years' custody	**Starting point** ~~1 year's~~ 2 years' custody **Category range** ~~High level community order – 2 years 6 months'~~ 6 months – 4 years' custody	**Starting point** ~~High level community order~~ 6 months' custody **Category range** Medium level community order – ~~1 year's~~ 18 months' custody
Category 3	**Starting point** ~~1 year's~~ 2 years' custody **Category range** ~~High level community order – 2 years 6 months'~~ 6 months – 4 years' custody	**Starting point** ~~High level community order~~6 months' custody **Category range** Medium level community order – ~~1 year's~~ 18 months' custody	**Starting point** ~~Medium~~ High level community order **Category range** Low level community order – 6 months' custody

3. Conduct a more thorough revision

3.15 The other main option is to take the opportunity to undertake a full revision of the guidelines, recalibrating the harm and culpability elements to reflect the new maximums. However, the guidelines are relatively recent and we have no evidence that they are misunderstood or not fit for purpose. Subject to other priorities, an evaluation would be undertaken at some point in the next few years to see what impact the current guidelines have had.

3.16 If limited only to sentencing levels, we could launch a relatively quick consultation before the summer, consider responses and publish a response by the end of the year, which would demonstrate responsiveness to the change in the law. A more far-reaching revision would be likely to result in a more in-depth consultation later in the year, with definitive guidelines being issued in mid 2023.

Question 1: would Council like to:

- **i) do nothing (beyond a message on the guideline about the revised maximums);**
- **ii) consult on changes to the sentence levels only (recommended);**
- **iii) consult on a full revision to the guidelines?**

Question 2: if consulting on sentence levels, which of the above options would you prefer? (creating a new upper band and leaving the rest is recommended);

Question 3: do you agree with the proposed sentence levels for that option?

4 IMPACT AND RISKS

4.1 Subject to your decisions above, we will consider recent transcripts and consider what the impact of the changes would be. If you do agree to consult on sentence levels only we will present a consultation stage resource assessment alongside draft revisions to the guidelines at June's meeting

4.2 There have been several high-profile cases recently of incidents of child cruelty resulting in death. Whilst we can show responsiveness to the change in the maximum penalties, we may need to explain carefully why offenders at the lower end of culpability are not deserving of significantly higher sentences.

4.3 Arguably, an anomaly remains whereby the worst cases of GBH with intent committed against an adult will be sentenced more severely than cases prosecuted under child cruelty legislation where a child has been killed or left with serious permanent disabilities. At root, this is reflective of the different maximum penalties available for different offences and charging decisions will determine the penalty available. Revised sentencing levels as above will mitigate this to some extent.

4.4 In terms of equalities, both offences have a high proportion of female offenders, relative to other offences. In most years, women represent the majority of those sentenced, and in some years this proportion is nearly as high as two thirds of total adults sentenced. Given the subject matter, some questions may be aired generally about the extent to which

women receive more severe sentences because they are perceived to have more greatly abused a position of trust than male offenders. There are also issues about the role of coercion and control, which are inherently linked with these offences, in particular section 5. For the lower level cases, this offending also raises interesting questions about the extent to which being a primary carer (either for the victim or for other children) acts as a mitigating factor.

4.5 In terms of data for the first of these questions, for section 1 offences there is some evidence that female offenders are less likely to get immediate custody and more likely to receive a community order than male offenders. There is no evidence of any particular difference between the average custodial sentence length (ACSL) given to men or women for section 1 offences; in 2020 the ACSL for male adult offenders was 2 years 3 months compared with 2 years 2 months for females.

4.6 For section 5, low volumes mean we should approach any figures with caution. The majority of both male and female offenders receive immediate custody (around two thirds of sentencing outcomes for male and female offenders in 2019 and 2020), although after combining data for 2019 and 2020, we can observe that the mean ACSL after any reduction for guilty plea for female adult offenders was slightly higher at 5 years 6 months, compared to 4 years 8 months for males. To reiterate, the low volumes of section 5 cases may limit the extent to which we can do a meaningful comparison between male and female offenders.

Sentencing Council

Sentencing Council meeting:	**8 April 2022**
Paper number:	**SC(22)APR03 - Totality**
Lead official:	**Ruth Pope**
Lead Council member:	**Maura McGowan**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 At the January meeting the Council agreed to consult on updating the Totality guideline without changing the overall approach or making substantial changes to the content. This decision was informed by the research carried out with sentencers (Exploring sentencers' views of the Sentencing Council's Totality guideline) which found that the guideline was considered to be useful and clear. At the March meeting the Council agreed changes to the format and content of the guideline and raised some technical issues to be resolved.

1.2 Since the last meeting, an academic, Dr Rory Kelly, has sent an advance copy of his paper 'Totality: Principle and Practice' which proposes reform to the Totality guideline by adding explicit reference to harm and culpability. The paper makes some interesting proposals for the Council to consider.

1.3 At this meeting the Council will be asked to consider changes arising from the discussion in March and to consider whether further changes should be made as proposed by Rory Kelly.

1.4 If the Council is able to agree a version for consultation at this meeting the plan is to consult from June to September. If, not that timetable will be delayed.

2 RECOMMENDATION

2.1 That the Council:

- Confirms the changes discussed in March;
- Agrees further changes to address technical issues; and
- Considers whether and to what extent any of the proposals put forward by Rory Kelly should be adopted.

3 CONSIDERATION

3.1 The current Totality guideline can be viewed online or in document form at **Annex A**.

The changes discussed in March

3.2 A revised version of the guideline incorporating changes agreed at the March meeting is at **Annex B**. Yellow highlighting indicates changes proposed in response to the discussions in March and a subsequent review of the guideline.

3.3 These changes are:

- Additional wording in the reference to the Equal Treatment Bench Book (ETBB);
- A reference to explaining the adjustments for totality at point 4 of the general approach;
- In March the highlighted section beginning 'Examples include' had been presented as a drop down box and labelled as if it were examples of consecutive sentences. However, on reviewing the guideline it is proposed that this content should form part of the core of the guideline as it gives general examples of how a sentence can be structured rather than specific examples of types of cases. Also, the examples are not all of consecutive sentences so the approach previously proposed would have been misleading.
- In the section 'Indeterminate sentence (where the offender is already serving an existing determinate sentence)' (on page 5) wording is proposed to cater for the fact that release provisions for determinate sentences may vary.
- Similarly, flexible wording is proposed in the section 'Ordering a determinate sentence to run consecutively to an indeterminate sentence' (on page 6).
- In the section 'Offender convicted of an offence while serving a community order' (on page 8) additional wording is proposed to clarify the procedure where a magistrates' court cannot commit the new offence.

