House of Commons
Justice Committee

Draft Sentencing Council guideline on terrorism

Sixth Report of Session 2017–19

Report, together with formal minutes relating to the report

Ordered by the House of Commons
to be printed 21 February 2018
**Justice Committee**

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General’s Office, the Treasury Solicitor’s Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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**Powers**

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

**Publication**

Committee reports are published on the Committee’s website at [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee) and in print by Order of the House.

**Committee staff**

The current staff of the Committee are Rhiannon Hollis (Clerk), Danielle Nash (Second Clerk), Gemma Buckland (Senior Committee Specialist), Nony Ardill (Legal Specialist), Claire Hardy (Committee Specialist), Christine Randall (Senior Committee Assistant), Su Panchanathan (Committee Assistant), and Liz Parratt and Simon Horswell (Committee Media Officers).

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1 Report

The Sentencing Council

1. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice, set up to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. Its primary role is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Council also assesses the impact of guidelines on sentencing practice and promotes public awareness of sentencing practice in the magistrates’ courts and the Crown Court.

2. Under section 120 of the Coroners and Justice Act 2009, the Council is required to publish sentencing guidelines in draft before they are finalised. Section 120(6) of the 2009 Act lists the Justice Committee as a statutory consultee on draft guidelines. The Council must also consult the Lord Chancellor and any person that the Lord Chancellor directs should be consulted, together with such other persons as the Council considers appropriate. In setting guidelines, the Council is required to have regard to a number of factors, including the sentences imposed by courts in England and Wales for particular offences and the need to promote consistency in sentencing.

Our response to the current consultation

3. On 12 October 2017, the Sentencing Council published for consultation a package of sentencing guidelines covering terrorism offences. Mindful of recent terrorist attacks, the Council felt it important to expedite the project so that the definitive guideline could be published as soon as possible; for this reason, the consultation period was reduced to six weeks from the normal period of three months. Alongside the draft guideline, the Council published a consultation stage Resource Assessment.

4. The offences covered by the draft guideline are as follows:

- Preparation of terrorist acts (section 5 of the Terrorism Act 2006)
- Explosive substances—causing an explosion likely to endanger life or property (section 2 of the Explosive Substances Act 1883), or attempting to do so, or making/keeping explosives with intent (section 3 of the 1883 Act)
- Encouragement of terrorism by making prohibited statements (section 1 of the Terrorism Act 2006) or dissemination of statements (section 2 of the 2006 Act)
- Membership of a proscribed organisation (section 11 of the Terrorism Act 2000)
- Support for a proscribed organisation (section 12 of the Terrorism Act 2000)
- Funding terrorism, by receiving, using, possessing or providing money or property for the purposes of terrorism (section 15 to 18 of the Terrorism Act 2000)

1 Terrorism Guideline Consultation, The Sentencing Council, 12 October 2017
2 Terrorism offences: draft Resource Assessment, Sentencing Council.
• Failure to provide information about acts of terrorism or about someone involved in acts of terrorism (section 38B of the Terrorism Act 2000)

• Possession of articles for terrorist purposes (section 57 of the Terrorism Act 2000)

• Collection of terrorist information (section 58 of the Terrorism Act 2000)

5. In publishing its consultation paper, the Sentencing Council aimed to seek the views of a wide range of respondents with an interest in the sentencing of terrorism offences; in all, 25 responses were received. As it has done in relation to previous consultations, the Council shared these responses with us, as well as producing a helpful note summarising its proposals and respondents’ reaction to them; this note is reproduced as Appendix 3 to our report. Because of this assistance from the Council, we considered that it was unnecessary for us to seek separate evidence on these proposals, either formally or informally.

