Dr Hywel Francis MP  
Chair of the Joint Committee on Human Rights  
House of Commons  
7 Millbank  
London SW1P 3JA  
28 MAR 2011

Dear Dr. Francis,

Thank you for your letter of 10 March 2011 which set out a series of questions following up my giving evidence to your Committee last month. Answers are provided to each question in turn below.

The priority of prosecution

Q1 Can you describe in detail what will be in the TPIMs regime that is not in the current control order regime which will ensure that there is more emphasis on investigation with a view to successful prosecution?

As I made clear to the Committee in my evidence on 8 February, the purpose of terrorism prevention and investigation measures (TPIMs) will be preventative. They are intended to protect the public from a small number of people who are assessed to pose a terrorism-related risk to the public, but who we can neither prosecute nor (in the case of foreign nationals) deport.

Notwithstanding the preventative nature of the measures, however, there will be an increased focus on investigation. The police will be under a duty to keep under review each individual subject to a TPIM with a view to his prosecution for a terrorism-related offence. And they will be under a duty to report regularly to the Secretary of State on this ongoing review. Further, the new regime will be complemented by the provision of additional resources to the police and Security Service. This will increase their capability to investigate suspected terrorists, including those subject to TPIMs, to gather evidence where it is available and to pursue prosecution where possible.

The findings and recommendations of the control order part of the counter-terrorism and security powers review, published on 26 January, emphasised that whilst restrictions are in place every effort will continue to be made to collect evidence
sufficient to prosecute. Prosecution of suspected terrorists is always the Government's preferred approach.

Pre-legislative scrutiny of draft emergency legislation

Q2 Can you confirm that Parliament will be given the same opportunity for pre-legislative scrutiny of draft emergency legislation extending TPIMs as it is being given in relation to the draft emergency legislation extending pre-charge detention? If not, what is the Government's justification for treating these two pieces of draft emergency legislation differently?

On 8 February I undertook to consider further the Committee's suggestion that the draft emergency legislation for enhanced TPIMs should be subject to pre-legislative scrutiny, in addition to discussion on Privy Council terms with the Opposition.

The Government has considered this carefully. The process of drafting the TPIMs legislation is currently underway, and once drafted it will be subject to close scrutiny in both Houses. We intend to consider the necessity of pre-legislative scrutiny of the enhanced TPIMs legislation in light of the passage of the TPIMs legislation through Parliament, and the issues coming out of those debates.

Publication of summary of consultation responses

Q3 Can you confirm that the Government will be publishing a summary of the responses to the consultation that have not so far been published?

I undertook to consider providing a summary of the responses from the police, CPS, intelligence agencies and other Government departments to the consultation on the review of counter-terrorism and security powers. A summary is attached to this letter. It covers the police, CPS and security and intelligence agencies views. It does not provide individual Departments' views given the Government's response to the review reflected the collective agreement of Departments.

Intercept as evidence

Q4 Are you in a position to provide us with further information about the review of control order cases which concluded that the use of intercept as evidence would not have made prosecution more likely in any of the cases studied?

You asked for further detail of the review by independent counsel into the impact the introduction of intercept as evidence in criminal proceedings would have had on nine control order cases. The report of that review is classified, as it is based on and references sensitive intelligence material, and the Committee will understand that I am not able to share the report itself or the detail of the cases examined in it. However there is some further information about the report and its conclusions which is already in the public domain. As I expect you will be aware, the Privy Council Review of Intercept as Evidence, published on 30 January 2008 (Cm 7324), contained the following material at paragraph 58:
"We have also seen a recent review of nine current or former Control Order cases, conducted by independent senior criminal Counsel *** for the Home Office. It concluded that the ability to use intercepted material in evidence would not have enabled a criminal prosecution to be brought in any of the cases studied – in other words, it would not have made any practical difference. In four cases, Counsel concluded that such intercepted material as exists, even if it had been admissible (including the assumption that it could be made to meet evidential standards), would not have been of evidential value in terms of bringing criminal charges against the individuals in question. In the other five cases, although Counsel assessed that there was intercepted material capable of providing evidence of the commission of offences relating to encouraging, inciting or facilitating acts of terrorism (as opposed to the direct commission of terrorist or other offences), he stated that “it is clear to me that in reality no prosecution would in fact have been brought against these five men”. This was because deploying the crucial pieces of intercepted material as evidence would have caused wider damage to UK national security (through, for instance, exposing other ongoing investigations of activity posing a greater threat to the public, or revealing sensitive counterterrorism capabilities to would-be terrorists) greater than the potential gains offered by prosecution in these cases.”

I am not able to go further.

Q5 What plans do you have to make available to Parliament more information about the scale and nature of the threats to national security to enable Parliament to make a meaningful assessment of the continued necessity and proportionality of various counter-terrorism powers?