3.4 The Council may wish to consider the practical implications of the proposed wording at point 4 relating to explaining the structure of the sentence and whether it is compatible with the decision in *R v Bailey* [2020] EWCA Crim 1719 in which it was said:

> [W]hether a judge has applied totality is a question of substance and not form.
>
> [V]arious arguments were advanced that the stages set out in the Totality Guideline under the heading "*General Approach*" (in relation to determinate sentences) should be referred to expressly in the sentencing remarks. Once again, substance cannot prevail over form. The stages or steps set out in the Guideline are intended to guide how the judge should "*consider*" the structuring of the sentence to arrive at a just and appropriate end result. The steps set out are not drafting instructions.
>
> The Totality Guideline provides a structured approach to guide judges in this endeavour. Our conclusions on the law are not, of course, intended to discourage any judge who wishes to provide fuller explanation or reasoning; but the essential

> point is that what matters on an appeal is the final sentence and whether that is just and proportionate and not the articulation of the chain of reasoning which led thereto.

Question 1: Does the Council agree to make the changes proposed at 3.3 above?

Further changes arising out of the discussions in March

3.5 The current guideline has footnotes which give the source of the rules/guidance included in the guideline. The proposal was to embed statutory references into the text and to remove references to case law on the basis that the cases have effectively been encoded in the guideline and the guideline supersedes any cases that predate it. The Council felt that some of the references to case law could still be useful and asked for further consideration to be given to this.

3.6 An attempt has been made to incorporate any key points from the referenced case law that are not already included in the guideline. These changes are highlighted in green in Annex B.

3.7 On page 3 of Annex B a suggested example has been added to 'c. one or more offence(s) qualifies for a statutory minimum sentence and concurrent sentences would improperly undermine that minimum'. This is taken from the case of *R v Raza* [2010] 1 Cr App R (S) 56 which states:

> in assessing the appropriate length of another custodial sentence for a different offence, one has to have regard in any adjustment for totality to the fact that Parliament has assessed the degree of culpability for possessing a prohibited firearm as requiring a mandatory minimum sentence of five years' imprisonment. In our judgment therefore in a situation in which that is one of the sentences which the court has to pass, the principle of totality has to be applied in such a way that it does not undermine the will of Parliament by substantially reducing an otherwise appropriate consecutive sentence for another offence so as to render nugatory the effect of the mandatory minimum sentence for the firearms offence. In this particular kind of case, before this court, involving offences of possession of drugs and possession of weapons clearly possessed in connection with drug supply and the protection of it, it is important in our view to ensure that any reduction on grounds of totality does not reduce the effect of properly deterrent and commensurate sentences for this combination of offences.

3.8 The next sentence in the guideline currently reads: 'However, it is not permissible to impose consecutive sentences for offences committed at the same time in order to evade the statutory maximum penalty' with a reference to *R v Ralphs* [2009] EWCA Crim 2555. This was a case involving several counts of possession of a prohibited firearm and ammunition for which the maximum sentence is 10 years (and the minimum 5 years) which the court noted 'leaves remarkably little room for case-specific flexibility'. The Court reviewed

examples of cases where consecutive sentences were or were not appropriate (examples which are used in the guideline):

> Two long-standing general principles are engaged. The first principle is totality. The aggregate of the sentences must be appropriate to the offender's criminality in the context of the available mitigation. Second, consecutive terms should not normally be imposed for offences which arise out of the same incident or transaction. *R v Noble* [2003] 1CAR(S) 312 provides a clear example: consecutive sentences for causing several deaths by dangerous driving were quashed. Notwithstanding the numerous deaths there was a single act of dangerous driving. However there is sometimes a difficulty in deciding whether criminality under consideration may or may not be regarded as a single incident. The fact that offences are committed simultaneously is not necessarily conclusive. Thus *R v Fletcher* [2002] 2 CAR (S) 127 exemplifies orders for consecutive sentences in the context of indecent assault and threats to kill which arose out of the same incident.
>
> Examples abound of occasions when consecutive sentences are justifiably imposed. Obvious examples include a robbery committed with the use of a firearm, or violent resistance of arrest, or offences committed on bail: in all these examples however distinct offences are committed in circumstances where the offences, although distinct, can properly be said to increase the relevant criminality.

3.9 The Court went on to say:

> The problem is simple. In the context of a narrow range of available sentencing powers, and in particular the statutory maximum sentence, we are in reality being invited to circumvent the statutory maximum sentence on the basis that we believe it to be too low and to achieve our objective by disapplying well understood sentencing principles of which Parliament must be deemed to have been aware when the statutory maximum and minimum sentence was fixed. Tempting as it is to do so, that is a step too far.

3.10 In a more recent case (*R v Omar Naeem* [2018] EWCA Crim 2938) where the offender was sentenced for a series of driving offences: three summary offences (driving whilst disqualified, drug driving and failing to stop) and one indictable offence (dangerous driving), the court considered the wording in the guideline and the decision in *Ralphs* and concluded:

> It is not possible to treat the offences of dangerous driving, driving whilst disqualified and drug driving other than as a single incident. The fact that the appellant was disqualified and the fact that he had consumed a substantial quantity of cocaine were matters which seriously aggravated his offence of dangerous driving. In the circumstances of this case, we find that it would be artificial and contrary to principle to regard those summary offences as distinct matters justifying the imposition of consecutive sentences. The length of each individual sentence was in our judgment amply justified. However, we conclude that all three prison sentences should have been ordered to run concurrently rather than the consecutively, making a total sentence of 16 months' imprisonment. That total figure of course reflects the statutory maximum for the dangerous driving offence, subject to full credit for the prompt guilty pleas.

3.11 It appears that the wording in the guideline accurately reflects and neatly summarises the decision in *Ralphs* though it might be preferable to use the term 'in a single incident' rather than 'at the same time'.

Question 2: Does the Council agree to make the change proposed at 3.11 and is any further explanation required?