6. Our response to the consultation was submitted by way of a letter from the Chair to the Chair of the Sentencing Council, Lord Justice Treacy, dated 24 January 2018. We have decided to publish this short report to draw the attention of both the House and other interested parties to the draft terrorism guideline and to our own response, which follows at Appendix 1 to this report. Lord Justice Treacy replied to our letter on 5 February 2018; his letter is at Appendix 2.
Appendix 1: Letter from the Chair of the Justice Committee to the Chairman of the Sentencing Council, dated 24 January 2018

Draft Sentencing Council Guideline on Terrorism Offences

The Justice Committee thanks the Sentencing Council for giving it the opportunity of responding to the draft guideline on terrorism offences, and in particular for permitting this response to be made after the six-week consultation period has ended. To avoid any further delay, we have decided to respond by way of a letter. Once again, we are grateful to the Council for agreeing to share with us the responses that it received to its consultation on this guideline, and for providing a helpful summary of its proposals and analysis of the consultation responses.

We should start by saying that we support the Sentencing Council’s broad approach to preparing this draft guideline for adult offenders. These are serious offences, as reflected in the maximum penalties set by Parliament. It is right that the guideline reflects public concerns about terrorism and the grave threats that it poses to society. We note that, mindful of recent terrorist attacks, the Council has decided to expedite this project to allow it to produce a package of guidelines as soon as possible. While we appreciate the context in which this decision was taken, we would nonetheless urge the Council to give full and careful consideration to the responses that it has received to its consultation, including the observations that we make in this letter. We also recommend that the guidelines explain the objectives of sentencing for terrorist offences within the context of the Government’s wider strategy on the prevention of terrorism, taking into account the impact of sentencing on the prison population—a point to which we return below.

Sentencing ranges—upper limits

In a departure from its normal approach, the Council proposes sentencing ranges that are up to the statutory maximum for the offences of funding terrorism and failure to disclose information about acts of terrorism. In contrast, for five other offences, the proposed sentencing ranges are slightly below the statutory maximum, to allow the courts a small amount of “headroom” to sentence above the range in exceptionally serious cases. For example, the offences of membership of a proscribed organisation and support for a proscribed organisation both carry a maximum sentence of 10 years’ custody, while the guideline proposes a sentencing range up to nine years’ custody. We believe that the latter approach is preferable, as it gives more flexibility to sentencers in dealing with particularly grave offences where the culpability and harm factors go beyond circumstances that have been envisaged by the guideline. We recommend that the Council reconsider the upper limit of the sentencing ranges for the two offences where the statutory maximum is currently proposed.
Sentencing ranges–lower limits

We note that some respondents to the Council’s consultation, including Professor Mike Hough, questioned the need for harsher sentences for lower level offences, suggesting that there might be a risk of backlash effects outweighing gains. When giving the Tom Sargant Memorial Lecture in October 2017, the Independent Reviewer of Terrorism, Max Hill QC, observed that terrorism trials are presided over by senior and experienced judges who should be entrusted with wide discretion in sentencing, depending on the offender and the offence in question. Mr Hill concluded these remarks by saying that he “cannot see any basis on which our judges should be so fettered that they are required to impose minimum terms”. Although the guidelines do not, of course, impose statutory minima, having relatively punitive lower limits within the sentencing ranges could have a similar effect in practice. We conclude that these observations are worthy of consideration, to ensure that appropriate sentences are imposed at the very lowest level of harm/culpability.

We also note that most of the offences within this guideline are triable either way, with lower penalties on summary conviction. We appreciate that, in practice, the magistrates’ court is likely to send terrorism cases to the Crown Court for trial; however, we would remind the Council that Parliament has envisaged the possibility of certain, relatively minor terrorism cases remaining within the jurisdiction of the magistrates’ court; the relevant statutes enshrine an upper limit of six months’ imprisonment that would apply in this jurisdiction. In particular, the Council has proposed a lower limit of one year for sentencing the (either-way) offences of funding terrorism and possession for terrorist purposes; this in practice removes any role for magistrates’ courts, even though Parliament specifically provided in legislation for the possibility that such offences could be tried there. This appears to us to sit uneasily with the statutory provisions. In addition, as these are low volume offences for which there is very limited evidence of current sentencing practice, there is all the more reason to be cautious in making significant changes which might constrain sentencers and effectively remove options they have at present.