We are committed to providing Parliament will as much information about the scale and nature of the threat. I and Ministerial colleagues regularly inform Parliament of scale and nature of the terrorism threat. Changes to the terrorist threat level are notified to Parliament as soon as is operationally possible.

Definition of terrorism / Freedom of speech

Q6 Has the Government considered whether the definition of terrorism is section 1 Terrorism Act 2000 is too broad?

Q7 What assessment has the Government carried out of the continued necessity for speech offences such as glorification of terrorism?

The Government’s review of counter-terrorism and security powers rightly focussed on the most sensitive and controversial powers. We are taking immediate steps to seek to implement the findings from that review – most notably in the Protection of Freedoms Bill. We have made clear, though, that the principles of the review will continue to guide the Government’s approach to counter-terrorism to ensure that, in protecting the public, the Government does not undermine the very civil liberties it is seeking to protect. This includes, of course, ensuring that freedom of speech is protected.
As the Committee will be aware, the definition of terrorism was reviewed by the previous Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew QC, in 2007 who concluded it was ‘practical and effective’. His review led to the definition being amended to include the use of threat to advance a racial cause.

The Government considers the offence of encouragement of terrorism by statements to be important in tackling the problem of radicalisation. We are undertaking a review of Prevent, the Government’s wider strategy to deal with this issue.

Q8 Does the Government consider justifiable counter-terrorism measures against speech which promotes hatred but falls short of terrorism?

Measures to deal with groups that espouse or incite violence or hatred were considered as part of the Government’s review of counter-terrorism and security powers, the findings of which were announced to Parliament on 26 January. The review found that it would be disproportionate to widen counter terrorism legislation to deal with such groups as there would be unintended consequences for the basic principles of freedom of expression. There is, however, wider Government work to tackle extremist views. As part of their approach to promoting integration and participation, the Department for Communities and Local Government will be taking forward work in this area.

Deportation of terrorism suspects

Q11 Is the Government looking at ways of prosecuting non-national terrorism suspects as an alternative to deporting them where deportation is not possible?

It is always the Government’s preference to prosecute individuals involved in terrorism, regardless of their nationality. It is only when prosecution is not possible that we attempt to deport those individuals who are foreign nationals. Prosecution is not, therefore, an alternative to deportation when deportation is not possible; it is our preference, and the course of action that is explored before deportation is considered.

Q9 Can you give us an idea of the scale of the problem concerning terrorism suspects who are not UK nationals? How many terrorism suspects does the Government want to be able to deport but currently cannot? How many such suspects are in immigration detention or on Immigration Act bail?

As the Home Secretary informed you in her letter of 7 December 2010, we do not keep statistics on the number of individuals we might want to deport for reasons of involvement in terrorism but cannot (usually due to human rights concerns). There are a broad range of cases that may fall for consideration for removal due to suspected involvement in terrorist activity. These are dealt with across the UK Border Agency (UKBA) – for instance suspicions may arise during an asylum interview, a case may be provided to UKBA by an external Agency, or an individual may be removed following conviction for an offence committed in the UK. It would require the manual review of a large number of case files to identify those cases where we have decided that deportation would not be possible.
Currently, we are seeking assurances to enable the deportation of 14 individuals. Of these, 4 are in immigration detention and 9 are on immigration bail. One has discretionary leave to remain in the UK.

Q10 How many non-UK nationals have been prosecuted for terrorism-related offences in each of the last 3 years?

We do not collect data on the nationality of individuals that have been prosecuted for terrorism-related offences. However, a snapshot of the (self-declared) nationality of terrorist and extremist prisoners (i.e. convicted individuals) in Great Britain as at 31 March 2010 shows that 76% were recorded as UK nationals; as at 31 Mar 2009, 76% of terrorist/extremist prisoners were recorded as UK nationals; and as at 31 Mar 2008, 62% were so recorded.

Human Rights and the National Security Strategy

Q12 The Government’s National Security Strategy recognises the interdependence of national security and human rights and states that the Government’s outlook will be underpinned by a firm commitment to human rights, justice and the rule of law.

Q13 What are the mechanisms for giving operational effect to this commitment?

Q14 How is expert advice on human rights systematically made available to the National Security Council and the Joint Committee on the National Security Strategy?

The Government is committed to upholding the fundamental principles of human rights, justice and the rule of law in its approach to national security. The new National Security Strategy is about protecting our people, their rights and liberties, in a way that recognises that security and liberty are complementary and mutually supportive.

To that end, the relevant human rights dimensions raised by a particular national security issues are brought out in the strategy and policy papers prepared by officials for both the PM chaired National Security Council and the supporting senior officials group led by the National Security Adviser, Sir Peter Ricketts.

In addition both the Secretary of State for Justice, who has lead responsibility, for human rights issues within the Cabinet, and the Attorney General, who is the Government’s chief legal adviser, attend meetings of the National Security Council where legal or policy issues relating to human rights might arise, to ensure that those aspects are properly considered. This is replicated at senior official level with both the Ministry of Justice and the head of the Cabinet Office’s Constitution Secretariat represented on the National Security Adviser’s cross-Government officials group.

