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27 March 2010

Dear Andrew

Joint Committee on Human Rights Second Report of Session 2009-10: The Work of the Committee in 2008-09

I am writing in response to the above report, which outlines the work of the Joint Committee on Human Rights during the 2008-09 parliamentary session.

Firstly, I would like to express my appreciation for the work undertaken by the Committee during 2008-09. The Committee carries out important work in scrutinising the Government's treatment of human rights in legislation and conducting thematic inquiries into human rights issues.

I am pleased that the Committee welcomes a number of positive developments in the protection and promotion of human rights implemented by the Government during 2008-09. The Government's full response to the Committee's report is enclosed. I will be making this response available in the libraries of both the Houses.

Yours ever

Michael

MICHAEL WILLS MP

GOVERNMENT RESPONSE TO JOINT COMMITTEE ON HUMAN RIGHTS SECOND REPORT OF SESSION 2009-10: THE WORK OF THE COMMITTEE IN 2008-09

The State of Human Rights in the UK

1. ***Serious, sustained allegations that the UK has received information from countries which routinely use torture, or has been more actively complicit in torture carried out by others, puts the UK's international reputation as an upholder of human rights and the rule of law on the line. (Paragraph 15)***

The Government notes the Committee's conclusion. However, the Government considers its position is clear that the UK stands firmly against torture and cruel, inhuman and degrading treatment or punishment. There is no truth in the suggestion that it is our policy to collude in, solicit, or participate in abuses of prisoners.

We have taken a leading role in international efforts to eradicate torture. We support the work of international organisations, including the UN, against torture, and work around the world to promote effective criminal justice systems to both prevent torture and ensure perpetrators are brought to justice.

Wherever allegations of wrongdoing are made, the Government takes them seriously, and refers them, if necessary, to the appropriate authorities to consider whether there is a basis for inviting the police to investigate. This is not a theoretical possibility - it has happened, and there are ongoing police investigations as a result.

Intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK itself in this decade have had significant links abroad. So our agencies must work with their equivalents overseas, some of whom may have different legal obligations and different standards to our own in the way they detain people and treat those they have detained. But that cannot stop us from working with them where it is necessary to do so to protect our country and our citizens.

Whether sharing information, which might lead to the detention of people who could pose a threat to our national security; passing questions to be put to detainees; or participating in interviews of detainees, we do all we can to minimise, and where possible avoid, the risk that the people in question are mistreated by those holding them.

Once published, our consolidated guidance to Agency staff and service personnel will make clear the careful and considered way we approach these situations.

There is no truth in the suggestion that the Government has "sidestepped parliamentary scrutiny" of these issues. These serious issues are subject to robust parliamentary scrutiny both during debates in the House and by parliamentary committee. The Intelligence and Security Committee, in particular, is a key organ of parliamentary accountability for the work of our security and intelligence Agencies, as the courts have recognised. The Committee is a creation of Parliament, not of Government. It is an independent body made up of senior members of both Houses of Parliament, which does not stint in criticism where it is appropriate.

One of the Committee's core functions is to review policies of the Agencies and report back findings to the Prime Minister and Parliament on an annual basis. In addition to its annual reports, the Committee has conducted detailed investigations on the "Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantanamo Bay and Iraq" (2005) and "Rendition" (2007). Both these reports have been published.

The Committee also reported to the Prime Minister in March 2009 on "Alleged complicity of the UK intelligence and security agencies in torture or cruel, inhuman or degrading treatment" and has considered the Government's consolidated guidance to Agency staff and service personnel. We expect their findings on both these issues to be made public shortly.