Ranking of terrorist activity

We note that the Council considers it would be inappropriate to require judges to rank terrorist organisations, citing the observations made by the Attorney General to the Court of Appeal in the 2016 guideline case of Kahar. Here, it was submitted by the Attorney General that Parliament has legislated against all terrorism and does not distinguish between causes and aims; as well as creating procedural difficulties, an attempt to rank terrorist organisations or causes would be invidious and may even provide an incentive to commit further atrocities. We fully support the approach that the Council has taken.

The Sentencing Council states that terrorism offences are “more serious than they have previously been perceived”, indicating that its proposals take account of the need to punish and incapacitate to a greater extent than previously. The Council’s approach has been informed by several recent, high-profile terrorist attacks and the changing nature of offending. However, some witnesses to the Council’s consultation have called for a more cautious approach. For example, Professor Emeritus Clive Walker suggests it is unhelpful to view the current wave of Islamist-inspired terrorism as being intrinsically more serious than—say—the Irish terrorist incidents of the late 20th century, many of which resulted in

4 Tom Sargant Memorial Lecture for JUSTICE, 24 October 2017
5 R -v- Mohammed Abdul Kahar and Others [2016] EWCA Crim 568
mass casualties and extensive economic damage. Notwithstanding understandable public opprobrium in the face of recent terrorist atrocities, we consider that it is important to maintain a proportionate approach to sentencing that preserves judicial discretion, irrespective of the ideological drivers of these offences.

**Mitigating factors**

While most sentencing guidelines include “age and/or lack of maturity” as a potential mitigating factor where it affects the responsibility of the offender, we note that this has not been included as proposed mitigation for terrorism offences. In its response to the Council’s consultation, Transition to Adulthood points to research on brain development in young adulthood, which has shown that the functions linked to “temperance” (impulse control, rational thinking and empathy) are not normally developed in full in the adult male brain until the mid-20s. The response of Interserve Citizen Services argues that vulnerabilities such as lack of maturity and social isolation can increase openness to suggestion and may lead to individuals being less aware of consequences. We have also taken account of our predecessor Committee’s report on Young Adult Offenders, which concluded that a strong case is made for a distinct approach to the treatment of young adults in the criminal justice system. Accordingly, we recommend that a mitigating factor of age and/or lack of maturity be included for all terrorism offences. We further recommend that “offender coerced” be included as a mitigating factor for the offences of possession for terrorist purposes and collection of terrorist information, as it is for other offences covered by this guideline.

**Issues relating to culpability and harm**

Several respondents made comments on aspects of the guideline’s approach to culpability and harm. Mr Justice Edis was unconvinced that advancement of preparation for a terrorist act should be given such prominence as an indicator of culpability, given that several recent terrorist offences have involved minimal preparation (for example, merely hiring a vehicle). While completeness of preparation has evidential value, he thought that the intention of the offender and his or her capacity to bring about the terrorist act is more relevant. Assistant Commissioner Mark Rowley, the National Counter-Terrorism Policing Lead, raised practical concerns about linking culpability with the advancement of preparation; he suggested that this may lead to perverse outcomes by encouraging police to allow a plot to run on, putting public safety at risk. Similarly, Lyndon Harris from Oxford University’s Centre of Criminology pointed out that the draft guideline could mean an offender who conceives of an unsophisticated plan one morning, intending to carry it out later than day, being found more culpable than one who has constructed a plan over many months, but had not yet brought it to fruition. Taking all these points into account, we recommend that that this culpability factor be reviewed.

In relation to harm factors, Dr Jonathan Bild from Cambridge University Faculty of Law thought that having a single harm category of “endangerment of life” was too blunt an instrument; a distinction should be made between an offender who is reckless as to endangering life, however remote the possibility might be, and an offender who wanted to kill as many people as possible. We agree that this distinction should be made.
The Criminal Law Solicitors Association (CLSA) considered that there was too much scope for subjectivity in the harm factors outlined in the draft guideline for possession of articles for terrorist purposes, and had similar concerns about the lack of clarity regarding collection of terrorist information. CLSA argued for more differentiation in the grading of such articles/information. We note that, for both offences, the guideline only distinguishes between Category 1 harm (article had potential to facilitate offence causing loss of life, serious injury, or a substantial impact to the economy or civil infrastructure) and Category 2 harm (all other cases), and that a custodial sentence is indicated for all such offences. We consider that more refined harm distinctions should be introduced, and the Council might wish to consider retaining the option of a high level community order for low level offences of this type—for example, if the offender has a reason for possession that falls just short of a “reasonable excuse” defence.