3.12 On page 4 of Annex B in the section on 'Offender serving a determinate sentence but released from custody' there is currently a footnote referencing the case of *R v Costello* [2010] EWCA Crim 371 as authority for the rule that a sentence 'must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to the recall period'. This is a clear statement and there does not appear to be any need to add anything.

3.13 At the bottom of page 4 and top of page 5 there is guidance on extended sentences. The current guideline contains a footnote referring to *R. v Pinnell* [2010] EWCA Crim 2848 which states:

> If no one offence would justify a four year custodial term on ordinary principles, the seriousness of the aggregate offending must be considered. If a four year custodial term results from aggregating the shortest terms commensurate with the seriousness of each offence, then that four year term can be imposed in relation to the specified offence. If there is more than one specified offence that aggregate term should be passed for the lead specified offence, or, if appropriate, concurrently on more than one specified offence. If appropriate a concurrent determinate term may be imposed for other offences. The combination of the custodial term and extension period cannot exceed the maximum statutory sentence for the offence to which the extended sentence is attached.

3.14 As can be seen the wording in the guideline is very close to that in *Pinnell* and it is suggested that wording is clear and does not require further explanation or justification.

3.15 However, there are some more recent cases on totality in the context of extended sentences which refer to case law but do not even mention the Totality guideline: *R v Rashid Ulhaqdad* [2017] EWCA Crim 1216 and *R v Wilding* [2019] EWCA Crim 694. The latter case is mentioned in the Sentencing Referencer chapter on 'Concurrent and Consecutive Sentences' as an authority for the statement: 'In a serious, multiple-count case the sentencing judge should endeavour to impose one term of imprisonment which reflects the defendant's overall criminality as that produces clarity and simplicity.' Taken out of context this appears to be a rather sweeping statement and runs counter to the more nuanced and detailed guidance in the guideline.

Question 3: Should any changes be made to the section on extended sentences?

3.16 The Sentencing Referencer also refers to the case of *R v Green* [2019] EWCA Crim 196 which gave guidance on sentencing for offences committed prior to other offences for

which an offender has been sentenced. In summary, the case said that it had been wrong for the judge to refuse to take into account the previous custodial sentence simply on the basis of the gravity of the instant offences. In such a situation, a judge should consider all the circumstances in deciding what, if any, impact the previous sentence should have on the new sentence, *R. v Cosburn (Sandy)* [2013] EWCA Crim 1815, [2013] 7 WLUK 382 followed. Without laying down an exhaustive list, such circumstances could include: (a) how recently the previous sentence had been imposed; (b) the similarity of the previous offences to the instant offences; (c) whether the previous and instant offences overlapped in time; (d) whether on the previous occasion the offender could have "cleaned the slate" by bringing the instant offences to the police's attention; (e) whether taking the previous sentences into account would give the offender an undeserved bonus; (f) the offender's age and health, and whether their health had significantly deteriorated in prison; (g) whether, if the previous and instant sentences had been passed together as consecutive sentences, the totality principle would have been offended. Having considered those or other relevant matters, the judge should reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. They then had a discretion whether to make further allowance to take into account the previous sentence. It was not simply a matter of considering the overall sentence as though the previous court had been seized of all the offences and deducting from that figure the sentence already imposed.

3.17 If this guidance was felt to be useful, it would be possible to add a section to the Totality guideline (as a dropdown) as follows:

Sentencing for offences committed prior to other offences for which an offender has been sentenced

The court should first reach the appropriate sentence for the instant offences, taking into account totality in respect of the instant offences alone. The court then has a discretion whether to make further allowance to take into account the previous sentence. The court should consider all the circumstances in deciding what, if any, impact the previous sentence should have on the new sentence. A non-exhaustive list of circumstances could include:

(a) how recently the previous sentence had been imposed;
(b) the similarity of the previous offences to the instant offences;
(c) whether the previous and instant offences overlapped in time;
(d) whether on the previous occasion the offender could have "cleaned the slate" by bringing the instant offences to the police's attention;
(e) whether taking the previous sentences into account would give the offender an undeserved bonus - this will particularly be the case where a technical rule of sentencing has been avoided or where, for example, the court has been denied the opportunity to consider totality in terms of dangerousness;
(f) the offender's age and health, and whether their health had significantly deteriorated in prison;
(g) whether, if the previous and instant sentences had been passed together as consecutive sentences, the totality principle would have been offended.

It is not simply a matter of considering the overall sentence as though the previous court had been seized of all the offences and deducting from that figure the sentence already imposed.

Question 4: Does the Council wish to make the addition proposed in 3.17 above?

3.18 The table on indeterminate sentences on page 5 of Annex B currently contains a footnote referencing *R v Rahuel Delucca* [2010] EWCA Crim 710 in the section on 'imposing multiple indeterminate sentences on the same occasion and using multiple offences to calculate the minimum term for an indeterminate sentence' as authority for point 1: 'first assess the notional determinate term for all offences (specified or otherwise), adjusting for totality in the usual way'. This appears to be clear and unambiguous and so no additional wording is proposed.

3.19 In the next section on 'Indeterminate sentence (where the offender is already serving an existing determinate sentence)' there is currently a footnote referencing the case of *R v O'Brien* [2006] EWCA Crim 1741 as authority for the statement: 'It is generally undesirable to order an indeterminate sentence to be served consecutively to any other period of imprisonment on the basis that indeterminate sentences should start on their imposition'. Again, this appears to be clear and unambiguous and so no additional wording is proposed.

3.20 In the third section on 'Indeterminate sentence (where the offender is already serving an existing indeterminate sentence) there is currently a footnote referencing the cases of *R v Hills* [2008] EWCA Crim 1871 and *R v Ashes* [2007] EWCA Crim 1848. It might be helpful to include in the guideline the example in *Hills* of when it might be necessary to impose a life sentence consecutive to a life sentence already being served: 'such as where the offender falls to be sentenced while still serving the minimum term of a previous sentence and an indeterminate sentence, if imposed concurrently, could not add to the length of the period before which the offender will be considered for release on parole in circumstances where it is clear that the interests of justice require a consecutive sentence'. It may also be useful to provide a link to the relevant provision of the Sentencing Code that permits a sentence to commence other than on the date it is imposed. A link can also be provided to the legislative provision dealing with release for life prisoners.

