PRISON REFORM TRUST

Prison Reform Trust response to the Sentencing Council Terrorism Offences Consultation – December 2019

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

www.prisonreformtrust.org.uk

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

No. We are very concerned that these changes, resulting from the introduction of a new recklessness offence, are extremely broad and confusing and could potentially net a wide range of behaviours which have not previously been criminalised. Although the fault lies primarily in the legislation, the draft guidance itself needs to be a lot clearer and more comprehensive on what constitutes a 'reckless offence' and how culpability, as well as aggravating and mitigating factors, should be considered. While 'recklessness' is a common legal test in some areas of the criminal law, including offences against the person, it is largely untested as a standard for criminalisation when applied to speech. As the Joint Committee on Human Rights concluded in 2006:

> …recklessness is normally applied to actions that are themselves within the realm of criminality… if you hit someone or deceive them then it is absolutely appropriate for a jury to be able to convict you of an offence even if you did not intend the consequences of your actions. The same nexus between action and consequence should not exist for speech offences. Speech does not naturally reside in the realm of criminality. This is why the element of intention should always be attached to speech offences. It is the means by which proper criminal responsibility can be determined.[1]

In addition to removing the requirement of intent, the legislation also fails to make clear what kind of speech would constitute an expression of support. It is therefore

[1] Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism, First Report of Session 2006–07, paragraph 9.

difficult to see how it could, as an interference with the right to freedom of expression, be described as adequately "prescribed by law". The JCHR has highlighted that "this could have a chilling effect, for instance, on academic debate during which participants speak in favour of the deproscription of proscribed organisations." It has further set out that: "As currently drafted, there is inherent ambiguity as to what would be caught by this offence, thus questioning whether the interference can be said to be 'prescribed by law'. Moreover, there is a very clear risk that it would catch speech that is neither necessary nor proportionate to criminalise […]. For these reasons, we consider that this clause violates Article 10 of the ECHR."[2]

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.

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

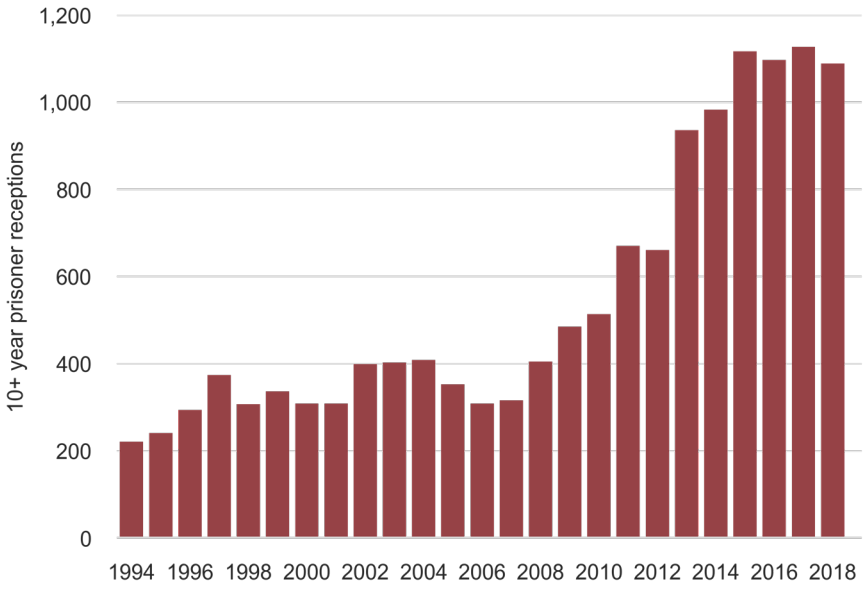
Yes.

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

No. We welcome the fact that the Council is proposing a more limited range of increases to sentence ranges than it had originally suggested. However, even the more limited changes the Council is proposing at the higher end of seriousness will add to the increasing number of people in prison serving long sentences. This,

[2] Ibid.

together with the significant increases in sentences across the board for other offences included in this draft guideline, will exacerbate existing problems of overcrowding in the prison estate without any proven benefits in terms of deterrence or desistance from crime.



Source: Offender management statistics ending March 2019 and ending December 2004

The graph above highlights the significant increase in receptions of prisoners serving sentences over 10 years in the past 25 years. A slight increase from 1994 is observable, peaking at 1998, and then declining slightly to 2006. From 2006 there is a very large increase, with three times as many persons being incarcerated by 2013. In 2018 four times as many people were sent to prison for a sentence over 10 years than in 1995, the year of peak violent crime.

While Parliament is responsible for setting the sentencing framework, including maximum and minimum terms, the Council has a responsibility to ensure that guidelines set in response are fair and proportionate. We note that, in relation to the offence of collection of terrorist information, the Council followed the advice of the London Criminal Courts Solicitors to consider the outcome of the debate in Parliament before setting new sentencing levels. We urge the Council to adopt a similar approach in future to all offences, and avoid increasing sentence levels across the board unless it is clear that it is the express will of Parliament to do so.

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

See answer to question 3.

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

See answer to question 3.

6. Do you agree with the additional guidance?

In so far as it reflects changes in statute which it is necessary for sentencers to be aware of.

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

Yes.

8. Are there are any other equality and diversity issues the guidelines should consider?

We note that the majority (52%) of those involved in terrorism offences are under the age of 29. In addition, although the numbers are low, a disproportionate number of women (14%) are involved in terrorism offences.[3] This may highlight the importance of ensuring mitigating factors of coercion and intimidation, primary care responsibilities, and age and / or lack of maturity, are taken into account as part of sentencing for this offence group. We use this opportunity to highlight the importance of sentencers having regard to the relevant sections of the Equal Treatment Benchbook.

We are particularly concerned that in 74% of cases the perceived ethnicity of the offender was not recorded or not known. Therefore, as the consultation itself acknowledges, "the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution." On the basis of this analysis, it is simply not possible to tell the likely impact of the draft guideline on ethnicity. We also note that there is no breakdown according to the protected characteristic of religion.

The lack of data on race and religion is extremely concerning given the racialised and religious-based context of much terrorism-related offending. We use this opportunity to highlight recommendations 1 to 4 of the *Lammy review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*.[4] We ask that the Council seeks to ensure that its own procedures for recording and analysing data meet the standards set by the review, and that it works with criminal justice partners to ensure a consistent approach to capturing data on religion and ethnicity.

1. Recommendation 1: A cross-CJS approach should be agreed to record data on ethnicity. This should enable more scrutiny in the future, whilst reducing inefficiencies that can come from collecting the same data twice. This more consistent approach should see the CPS and the courts collect data on religion so that the treatment and outcomes of different religious groups can be examined in more detail in the future.
2. Recommendation 2: The government should match the rigorous standards set in the US for the analysis of ethnicity and the CJS. Specifically, the analysis commissioned for this review – learning from the US approach –

[3] See also Counted Out: Black, Asian and Minority Ethnic Women in the Criminal Justice System http://www.prisonreformtrust.org.uk/Portals/0/Documents/Counted%20Out.pdf
[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

must be repeated biennially, to understand more about the impact of decisions at each stage of the CJS.

3. Recommendation 3: The default should be for the Ministry of Justice (MoJ) and CJS agencies to publish all datasets held on ethnicity, while protecting the privacy of individuals. Each time the Race Disparity Audit exercise is repeated, the CJS should aim to improve the quality and quantity of datasets made available to the public.
4. Recommendation 4: If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of 'explain or reform' should apply to every CJS institution.