2. ***We have consistently argued that the system of control orders, by which the activities of terrorism suspects who have not been prosecuted can be regulated and curtailed, is bound to lead to breaches of the ECHR, particularly because people subject to control orders are not given the details of the case against them. In a series of judgments during the session, the courts have reached broadly similar conclusions, culminating in decisions of the Grand Chamber of the European Court of Human Rights and the House of Lords, which have caused the whole system to unravel. (Paragraph 16)***

The Government has consistently disagreed with the JCHR's assertions relating to control orders. The Government's position on the control order regime was set out in detail in its memorandum to the Home Affairs Committee on post-legislative scrutiny of the Prevention of Terrorism Act 2005 (Cm 7797), which was laid before Parliament on 1 February 2010.

The regime is not 'bound' to lead to breaches of the European Convention on Human Rights (ECHR). As a result of various House of Lords judgments, the 2005 Act is fully compliant with the ECHR.

Nor has the system unravelled. As set out in the 16 September 2009 quarterly report to Parliament on control orders, the Secretary of State for the Home Department considered that the control order regime remained viable following the June 2009 House of Lords judgment in *Secretary of State for the Home Department v AF & Others [2009] UKHL 28 (AF & Others)*, but intended to keep that assessment under review as more cases were considered by the courts. The High Court has upheld four control orders since the House of Lords judgment, following proceedings that were compliant with the Article 6 test laid down in *AF & Others*. The Government therefore remains of the view that the regime continues to be viable.

The independent reviewer of terrorism legislation, Lord Carlile has reached the same conclusion. In his fifth annual report on the operation of the 2005 Act, laid before Parliament on 1 February 2010, he states that 'abandoning the control orders system entirely would have a damaging effect on national security. There is no better means of dealing with the serious and continuing risk posed by some individuals.' He also emphasises that in reaching this conclusion he has 'considered the effects of the Court decisions on disclosure. I do not consider that their effect is to make control orders impossible.'

3. ***The Government is, of course, to be commended for introducing the Human Rights Act; but too often subsequently there has been a lack of leadership to use the Act to its full potential, ensure that public bodies promote human rights as well as do the minimum necessary to comply with the legislation, and respond to court judgments which have narrowed the scope of the Act from what Parliament originally intended. (Paragraph 20)***

As the Committee notes, the Government introduced the 1998 Human Rights Act, which has been a significant development in ensuring the human rights of individuals within the UK. The Government does not accept the Committee's conclusions relating to a lack of leadership on human rights. As outlined in the Government's response to the Equality and Human Rights Commission's Human Rights Inquiry Report, since the 1998 Human Rights Act came into force, the Government has aimed to encourage a culture within public authorities in which human rights principles are seen as integral to the design and delivery of policy, legislation and public services.

The Government remains committed to the Human Rights Act and to demonstrating that the Act is a common sense way to realise our common values. Following the review of the implementation of the Human Rights Act, the findings of which were published in July 2006, the Ministry of Justice (MoJ) has taken forward a programme of work to implement the recommendations of the review.

As part of this programme of work, an ad-hoc Ministerial Group was established with a specific function to provide senior level oversight and leadership to the implementation programme. This group met three times in 2007 and was than concluded because it had delivered the outcomes it was set up to achieve. There continues to be a nominated Minster who has responsibility for human rights in each major Government Department. The Senior Human Rights Champions Network, which was established in 2007 to provide support to the Ministerial Group, continues to meet every three months to share good practice and information across Whitehall and is an important vehicle to maintain human rights momentum within Departments.

MoJ is leading Government Departments as they embed human rights within their policies and practices, and lead the implementation of a human rights framework in their agencies and sponsored bodies. The Department continues to provide support to other Government Departments in reviewing their own provision of guidance, training and access to legal advice on human rights in the sectors for which they are responsible. Government Departments are taking various steps to implement a human rights framework throughout their Department, their agencies and their sponsored bodies. Examples of this are the Department of Health's *Human Rights in Healthcare Project*, and the *Human Rights in Schools Project* being taken forward by MoJ in partnership with the British Institute of Human Rights and input from the Department for Children, Schools and Families and Amnesty International.