Question 5: Does the Council agree make the additions proposed in 3.20 above?

3.21 In the table 'Multiple fines for non-imprisonable offences' on pages 6 and 7 of Annex B references to the Sentencing Code have been incorporated into the text. In the table 'fines in combination with other sentences' a reference to the relevant sections of the Sentencing Code has been added.

3.22 In the table 'Community orders' on page 8 of Annex B references to the Sentencing Code have been incorporated into the text.

3.23 In the 'Disqualifications from driving' table on page 9 of Annex B statutory references have been incorporated into the text.

3.24 In the table 'Compensation orders' on page 10 of Annex B references to the Sentencing Code have been incorporated into the text.

Question 6: Does the Council agree to the approach proposed in 3.21 to 3.24 above?

The proposed approach from Rory Kelly

3.25 In his paper 'Totality: Principle and Practice', Rory Kelly of UCL proposes adding explicit reference to culpability and harm to the Totality guideline. With his permission a copy of his, as yet, unpublished paper has been circulated to Council members on the understanding that it will not be shared more widely.

3.26 Kelly argues that 'Harm and culpability frame the assessment of offence seriousness. The concepts are familiar: they form the basis of establishing offence seriousness in offence-specific guidelines, the Imposition Guideline, and the General Guideline. The Sentencing Code also requires sentencers to consider harm and culpability when assessing the

seriousness of an offence. On its face then it appears odd that the concepts are not relied on in the more complex domain of sentencing multiple offenders.' He identifies three challenges in sentencing multiple offences and suggests that his approach would address these:

1. the risk of double counting;
2. sentencing a single incident made up of multiple offences; and
3. sentencing above the offence range or maximum for the most serious offence.

3.27 The paper suggests a process for sentencing multiple offences as follows:

1. **Consider the nature of the lead offence and the other offence(s).**
   - Establish which offence is the lead offence. This will typically be the most serious offence.
   - Assess whether the harm of the other offence(s) and the offender's culpability in committing them can be dealt with whilst sentencing for the lead offence or whether those offences must be addressed separately. This assessment will require consideration of the sentences available for the lead offence in addition to whether the offence-specific guideline for the lead offence offers sufficient guidance for sentencing the other offence(s).
   - If the other offence(s) can be wholly accounted for whilst sentencing the lead offence, impose a concurrent sentencing applying the method at 2.
   - If the other offence(s) cannot be wholly accounted for whilst sentencing the lead offence, impose consecutive sentences applying the method at 3.

2. **Concurrent sentencing method.**
   - Sentence the lead offence using the relevant offence specific guideline. Account for the impact of the other offence(s) on seriousness. The other offence(s) may affect sentencing at step 1 (determining the offence category) and step 2 (starting point and category range).
   - Sentence the other offence(s) with reference to the relevant offence specific guidelines. Account for all relevant harm and culpability factors.
   - Set a sentence for the other offence(s) to run concurrently to the sentence for the lead offence.

3. **Consecutive sentencing method.**
   - Sentence the lead offence with reference to the relevant offence-specific guideline. Account for all harm and culpability factors of relevance for the lead offence. Do not account for any harm and culpability factors related only to other offences.
   - Sentence the other offences with reference to the relevant offence specific guidelines. If a culpability or harm factor has already been accounted for when sentencing for the lead offence (or another offence), do not consider it again.
   - Set a sentence for the other offence(s) to run consecutively to the sentence for the lead offence.

4. **Reassess the total sentence**
   - Assess the overall sentence against the requirement that it be just and proportionate.
   - It may be useful to consider single offences likely to attract a comparable sentence.

5. **Explain the process of sentencing and the final sentence.**

- Where a concurrent sentence has been imposed under step 2, explain the process of sentencing and the final sentence reached. The below paragraph may assist in structuring your remarks.

  > "The offender has committed multiple offences. They are sentenced to __ for the lead offence of __ and a concurrent sentence of __ for the offence of __. The total sentence is __. The decision to impose concurrent sentences relates to the nature of the sentencing exercise. I emphasise that the harm of both offences and the overall culpability of the offender are accounted for in the sentence for the lead offence. The length of the total sentence that the offender will serve is thus proportionate to the severity of all their offending."

- Where a consecutive sentence has been imposed under step 3, explain the process of sentencing and the final sentence reached. The below paragraph may assist in structuring your remarks.

  > "The offender has committed multiple offences. They are sentenced to __ for the lead offence of __ and a consecutive sentence of __ for the offence of __. The total sentence is __. The decision to impose consecutive sentences relates to the nature of the sentencing exercise. The length of the total sentence that the offender will serve is proportionate to the severity of all their offending."

3.28 Consideration has been given as to whether this approach would be preferable to the current structure of the guideline and/or whether elements of his approach could usefully be adopted. It is undoubtedly the case that the consideration of culpability and harm is central to sentencing and is a familiar concept for all sentencers. However, there are dangers in providing a more rigid structure and any attempt to incorporate the necessary flexibility alongside greater guidance could lead to greater complexity. Kelly's proposed structure appears to operate on the basis that the sentence would be constructed as either concurrent or consecutive whereas, in practice, a combination of the two is often appropriate. His suggestion at point 4 above that 'It may be useful to consider single offences likely to attract a comparable sentence' may be particularly problematic and could have wider implications. Kelly states (at page 17 of his paper):

> Explicit reference to harm and culpability would add clarity to the Totality Guideline. It would not give rise to irresolvable issues within proportionality. Instead, the reform may draw out the difficulties of achieving both inter and intra-offence proportionality in sentencing multiple offenders. Where these accounts conflict, parsimony dictates the shorter sentence should be preferred. In the longer term, any divide between inter and inter-offence proportionality emphasises the value there would be in a wider review of sentencing levels in offence-specific guidelines.

3.29 Given that adopting Kelly's structure would not be straightforward it may be preferable to incorporate some of his ideas into the existing structure. **Annex C** contains just the core structure of the Totality guideline (incorporating some of the changes already agreed) with some suggested additional text highlighted in yellow. This additional text is

designed to ensure that considerations of culpability and harm are part of the assessment and to remind sentencers not to double count factors. Some wording acknowledging that concurrent and consecutive sentences may be combined is also suggested. The Council may feel that it is important to keep the core text of the guideline as concise as possible.