**Impact of sentencing on prisons**

We were particularly struck by the consultation response of the Parole Board, which points out that the lack of a specific risk assessment tool for those convicted of terrorist offences may well inhibit the release of prisoners serving indeterminate sentences and extended sentences/offenders of particular concern, all of whom can only be released by the Board. The Board also raises concerns about radicalisation in prisons, a problem that it suggests will remain regardless of whether the Government decides to segregate prisoners or continues to spread them around the prison estate. In the Board’s assessment, there are concerns that increasing the penalties for less serious offenders will result in them becoming more likely to commit terrorist acts when they are released. The Board goes on to observe:

> Most of the rest of Europe is devising interventions in the community to deradicalise less serious offenders. These programmes are more likely to be successful in the community than in prison where the influence of extremist inmates is likely to be stronger.

While we appreciate that these observations go beyond the scope of the draft sentencing guideline, we believe that they underline the importance of ensuring that sentencing policy is consistent with the Government’s wider strategy on prevention of terrorism, and that taken together these measures are likely to be effective. It is not a matter for the Council to ensure the provision of effective deradicalisation, but if provision in prisons is in fact absent or inadequate, as we have reason to believe is often the case, then this must have an effect on the Council’s assessment of the likely efficacy of sentences, and in turn on its guidelines. As noted in the consultation paper, the statutory purposes of sentencing (under section 142 of the Criminal Justice Act 2003) include the reform and rehabilitation of offenders and the reduction of crime—not limited to its reduction by deterrence. In addition, when preparing guidelines, one of the matters to which the Council must have regard is the effectiveness of different sentences in preventing reoffending. We suggest that concerns about the adequacy of deradicalization programmes in prison may mean that the court should consider, for certain offences at the lowest level, whether it would be appropriate to impose a non-custodial sentence; however, we recognize that non-custodial disposals will not be suitable for the majority of cases.
Appendix 2: Letter from the Chairman of the Sentencing Council to the Chair of the Justice Committee, dated 5 February 2018

I am writing to extend my thanks to the Justice Committee for their thorough consideration of our terrorism consultation paper.

Your comments have been put before the Council and we intend to reflect on them fully when reviewing and finalising the guidelines. As you will be aware, the Council will publish a response document at the same time as we publish the guidelines. This response document will provide a full explanation for the changes that we have made, as well as addressing the submissions you have made to us.
Appendix 3: Terrorism Guideline Consultation

Aim and summary of the proposals

This package includes nine separate guidelines that will apply to all relevant offenders aged 18 or over;

- Section 5 (Preparation of Terrorist Acts) Terrorism Act 2006
- Section 2 (Causing explosion likely to endanger life or property) Explosive Substances Act 1883
- Section 3 (Attempt to cause explosion, or making or keeping explosive with intent to endanger life or property) Explosive Substances Act 1883
- Section 1 (Encouragement of Terrorism) Terrorism Act 2006
- Section 2 (Dissemination of Terrorist Publication) Terrorism Act 2006
- Section 11 (Membership of proscribed organisation) Terrorism Act 2000
- Section 12 (Support for a proscribed organisation) Terrorism Act 2000
- Section 15 (Fundraising) Terrorism Act 2000
- Section 16 (Use and Possession) Terrorism Act 2000
- Section 17 (Funding Arrangements) Terrorism Act 2000
- Section 18 (Money Laundering) Terrorism Act 2000
- Section 38B (Information about Acts of Terrorism) Terrorism Act 2000
- Section 57 (Possession for Terrorist Purposes) Terrorism Act 2000
- Section 58 (Collection of Terrorist Information) Terrorism Act 2000

Through the production of these drafts the Council aims to provide a comprehensive package of sentencing guidelines for sentencing offenders guilty of terrorism offences. The guidelines will promote consistency in sentencing for these extremely serious and varied offences.