Following the review of the implementation of the Human Rights Act MoJ has also been working with the UK's inspectorates and regulatory bodies to provide leadership for the implementation of a human rights approach within these bodies. This has included publishing a guide, entitled '*The Human Rights Framework as a Tool for Regulators and Inspectorates*', which aims to show how a human rights framework can be a valuable tool

for these bodies, and to provide practical advice on how to integrate human rights within their practices. A regular forum, co-chaired by the EHRC, has also been established, for these bodies to share information and examples of good practice; and MoJ will be working with inspectorates and regulatory bodies to assist them to assess the training needs within their organisation.

To address the number of damaging myths that have grown up about the Human Rights Act, MoJ Press Office works with officials and counterparts in other Government Departments to provide the media with correct information about the Act. This includes identifying misleading articles and articles which incorrectly cite the Act and clarifying the situation with the media. The principal Government Departments each have a nominated press officer who can liaise with the MoJ Press Office when necessary to ensure this is done as rapidly as possible.

In addition to providing leadership on embedding human rights within public authorities, the Government has also established the EHRC which, under Section 9 of the Equality Act, has a statutory duty to:

- "promote understanding of the importance of human rights",
- to "encourage good practice in relation to human rights", and
- to "promote awareness, understanding and protection of human rights", and
- to "encourage public authorities to comply with section 6 of the Human Rights Act 1998"

Following the publication of its human rights strategy in November 2009, the EHRC is planning to hold a meeting with key stakeholders in February 2010 where the Commission intends to discuss how it plans to implement its strategy, including the recommendations of its Human Rights Inquiry. The Government is looking to the Commission to take a strategic approach to human rights and to translate the actions recommended by the Inquiry into specific initiatives.

4. ***We are concerned that human rights will again become a political football, with serious debate on the choices facing the UK kept on the touchline in favour of noisy recitals of the myths and distortions with which we are so familiar. Politicians on all sides must be clear about what they intend to do and the practical impact of their proposals. We would oppose any suggestion that rights encompassed in the Human Rights Act should no longer be protected or should not be enforced in UK courts, or that the UK need not fully comply with judgments of the European Court of Human Rights. (Paragraph 21)***

5. ***Whatever decisions are taken on the shape of the human rights framework in the UK, we are of the view that Parliament, Government and the people we serve will continue to benefit from a dedicated human rights committee with an unflinching focus on whether human rights are being protected and promoted sufficiently in the UK (Paragraph 22)***

The Government notes the Committee's comments.

Pre- and Post-Legislative Scrutiny

6. ***We draw to the attention of both Houses the Government's undertaking, in 2006, that a coroner may refuse to suspend an inquest in favour of an inquiry under the Inquiries Act 2005 if he reasonably believes that the inquiry will not comply with Article 2 of the ECHR (Paragraph 29)***

We believe that the Government's 2006 view, which stopped short of an undertaking, still applies in most circumstances when an inquiry into a death, or a series of deaths, is established under the Inquiries Act 2005.

However, as has been made clear in extensive debate, in both Houses, during the course of what became the Counter Terrorism Act 2008 and the Coroners and Justice Act 2009, there are some extremely rare circumstances when an Article 2 compliant inquest cannot be held. This is because there is centrally relevant material which cannot be disclosed to the coroner, a jury (where summoned) or to the family of the person who has died, and an inquest cannot therefore fulfil its purposes.

During the course of debate, Ministers acknowledged that these circumstances are so rare that they apply to only one current case, and that this case was not drawn to their attention until August 2007. At that time, a coroner ruled that he was unable to proceed with an Article 2 compliant inquest because particular material was unable to be disclosed to him.

Subsequently, and in both Bills referred to above, the Government has put forward several different models for how Article 2 can be complied with.

The solution reached is that if the Lord Chief Justice believes an inquiry should be established, then he will nominate a judge to chair the inquiry and the Lord Chancellor will advise the coroner with responsibility for investigating the death that he or she should suspend his or her investigation.