3.30 If the Council wishes to make more radical changes to the guideline this will inevitably delay the process. A working group could be set up to consider the details of Kelly's proposals. It would probably be necessary to road test any radically different version of the guideline before consulting on it. Alternatively, the Council may wish to incorporate some of the ideas into the existing structure and sign the guideline off for consultation at this meeting and consult over the summer as planned.

Question 7: Does the Council wish to change the approach of the Totality guideline based on the proposals from Rory Kelly?

Question 8: Does the Council wish to adopt any of the proposed changes in Annex C?

Explaining the structure of the sentence

3.31 Mention was made at the March meeting of working with the Judicial College to amend the pronouncement cards to ensure that a clear explanation is given (including for the benefit of victims) when sentencing for multiple offences. The suggestions from Kelly above are helpful but also illustrate the difficultly of providing a set form of words. The pronouncement card for a custodial sentence in magistrates' courts is as follows:

Custodial sentence

We are sending you to [prison] [a young offender institution] for a total period of …… days/ weeks/months.

[State each offence.
State the term of custody.
State whether concurrent or consecutive.]

1. The offence(s) is/are so serious that only a custodial sentence can be justified. [or]

2. There has been a wilful and persistent failure to comply with your community order. [or]

3. You have refused to agree to the making of a ……requirement on a community order.

Our reasons are:

[State your reasons]

3.32 In the Crown Court the Compendium gives various examples such as:

Example: Court has to sentence for two offences

On count 1 of this indictment, the charge of wounding {name} on {date}, the sentence will be two years' imprisonment. On count 2, the charge of assaulting {name} occasioning actual bodily harm on {date}, the sentence will be one year's imprisonment. The sentence on count 2 will run consecutively to the sentence on count 1, making a total sentence of three years in all. That is the least sentence that I can impose to mark the totality of your offending. You will serve up to half of your total sentence in custody and then …..

Example: where D is already serving a life sentence with a minimum of 10 years

For this offence of wounding you will serve a sentence of 18 months' imprisonment. You will serve no more than half of this sentence in custody – i.e. nine months. However, this sentence will be served consecutively to the minimum term of 10 years which you are currently serving. This means that when you have completed the minimum term of 10 years you will then serve the custodial portion of this sentence – namely nine months – and you will not be eligible to be considered for parole until you have served that additional period.

3.33 We could suggest to the Judicial College that wording such as that proposed in the guideline could be added: 'When sentencing for more than one offence explain how the individual elements have been adjusted to arrive at the total sentence'.

Question 9: What changes should be proposed to the Judicial College to assist with sentencing multiple offences?

4 EQUALITIES

4.1 At the March meeting the Council agreed to add some additional wording to the reference to the ETBB (see 3.3 above). As previously noted, the nature of the guideline and the lack of reliable data on multiple offences makes it difficult to draw any conclusions about how the guideline applies to different demographic groups and so no other changes relating to equalities are proposed.

4.2 The views of consultees will be sought as to whether there are any equalities issues that the guideline should address.

Question 10: Is the Council content with the proposed approach to equalities?

5 IMPACT AND RISKS

5.1 If the Council decides to consult on a fairly limited review of the guideline this is likely to attract criticism from academics and some other commentators. The consultation

document can explain why the Council is taking this approach and leave open the possibility of a future revision if and when better data become available.

5.2 If, on the other hand, the Council chooses to consider a more radical review, this will delay the process and may attract criticism from sentencers who are broadly happy with the guideline in its current form The more radical the changes, the greater the risk of unintended and unforeseen implications given the limited data available.

5.3 The guideline is of wide application and therefore any changes could have a significant impact on sentencing practice. If only limited changes are made these are unlikely to lead to substantive changes.

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Sentencing Council

Sentencing Council meeting:	**8 April 2022**
Paper number:	**SC(22)APR04 – Business Plan**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The Council's 2022-23 Business Plan and a review of the risk register.

2 RECOMMENDATIONS

2.1 That Council:

- signs off the draft of the Business Plan attached at **Annex A**;
- notes the current risk register at **Annex C**, alongside the summary below; and
- continues delegating risk to the Governance sub-group but is given the chance to review it in April each year.

3 CONSIDERATION

Business plan

3.1 The annual business plan, published towards the start of the financial year, sets out the planned activities for the forthcoming year. This will be the Council's ninth and follows a "double edition" last year which, due to the pandemic, covered the year 2020-21 retrospectively and looked ahead to 2021-22.

3.2 This year's business plan follows a very similar format to previous years, with a narrative introduction by the Chair providing a taste of what has been achieved in 2021-22 (though not in so much detail as to render the Annual Report redundant) and looking ahead to the guidelines, research and communications activities for 2022-23.

3.3 There is also standard information about the Council and how it operates. We include details about the Council's members, staffing of the office and budget, as well as how we work, particularly on developing guidelines. We are providing a little more information this year about sub-groups, which replicates information we already provide in the annual report.

We have updated the criteria for prioritising guidelines, after the refresh of these last year following the 'What next for the Sentencing Council?' consultation.

3.4 However, we are taking a different approach to setting out our objectives this year. There was a risk of confusing our previous overarching objectives with the strategic objectives we have agreed and published for 2021-2026. We have therefore reworked this section (pages 7-8) to set out our main statutory duties (what we need to do), which then serve to introduce the five-year strategic objectives (how we will do it). This includes a link to a web page documenting current progress against the strategic objectives that we will publish simultaneously with the Business Plan in May (see **Annex B**).

3.5 Table 1, the timeline and Annex C to the plan then provide more line-by-line detail on the guidelines and analytical and research publications planned for the coming year in the usual way.

Question 1: are you content with the draft 2022-23 business plan at Annex A?

Risk register

3.6 Although Council considers risk and handling issues in the course of any guideline or publication, it has been a long time since full Council has considered risk in the round.

3.7 Risk is something which in practice the Council delegates to the Governance sub-group. It reviews risk at each of its meetings (which now take place quarterly) and the other sub-groups (analysis and research, and communications and confidence) and the equality and diversity working group consider and adjust the risks relevant to them to feed into that overall consideration. The office Senior Management Team (SMT) also review the risk register (current version at **Annex C**) every other month and provide updates, so there is an almost continual process of review.