Each of the guidelines follows the Council’s step by step approach to sentencing which involves an assessment of culpability and harm. The offences under this package vary hugely and so the culpability and harm models vary to fit the offence.

The Preparation of Terrorist Acts guideline is expected to result in an increase in sentencing practice for offences at the lower end of seriousness. The Council considered the sentences as set out in the guideline case Kahar alongside the details of recent cases, and agreed

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6 This document is an overview of the Sentencing Council’s consultation on the terrorism guidelines prepared for the Justice Select Committee. Full details of the proposals can be found at the Council’s website: www.sentencingcouncil.org.uk
that sentencing practice should be increased for these offences. In Kahar the lowest level offence will fall into Level 6 which has a sentencing range of 21 months to 5 years, whereas the lowest sentence within the proposed guideline is 3 years to 6 years. The cases that will fall into the lower categories of the proposed guideline are ones where preparations might not be as well developed, or an offender may be offering a small amount of assistance to others. The Council determined that due to the changing nature of terrorist attacks, where offenders may not embark on a sophisticated plan but instead plan in a very short time period, and make use of readily available items as weapons; combined with the increased volume of online extremist material on websites which normalise terrorist activity, and create a climate where acts of terrorism can be committed by many rather than a few highly-organised individuals, these offences are more serious than they have previously been perceived.

There may also be increases for encouragement of terrorism, possession for terrorist purposes and collection of terrorist information. However, these three offences have such low volume that it is difficult to establish what current sentencing practice is.

**Why produce a package of terrorism guidelines?**

In 2016, in the absence of sentencing guidelines for terrorism offences, the Court ofAppeal gave guidance for sentences imposed under section 5 Terrorism Act 2006 (Preparation of Terrorist Acts) in the case of R v Kahar & Others7 (Kahar). The guidance was intended to assist courts to achieve consistency when sentencing these very serious cases which vary hugely in nature. This guidance has worked effectively for sentencing preparation cases up until now, but the changing nature of offending requires that the guidance be reconsidered, and that a comprehensive package of guidelines be produced to cover a wider number of offences. Over the last year there have been a number of terrorist attacks, and many more have been prevented. These latest acts of terrorism have involved far less sophisticated methods, many using motor vehicles, or knives, with devastating effects. This is a change from the types of case that were considered by the Court of Appeal when putting together the guidance that is set out in Kahar. In addition, there has been growing concern about the availability of extremist material over the internet. The wide availability of this material is increasingly of concern given that consumption of this material can lead to individuals becoming self-radicalised.

In addition, most of the terrorist offences are very low in volume and so judges are not required to sentence them very often. The cases can also vary enormously which means that guidelines are particularly useful in assisting judges in reaching an appropriate sentence.

For these reasons the Council decided that it was necessary to produce an up to date package of guidelines covering all of the main terrorist offences. The Council began this work in January 2017. It was during this work that a number of major terrorist attacks took place. The Council therefore decided to give greater resource to this project so that the guidelines could be produced in a shorter time period, and it is now hoped that the guidelines will be in force by April 2018.
Reaction to the proposals

The consultation closed on 22 November 2017. 25 responses were received. The Council have not yet considered the responses, however officials have had the time to read them. The responses were broadly positive, but there were a number of areas where respondents felt change was required:

General

Several of the academic respondents felt that the Council needed to be clearer about the purpose of sentencing for these guidelines (i.e. punishment, deterrence, rehabilitation, protection of the public and reparation).

A couple of respondents queried the absence of the standard mitigating factor ‘age or lack of maturity’.

Preparation of Terrorist Acts

A number of respondents queried the culpability factors in the Preparation of Terrorist Acts guideline as they felt that proximity or state of advancement of the terrorist act was given too much prominence. They felt other issues such as sophistication of the preparations or likelihood of the terrorist act succeeding should also be considered.

