



Sentencing Council meeting:

20 December 2019

Consultation Responses

The Consultation can be seen here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-guideline-consultation-2019.pdf>

Consultation Question 1

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

The consultation version of the Support guideline can be seen here:

<https://www.sentencingcouncil.org.uk/offences/crown-court/item/proscribed-organisations-support-for-consultation-only/>

- 3.3 The offence of inviting support for a proscribed organisation (section 12 Terrorism Act 2000) was amended by the Counter Terrorism and Border Security Act 2019 (the 2019 Act) to create a new offence (section 12(1A)) of expressing an opinion or belief supportive of a proscribed organisation, reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.
- 3.4 In the consultation the Council proposed that the culpability factors were amended so that the original factor; 'Offender in position of trust, authority or influence and abuses their position' was separated into an intentional offence and a reckless offence, with the intentional offence appearing in culpability A and the reckless offence in culpability B.
- 3.5 Of the 13 respondents only nine commented; six agreed and three disagreed. Amongst those that agreed were the CPS and the Criminal Bar Association. However, in disagreement was the current Independent Reviewer of Terrorism Legislation, Jonathan Hall;

The effect of the proposed amendment is to steer the sentencing judge from ever including an offender who has been convicted of the section 12(1A) offence in the highest Culpability bracket (A). This is because the offence will not qualify as an Intentional Offence, and the

second (“persistent efforts to”) and third (“encourages activities intended to”) also appear to require intention.

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

The section 12(1A) Terrorism Act 2000 offence requires proof of subjective recklessness. An outcome of the proposed change is that, even for cases in Harm Category 1, for example where there is evidence that individuals have acted on or been assisted by the encouragement to carry out activities endangering life, the starting point will be limited to 5 years.

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

3.6 However, the other two respondents who disagreed (Prison Reform Trust and a Professor at the University of East Anglia) both expressed their concern about the mere existence of the provisions in legislation. The Prison Reform Trust went on to say;

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

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

- Whether or not the defendant knew if the organisation was on the proscribed list*
 - The context for and motivation of the offence – eg support expressed for a proscribed organisation in the context of an educational setting and in the interests of furthering open debate and democratic accountability and scrutiny should at least be subject to mitigation, and arguably exempt from criminal prosecution entirely*
 - The extent to which the defendant took steps to mitigate or reverse the original reckless offence eg by deleting and / or retracting a tweet made in support of a proscribed organisation.*
- Therefore, rather than seeking to integrate the new recklessness offence into the existing guideline, we recommend that the new offence is drawn up as a separate guideline, so that the full range of factors relating to both culpability and aggravation / mitigation can be properly outlined. This should be subject to separate consultation, with a particular focus on understanding the implications for civil liberties and freedom of expression.*

- 3.7 If we take the course of action recommended by Jonathan Hall the concerns expressed by the PRT would be exacerbated. The type of case they (and the JCHR) refer to, where an academic is speaking about an organisation that should be deproscribed, reckless as to whether his talk will encourage his students to join the proscribed organisation, would remain at culpability A and only receive a small reduction at step 2 through the use of relevant mitigating factors.
- 3.8 When drafting the amendments, the Council understood that the legislative change was intended to capture figures such as Anjem Choudhary but was also mindful of the fact that the guideline must ensure that anyone sentenced for this offence receives an appropriate sentence. It was felt that ensuring that only intentional acts fall into the highest culpability bracket was the most appropriate way to proceed.
- 3.9 It is unclear how the PRT would like their concerns to be addressed beyond the addition of aggravating and mitigating factors. It may be that they would prefer the reckless factor to fall into culpability C. However, when drafting the revised guidelines, the Council was clear that an offender in a position of trust, authority or influence should receive a harsher sentence. Whilst the scenario described of an academic falling foul of the legislation is a concern there will be many other examples that are more likely to be prosecuted that need to be adequately sentenced through the guideline.
- 3.10 A way to address the concerns raised by both parties could be through additional step 2 factors;
- Aggravating: Offender has terrorist connections and/ or motivations
 - Mitigating: Offender has no terrorist connections and/ or motivations
 - Mitigating: Offender did not know that the terrorist organisation was proscribed (could be problematic as many offenders could argue this)
 - Mitigating: Offender has taken steps to retract their support
- 3.11 Alternatively, changes could be made to step one. Instead of separating out the first factor into intentional and reckless acts the Council could instead focus on the offender's motivation:
- Category A - Offender with terrorist connections and/ or motivations, in a position of trust, authority or influence, and abuses their position
 - Category B - Offender with no terrorist connections and/ or motivations, in a position of trust, authority or influence, and abuses their position

Question 3: Does the Council want to add any additional aggravating and/ or mitigating factors?

Agreed to add factors set out below:

Aggravating factors

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

Mitigating factors

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

Question 4: Does the Council want to amend the step 1 factors to remove the reference to reckless and intentional acts?

No:

The Council considered the responses and concluded that separating reckless and intentional acts so as to treat intentional acts as more serious within culpability is common to sentencing guidelines and an important factor in assessing seriousness.