3.8 Recently, deep dives have been held in the relevant sub-groups on some risks which were felt to be persistently high, or very high. These were:

i) loss of support/confidence in the Council by Public/Media;

ii) criticism that guidelines do not take account of specific minority groups and protected characteristics in relation to both victims and offenders, as relevant to sentencing guidelines;

3.9 As a result of these deep dives, these have been updated with the latter being split into two distinct risks (one related to the actual risk guidelines contributing to disparities between different groups, and the other being the lack of data to be able to tell). On review, the levels for these risks have been reduced to 'Medium'.

3.10 This means that the top four highest risks, according to the risk register are now:

i) risk 1: guidelines have impacts that cannot be assessed or are not anticipated or intended;

ii) risk 8: insufficient resources to deliver statutory and business plan priorities;

iii) risk 12: guidelines cause, or fail to address existing disparities in sentencing between different groups; and

iv) risk 13: inability to assess if guidelines are leading to disparities within sentencing.

3.11 The risk register sets out the actions that are being taken to mitigate these and all the risks, although it is important to maintain a realistic sense of what risk tolerance the Council is prepared to carry. For example, there will always be a risk of external criticism, or the risk of decreased resources. Some of the response to that will be within our gift, but to some degree the impact and likelihood are beyond our control. Taking that approach means that some risks, like risk 5 (Sentencers interpret guidelines inconsistently) and risk 6 (Loss of support/confidence in the Council by Public/Media), even though at medium, are on track.

3.12 Some risks (such as those just mentioned) will be permanent, and subject to ongoing mitigation and periodic review. Others, such as risk 9 (Covid 19 impact upon staff resources and Council workplan) will likely be time limited and can be closed at some point, or wrapped up within other risks. Linked with that, it is important to have an honest sense of when it is achievable to get other risks on target. For example, risks 1, 12 and 13 are long-term risks which all to some degree rely on improved data and long-term mitigating actions. These are set for 2024.

3.13 The risk register is very much a living document. Some of the risks it sets out have been there since the Council's inception and the coming year will provide an opportunity for a thoroughgoing review of whether they are the right ones for the Council in 2022. The current process where risk management is delegated to the Governance sub-group, supported both by the other sub-groups and by regular updates from SMT seems effective and proportionate. However, I would propose that in future Council is given the opportunity for an annual overview at the start of the financial year, alongside the draft business plan.

Question 2: do you have any observations on the risks as set out in the current risk register?

Question 3: do you agree to an annual review of risk in full Council, with continued delegation to the Governance sub-group?

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Sentencing Council

Sentencing Council meeting:	**8 April 2022**
Paper number:	**SC(22)APR05 – Terrorism**
Lead Council member:	**Maura McGowan**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 From 20 October 2021 to 11 January 2022, the Council consulted on revisions to terrorism guidelines brought in by the Counter Terrorism and Sentencing Act 2021.

1.2 In addition, the consultation covered changes to the Preparation of terrorist acts guideline to ensure that judges approach cases involving undercover police or security services, in a consistent manner.

1.3 At this meeting the Council will be asked to consider the responses relating to the legislative changes, with the remaining issues to be discussed in May, when it is hoped that the guidelines can be signed off for publication in July to come into force in October 2022.

2 RECOMMENDATION

2.1 It is recommended that the Council agrees on revisions:

- to the Preparation of terrorist acts and Explosive substances (terrorism only) guidelines related to the introduction of 'serious terrorism sentences' and
- to the Membership of a proscribed organisation and the Support of a proscribed organisation guidelines to take into account the increase in the maximum sentence from 10 to 14 years.

3 CONSIDERATION

Background

3.1 In March 2018, the Sentencing Council published the first package of 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 (Terrorism Act 2000, section 38B)
- Possession for Terrorist Purposes (Terrorism Act 2000, section 57)
- Collection of Terrorist Information (Terrorism Act 2000, section 58)

3.2 The Counter-Terrorism and Border Security Act 2019 received Royal Assent on 12 February 2019. This made changes to terrorism legislation, some of which affected the guidelines listed above. The Council therefore sought to amend the relevant guidelines.

3.3 In October 2019, the Council published a consultation paper seeking views on amendments to some of the guidelines to reflect the new legislation, 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 12A), 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, additional aggravating and mitigating factors were added to the Funding terrorism guideline 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.

3.4 The Council considered the responses to the consultation in December 2019 and March 2020 and drafted some further changes in light of these. However, by this time, further terrorism legislation was planned which would have an impact on the guidelines, so the Council chose to pause the publication of the revised guidelines to await this new legislation.

3.5 As noted above, the Council consulted on further changes resulting from the Counter–Terrorism and Sentencing Act 2021, which was given Royal Assent on 29 April 2021.

3.6 The 2019 revised guidelines will be published alongside the revisions made under the most recent consultation process, and the accompanying consultation response document will incorporate both the 2019 changes and the changes under discussion today.

Preparation of terrorist acts guideline – the responses to consultation

3.7 The existing Preparation of terrorist acts guideline can be seen here and the draft consulted on can be found here.

3.8 The Council proposed expanding and extending the text above the sentencing table to provide for the introduction of 'serious terrorism sentences':

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 should 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 consider 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).

3.9 Respondents were generally content with this wording. The Criminal Bar Association (CBA) suggested a slight change:

From:

> Where the dangerousness provisions are not met the court must consider the provisions set out in section 265 and 278 of the Sentencing Code (required special sentence for certain offenders of particular concern). (See STEP 7 below)."

To:

> Where the dangerousness provisions are not met the court must **impose a sentence in accordance with** the provisions set out in section 265 and 278 of the Sentencing Code (required special sentence for certain offenders of particular concern). (See STEP 7 below).

3.10 The wording at step 7 (which reflects the language of the statute) is:

> Where the court does not impose a sentence of imprisonment for life or an extended sentence, or a Serious Terrorism Sentence but does impose a period of imprisonment, the term of the sentence must be equal to the aggregate of the appropriate custodial term and a further period of 1 year for which the offender is to be subject to a licence (sections 265 and 278 of the Sentencing Code).

