CBA Response to the Sentencing Council's Consultation on changes to the Definitive Guideline 'Terrorism Offences'

Date: 11 January 2022

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultations undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Consultation

4. On 20 October 2021, the Sentencing Council published a consultation with the intention of using the responses principally to revise four sentencing guidelines for terrorism offences in England and Wales in order to reflect changes brought in by the Counter-

Terrorism and Sentencing Act 2021. The CBA responses to the questions posed in the Consultation document are set out, below.

Preparation of Terrorist Acts Guideline

5. Question 1: We agree subject to one suggestion. We suggest that instead of the words:

   "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 SEVEN below)."

   It would be better to say:

   "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 SEVEN below)."

6. Question 2: We agree.

7. Question 3: We agree that the lower end of the category range for a C1 offence should be changed to 14 years, but at the same time it may be best to change the starting point from a minimum term of 15 years to a minimum term of 17 years. It is unusual to see a category range where the lower figure is one year below the starting point but the higher figure is five years above the starting point.

8. Question 4: 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.

Explosive Substances (Terrorism only) Guideline

9. Question 5: We refer to our answers, above.

Statutory maximum sentences

10. Question 6: We agree, although we note that the draft proposed guideline for both the membership and support offences, at their respective p.1, continue to refer to the previous maximum sentences and offence ranges.

11. Question 7: We agree.

Cases involving LEAs

12. Question 8: We do not disagree but we do sound a note of caution about the juxtaposition of this passage within the Definitive Guideline. At the moment at Step One the shaded box entitled Harm states that "Harm is assessed based on the type of harm risked and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan". Where an LEA is involved there will now be a preceding box which will stipulate that the harm should be assessed not on the basis of the harm that was risked or that was likely to occur but on the basis of the harm the offender intended to cause and the viability of the plan. Is there a distinction between the harm intended and the harm risked? And if the viability of the plan is relevant to the risk of harm, why is it a separate consideration to the harm intended when an LEA is involved?

13. It might make more sense throughout Step 1 to refer to both the harm intended (subjective) and the harm that might foreseeably have been caused (objective) as both of

these matters are specifically referred to in section 63 of the Sentencing Code as being relevant to an assessment of the seriousness of the offence in addition to any harm actually caused by the offender.

14. Alternatively, we wonder whether the passage in respect of LEA involvement might better read "in a case that involves an LEA, the harm should be assessed in the first instance by reference to the offender's intentions, followed by a downward adjustment at step 2 to reflect the fact that the harm did not occur. The extent of this adjustment will be specific to the facts of the case….[and so on as per the current draft]" Given the mens rea of the offence is one of intention anyway, might the box at the top of p.4 (the general harm guidance) read "Harm is assessed based on the type of harm intended and the likelihood of that harm being caused. When considering the likelihood of harm, the court should consider the viability of any plan".

15. Also, the section in the new proposed box about the discount that will be available to an offender who voluntarily desists at an early stage should presumably apply whether an LEA has been involved or not. Why should the lone defend who abandons his preparations be denied the benefit of a discount when a defendant who has unwittingly allied himself with an LEA and who does likewise could receive a substantial discount?

Life sentences

16. Question 9: We agree. As the time a convicted offender is required to serve in custody pending release or eligibility for release can be altered by statutory instrument it makes little sense to alter the Definitive Guideline to take account of the approach of the present government to that issue. If a future government set the period at one-half of the custodial term, or more or less, then the Definitive Guideline would need to be changed again. That is a recipe for confusion and injustice.

Public sector equality duty

17. Question 10: No

18. Question 11: No