Recent examples of relevant discussions include the development of a Government Green Paper which will seek views on a range of proposals designed to enable the
courts and other oversight bodies to scrutinise actions in pursuit of national security effectively without compromising security.

The provision of expert advice on human rights to the Joint Committee on the National Security Strategy is primarily a matter for the Committee itself and Parliament, but of course the Government is happy to give evidence on National Security Strategy and human rights.

Democratic oversight

Q15 The Government acknowledges the importance of appropriate democratic oversight of its national security Strategy and of the balances struck between security and freedom in countering terrorism.

The Government is committed to appropriate oversight of its counter terrorism and national security work and is actively taking steps through the development of a Green Paper that the Prime Minister announced on 6 July 2010. The Green Paper will set out proposals for how sensitive information is to be treated in the full range of civil judicial proceedings and will examine the existing oversight arrangements for our security and intelligence agencies.

Q16 What proposals does the Government have to increase the democratic accountability of the intelligence and security services?

As noted above, a range of proposals to review and improve the effectiveness of current arrangements for oversight of the work of the intelligence and security agencies are currently under consideration as part of the Green Paper. We will be consulting extensively on the Green Paper in the coming months. As the Committee will be aware, the Intelligence and Security Committee is also looking at ways to enhance the role it plays in democratic oversight and the Committee’s proposals will be considered as part of the Green Paper.

Prosecution

Q17 Although the threat level has apparently remained constant, the rate of successful prosecution has declined.

Q18 What accounts for the decline in the rate of successfully prosecutions for terrorism offences?

The terrorism threat level is not necessarily best assessed by the number of terrorism cases prosecuted. The first is based on intelligence; the second on admissible evidence.

I recognise that the rate of successful prosecutions for terrorism offences has declined but it is important to see this in context. As the Committee will appreciate, certain types of prosecution can be more difficult than others. When a number of such cases occur, the conviction rates can also be affected especially as the total numbers of prosecutions are low. This combination of circumstances increases the likelihood of fluctuations in conviction rates.
Q19 How does the Government propose to increase the rate of successful prosecutions?

As I made clear when I gave evidence to the Committee on 8 February, and reflecting the Home Secretary’s statement on 26 January, the Government believes that the best place for a terrorist is in a prison cell. We continue to work with the CPS and police to ensure that they have the necessary powers and resources to protect the public from the ongoing real and serious threat from terrorism. The work on post-charge questioning and obtaining more intelligence and evidence from terrorism suspects and prisoners (see questions 20 and 21 below), as well as the increased investigative focus (with a view to prosecution) in TPIMs (see question 1), support these efforts.

Q20 Can you give more detail of the work that is being done to maximise the intelligence and evidence dividend from terrorism suspects and prisoners?

We will commence the post-charge questioning provisions in the Counter-Terrorism Act 2008 as an additional investigative tool. This could help in individual prosecutions and may encourage terrorist suspects to assist investigators either by turning ‘Queen’s Evidence’ or by providing intelligence.

We are also seeking to improve the use of the ‘assistance by offenders and defendants’ provisions set out in Sections 71-74 of the Serious Organised Crime and Policing Act (SOCPA) 2005. We intend to make it easier for defendants to enter into the SOCPA process by making it easier for them and prisoners to clarify the information they hold without fear of self incrimination and by increasing awareness of the SOCPA provisions amongst defendants.

Q21 What consideration has the Government given to the scope for greater use of plea bargaining to increase the conviction rate for terrorism offences?

The Government have looked at the use of ‘plea bargaining’ to increase conviction rates for terrorism. ‘Plea bargaining’ is used in countries such as the US which has a significantly different justice system to the UK. In the US criminal justice system, sentences are decided on the basis of a complex matrix. In the UK the judiciary enjoy significantly greater discretion in sentencing decisions, which are based on sentencing guidelines which the judge applies to the particular details of individual cases. In addition, in the US system, prosecutors have the power to influence sentences and will negotiate with the defendant to settle the case. The agreement is usually reached before the trial and significantly reduces the judge’s discretion in sentencing. In the UK, on the other hand, prosecutors do not plead for special sentences and judges have far greater discretion over sentencing. In the case of R v Dougall [2010] EWCA Crim 1048, the judgment emphasised that the choice of the sentence is a matter for the court alone, not for agreement between the prosecution and defence. We do not, therefore, intend to replicate a US style system of ‘plea bargaining’ in the UK.

As I already mentioned we are seeking to improve the use of the ‘assistance by offenders and defendants’ provisions set out in Sections 71-74 of the Serious
Organised Crime and Policing Act (SOCPA) 2005 but this will be different from the US-style 'plea bargaining' given our different judicial systems.

The Rt Hon Baroness Neville-Jones DCMG PC