3.11 The Prison Reform Trust referred to their opposition to the introduction of serious terrorism sentences (STS) and stated:

Attention should be given in the guidance to how age and/or lack of maturity should be taken into consideration when deciding on the imposition of an STS. This is particularly important when an STS is being considered for an offender aged 18-25. It is well established that age and/or lack of maturity are factors that are highly relevant to culpability. It is also established that this should be reflected in the sentencing process by "the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were". A separate sentencing regime exists for children (aged under 18) underpinned by the primary importance of considering the welfare needs of the child. For adults aged 18 and over, age and/or lack of maturity is recognised as an important factor in sentencing guidelines and prosecution guidance.

However, the new STS regime goes against the recognition of age and maturity in other areas of sentencing, by imposing the same conditions on children and young adults as adults convicted of terrorist offences. Removing the possibility of parole authorised release from children and young adults is counter to existing sentencing practice; and the evidence that it is this group in particular which are most capable of change and desistance from crime.

We recommend that this section of the guidance cross-refers to the equal treatment bench book. As we highlight in our answer to question 4, special consideration should also be given to age and / or lack of maturity as a factor which may indicate exceptional circumstances for not imposing an STS. Further concerns relating to the proposed guidance on exceptional circumstances, and the knock on impact of the 14 year minimum term on sentencing levels, are highlighted below.

Question 1: Does the Council wish to make any changes to the proposed text regarding serious terrorism sentences?

3.12 The consultation recommended that the sentence table for this offence should remained largely unchanged, stating:

> If a serious terrorism sentence is to be imposed but the sentencing table would lead to a custodial term of below 14 years then at Step 3, once the seriousness has been determined, the judge will need to increase the sentence to the minimum unless exceptional circumstances apply.
>
> There are not many sentences within the table that might require adjustment in this way. The serious terrorism sentence criteria includes the multiple deaths condition (i.e. that the offence was very likely to result in or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism). This means that category 2 and 3 harm cases are unlikely to ever be eligible for a serious terrorism sentence, and so no adjustment would be necessary.
>
> **D1** includes a sentence of less than 14 years within the sentencing range. However, whilst cases falling into this category *may* meet the criteria for a serious terrorism sentence and if so might need adjusting at step 3, there are just as likely to be cases that do not meet the criteria. Many cases falling into this category will not meet the first main test (that the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further serious terrorism offences or other specified offences) and in

> those cases it is helpful for the sentencer to be given a suitable starting point and range that is based on the offence seriousness.

3.13 The only change that the consultation recommended to sentence levels was to change 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:

> The only other adjustment that might be needed would be in those instances where a life sentence is imposed, but the 'serious terrorism case' criteria is met (i.e. this would have been a serious terrorism sentence but for the imposition of a life sentence). In these situations, the minimum term must be at least 14 years. C1 currently includes a life sentence minimum term of less than 14 years within its range. However 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.

3.14 Jonathan Hall QC, the independent reviewer of terrorism legislation did not agree with the change to C1:

> 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.

3.15 The Justice Committee was persuaded by this argument:

> 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.

3.16 The Prison Reform Trust endorsed this view and considered that the proposal 'risks contributing to sentence inflation and the upward drift of sentences which were not within scope of the original legislation'. They said that the guideline should not assume that no case could fall into C1 where the serious terrorism criteria were not met and run the risk of imposing a disproportionate sentence as a consequence.

3.17 The CBA agreed with the proposed increase at C1 from a 10 to a 14 year minimum term but suggested increasing the starting point from 15 to 17 years so that the starting point was more centrally positioned in the range.

Question 2: Does the Council wish to change the range for C1 as proposed in the consultation?

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

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' **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) to impose a serious terrorism sentence (s323(3) of the Sentencing Code).

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. (s282C Sentencing Code).

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

Circumstances are exceptional if the imposition of the minimum term (in the case of a life sentence), or not imposing the Serious Terrorism Sentence would result in an arbitrary and disproportionate sentence.

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.

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).

3.19 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."? [highlighting added]

3.20 Jonathan Hall QC queried the wording on exceptional circumstances:

> 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.

3.21 The Prison Reform Trust also objected to the reference to deterrence and developed their point made at 3.11 above:

> 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.

3.22 In contrast the Justice Committee stated:

> 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.

3.23 The CBA had one area of disagreement:

> 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.

3.24 In road testing conducted in September and October 2021, judges were generally positive about the proposed step 3, although there were suggestions for changes. Of eleven judges sentencing a scenario which was presented as meriting 12 years before any guilty plea reduction, eight imposed a serious terrorism sentence and three found exceptional circumstances not to do so. A summary of the road testing of step 3 is provided at **Annex A**.

3.25 Of the three judges who **did not** impose a serious terrorism sentence, two gave pre-guilty plea sentences of 12 years, one reduced this to eight years for the plea plus a four year extension, and one to nine years, and one judge gave a final sentence of 12 years plus a one year sentence for offenders of particular concern (SOPC) but did not provide a pre-guilty plea sentence. These judges were '*happy'* with their sentences.

3.26 Of the eight judges who **did** impose a serious terrorism sentence, four judges gave pre-guilty plea sentences of 14 years reducing these by 20 per cent to 11.2 years; one gave a pre-guilty plea sentence of 14 years plus a 10 year extension, and would '*apply a third, if at the earliest'*; two judges started at 15 years, with one reducing by 20 per cent to 12 years, and one who would reduce '*by the book depending on when the guilty plea was entered'*; and one judge started at 18 years, reducing by a third to 12 years, noting this was '*within the 20 per cent rule*'. Seven judges felt their final sentence was '*about right / fair'*, while one noted they *'found themselves trying to find a reason not to apply serious terrorism sentence'*.

3.27 The apparent inconsistency in outcomes is not an issue because the scenario was devised to test the usefulness of the guidance at step 3 and not in the expectation of a particular outcome. However, there does appear to be an issue in that many of the sentences passed were not in accordance with the legislation (sections 268C and 282C of the Sentencing Code), which specifies that a 'serious terrorism sentence' comprises a period of imprisonment (or detention in a young offender institution for those aged 18-21) for a minimum period of 14 years, and an extension period to be served on licence (between 7 and 25 years).

3.28 Taking the various points in turn:

(a) The point made by the Council of HM Circuit Judges at 3.19 above (and by a judge in road testing) appears to be a good one - it is proposed that the change they suggest is adopted;

(b) Jonathan Hall QC makes a valid point about deterrence not being a purpose of the provisions – the wording could be amended to remove the reference to deterrence;

(c) 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 could have an impact on the number of cases where there are findings of exceptional circumstances. The age profile of offenders for this offence is relatively young: in 2018-2020 28% were aged 18-21 and 39% aged 22-29. Three judges in road testing made reference to immaturity (in a scenario featuring a 19 year old offender) and one judge specifically said that step 3 should make some reference to age and immaturity.