Some respondents felt that the harm factors should be more specific and that the current category 1 factor ‘endangerment of life’ is too broad. They suggested that other issues were relevant such as what harm was intended, or whether an offender was reckless could also be considered, as could the likelihood of harm.

Explosive Substances

A couple of respondents questioned whether it was correct to treat both those offenders who cause an explosion, and those offenders who are ready to cause an explosion but do not do so as equally as culpable. They suggested that the first offender was more culpable.

Encouragement of Terrorism

One respondent suggested that the harm factors should better reflect the severity of the terrorist material.

Membership of a Proscribed Organisation

A couple of respondents felt that there should be amendments to the sentencing table so that the sentencing ranges for culpability A and B are closer to allow for the fact that an active member of an organisation can in some cases be just as culpable or cause just as much harm as a prominent member.

The currently drafted guideline does not include consideration of harm as the Council concluded that it was not possible or desirable for judges to determine whether membership of one proscribed organisation was more harmful than membership of another. However,
one respondent suggested that harm could be considered in relation either to what the offender hoped to achieve in joining the organisation, or what the offender knew about the organisation.

A couple of respondents proposed the removal of the mitigating factor ‘unaware that organisation is proscribed’ on the basis that ignorance of the law should be irrelevant.

**Support of a Proscribed Organisation**

One respondent suggested moving the factor ‘vulnerable or impressionable audience’ from the step 2 factors to step 1 to give it greater prominence.

**Funding**

One respondent proposed an aggravating factor to deal with cases were offenders dupe members of the public into donating to what they believe to be a genuine charity, only for their money to be used for terrorist purposes.

**Failure to Disclose Information**

One respondent suggested that the guideline should give consideration to how useful the information was in relation to preventing a terrorist act or apprehending a terrorist.

Some respondents felt that the mitigating factor ‘offender was pressured or coerced into concealing the information’ might be too narrowly stated or set the bar too high.

**Possession for Terrorist Purposes**

One respondent argued that the harm assessment in the guideline should reflect the severity of the material in the offender’s possession

**Collection of Terrorist Information**

A number of respondents felt that the proposed sentence in the lowest level of offending (C2) is too high and should be lower, perhaps even including a community order option.

One respondent suggested that the culpability factors should focus more on the offender’s mindset rather than intention, as those offenders with intentions to use the terrorist material in the preparation of terrorist acts are likely to be charged with other, more serious, offences.

**The Council’s response**

The Council will discuss the responses to the consultation (including the response from the JSC) at its meetings in December 2017, January and March 2018 with a view to publishing the definitive guideline toward the end of March 2018. However, this timetable may change if the Council considers that more time is needed to refine the proposals.
Formal minutes

Wednesday 21 February 2018

Members present:

David Hanson, in the Chair
Ruth Cadbury          John Howell
Alex Chalk            Victoria Prentis
Marie Rimmer          Ellie Reeves

Resolved, That at this day’s sitting, David Hanson take the Chair of the Committee.

Draft Report (Draft Sentencing Council Guideline on terrorism offences), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 6 read and agreed to.

Three papers were appended to the Report as Appendices 1 to 3.

Resolved, that the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

[Adjourned till Tuesday 27 February at 9.30am]
List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee’s website. The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report
Disclosure of youth criminal records
HC 416

Second Report
Draft Sentencing Council guidelines on intimidatory offences and domestic abuse
HC 417

Third Report
Pre-legislative scrutiny: draft personal injury discount rate legislation
HC 374

Fourth Report
Draft Sentencing Council guidelines on manslaughter
HC 658

Fifth Report
HM Inspectorate of Prisons report on HMP Liverpool
HC 751

First Special Report
The implications of Brexit for the Crown Dependencies: Government Response to the Committee’s Tenth Report of Session 2016–17
HC 423

Second Special Report
Government Responses to the Committee’s Reports of Session 2016–17 on (a) Prison reform: governor empowerment and prison performance (b) Prison reform: Part 1 of the Prisons and Courts Bill
HC 491

Third Special Report
The implications of Brexit for the justice system: Government Response to the Committee’s Ninth Report of Session 2016–17
HC 651