(d) The Justice Committee's suggestion that the guidance should include examples of what might be exceptional is problematic. The Council has previously taken the view that by its very nature it is neither possible nor helpful to try to identify what amounts to 'exceptional'. One judge in road testing queried the use of the words 'arbitrary and disproportionate' suggesting that they might dilute the requirement to be truly exceptional – this is wording taken from case law on minimum terms for firearms offences and without it there is no real guidance on what 'exceptional circumstances' are.

(e) The CBA's comment appears to be based on a misunderstanding 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'.

(f) The apparent uncertainty among some of the judges in road testing as to the exact requirements of a serious terrorism sentence, suggests that it may be useful to spell this out at step 3 (including a reference to the restrictions on the reduction for a guilty plea) and possibly also in the text above the sentence table.

Question 3: Does the Council wish to make changes to step 3?

Explosive substances (terrorism only) guideline

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

Proscribed Organisations – Membership (Terrorism Act 2000, section 11)

3.30 The consultation proposed changes to the sentence levels to reflect the change in the statutory maximum sentence from 10 to 14 years. The draft guideline can be found here.

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

3.31 Jonathan Hall QC raised an issue not specifically addressed in the consultation:

> 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.

3.32 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.

3.33 Looking back through Council papers, the relevance of the guideline to professing to belong does not appear to have been discussed. I can find one reference to a case where an offender professed to belong to a proscribed organisation when in fact he had no links to it. He invited support for the organisation over the internet by calling on Muslims in the UK to prepare themselves for 'martyrdom operations' and was prosecuted under both s11 (membership) and s12 (support) receiving concurrent 5 year sentences for each after a guilty plea.

3.34 As the guideline stands, an offender who professes to belong (but does not) would fall into culpability C: 'All other cases'.

Question 4: Should the guideline explicitly refer to professing to belong to a proscribed organisation?

3.35 One anonymous respondent thought that the range for category A should go up to the statutory maximum, stating:

> 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.

3.36 A magistrate disagreed with having a community order option at the bottom of the range for category C.

3.37 The Prison Reform Trust disagreed with the proposed levels:

> 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.

3.38 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.

Question 5: Does the Council wish to make any changes to the proposed new sentence levels for membership of a proscribed organisation?

Proscribed organisations – support (Terrorism Act 2000, section 12)

3.39 The consultation proposed changes to the sentence levels to reflect the change in the statutory maximum sentence from 10 to 14 years. The draft guideline can be found here.

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

3.40 As can be seen above, 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 tougher 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 has similarly had its range broadened, although its starting point remains the same.

3.41 Responses to the proposed new sentence levels were generally supportive, including from the Prison Reform Trust. The anonymous respondent thought that the range for category A should go up to the statutory maximum for this offence as well and a magistrate repeated his objection to a community option at C1. 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. The Council may also wish to consider whether the range for either B1 or C1 should be widened so that they meet if not overlap.

3.42 The Ministry of Justice stated:

> 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.

3.43 The Justice Committee agreed:

> 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.

3.44 Looking at step one and the sentence tables of the two guidelines side by side:

S11 membership	S12 support
Culpability demonstrated by one or more of the following: **A** • Prominent member of organisation **B** • Active (but not prominent) member of organisation **C** • All other cases	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
Harm There is no variation in the level of harm caused. Membership of any organisation which is concerned in terrorism either through the commission, participation, preparation, promotion or encouragement of terrorism is inherently harmful.	Harm Category 1 Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life Significant support for the organisation gained or likely to be gained

	Category 2 Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life Category 3 All other cases

Culp	A	B	C
	SP 10 **Range** 8 - 13	**SP** 7 **Range** 5-9	**SP** 3 **Range** High level CO - 4

	A	B	C
1	**SP** 10 **Range** 8-13	**SP** 7 **Range** 5-9	**SP** 3 **Range** 2-4
2	**SP** 8 **Range** 6-9	**SP** 4 **Range** 3-6	**SP** 2 **Range** 1-3
3	**SP** 6 **Range** 4-7	**SP** 3 **Range** 2-4	**SP** 1 **Range** High level CO – 2

3.45 The factors for the support offence were considered by the Council in December 2019 in the light of consultation responses. The relevant section of that paper annotated with the decisions made is attached at **Annex B**.

3.46 Both of these offences have low volumes of cases sentenced. In the three years 2018-2020, around 20 offenders were sentenced for the membership offence. All but one received an immediate custodial sentence. The mean average custodial sentence length (ACSL) was 5 years (median was 5 years 6 months) after any reduction for guilty plea. From 2010 to 2020 (inclusive) there have been 11 offenders sentenced for the support offence. All 11 offenders were actually sentenced in 2016 and 2017 which was prior to the publication of the current sentencing guideline. All offenders received an immediate custodial sentence. The mean ACSL was 4 years 5 months (median was 5 years) after any reduction for a guilty plea. At **Annex C** the Council can see a summary of some membership and support cases taken from transcripts.

3.47 In discussions at previous meetings the Council has acknowledged that although the legislation draws a distinction between support and membership, in reality that distinction is not clear cut. Nevertheless, it is difficult to see how the sentences for these two guidelines can be aligned when they are structured so differently. The concern raised by MoJ seems to

relate to cases of medium harm and this could be addressed by increasing the starting point for B2 from 4 years to 5 or 6 years. If that were done, the range would probably need to be adjusted as well, possibly to 3-7 years or 4-7 years with potential adjustments to the ranges for other categories. See suggestions below:

	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** 5/6 years' custody **Category range** 3/4-7 years' custody	**Starting point** 2 years' custody **Category range** 1-3/4 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

3.48 At **Annex D** the Council can see the sentencing tables of a number of other terrorism offences with similar statutory maximum sentences for comparison.

Question 6: Does the Council wish to make any changes to the proposed new sentence levels for support of a proscribed organisation?

4 IMPACT AND RISKS

4.1 The resource assessment will be updated in the light of any changes agreed at this meeting and presented to the Council at the next meeting.

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