The subsequent inquiry will have access to the material which was unable to be disclosed to the coroner, and the bereaved family will have a Counsel to the Inquiry to review and ask questions about material that cannot be disclosed to them. In the Government's view, these proposals comply with Article 2 requirements.

There would be no purpose in either the coroner proceeding to hold a parallel inquest, or resuming the inquest at the conclusion of the inquiry, given that he or she would not be able to see the sensitive material. There would therefore be no prospect of such an inquest being Article 2 compliant.

7. ***We welcome requests from members of the public to investigate Government policy or practice which may not comply with the UK's human rights obligations (although bearing in mind that we cannot investigate individual cases). Where time allows, we will endeavour to take up matters within our remit with the Government and to provide a response to those who raise matters with us explaining the action we intend to take or the reasons why we have decided not to act. (Paragraph 31)***

The Government notes the Committee's position.

8. ***We look forward to receiving the fruits of this work: scrutiny of the Finance Bill is central to the work of Parliament and we require additional information than that which is normally provided in order to perform our scrutiny role properly (Paragraph 33)***

Following publication of the Finance Bill, the Government will provide the JCHR with a memorandum identifying the fully retrospective provisions within the Bill, (i.e. not including those about which a budget or an in-year announcement has been made), in order to aid the Committee's scrutiny of the legislation.

Timeliness

9. ***During the session we reported on nine bills before Report stage in the first House and one before Second Reading in the second House. (Paragraph 34)***

The Government notes this information.

Recurring Themes

10. ***We welcome the Government's willingness to amend the Marine and Coastal Access Bill to meet our concerns about compliance with Article 6 of the ECHR in the light of the Tsfayo judgment. We look to the Government to build on its approach to dealing with Tsfayo in this context in future legislation. (Paragraph 37)***

The Government would like to make clear that its reasons for amending the Marine and Coastal Access Bill in this respect should not be taken to imply any acceptance by the Government of the view that the Bill, as introduced into the House of Lords, or at any intermediate stage of its proceedings to date, was not compatible with Article 6(1) ECHR. The reasons for the Government's view on compatibility with Article 6 (1) were set out in a letter from Lord Hunt of Kings Heath to the Chairman of the Joint Committee dated 27th February 2009, published as an Annex to the Committee's Eleventh Report of Session 2008-9 (at Ev.25). The Government stands by the views expressed there.

The Government remains of the opinion that the decision in Tsfayo relates only to the specific facts of that case.

Quality of Explanatory Notes

11. Following the example set by the Department of the Environment, Food and Rural Affairs with the Marine and Coastal Access Bill and the Government Equalities Office with the Equality Bill, Ministers should provide us with a redacted version of the human rights memorandum circulated within Government when a bill is introduced. We recommend that Government guidance on the introduction of legislation should be amended to give effect to this proposal in time for the first session of the new Parliament. (Paragraph 42)

The Government has continued to work hard throughout this Parliament to improve the quality of the human rights analysis contained in the Explanatory Notes and we welcome the Committee's acknowledgement of this improvement. In addition, as the report notes, Bill teams are increasingly providing detailed memoranda or letters to assist the Committee in its legislative scrutiny.

Whilst Bill teams are encouraged to draw on the analysis in the ECHR memorandum when preparing explanatory notes, the Government remains of the opinion that it is not appropriate for redacted versions of all ECHR Memoranda automatically to be sent to the Committee. The principal purpose of the Memorandum is to provide legal advice to Legislation Committee when Bills and Draft Bills are considered for introduction, and it may contain advice from Law Officers which, as the Committee is aware, is privileged legal information.

In light of the Government's continuing commitment to improving the quality of information received by the Committee, and the need to ensure that the ECHR Memorandum fulfils its intended purposes effectively, the Government will not change the Cabinet Office guidance at this time. The Committee may be interested to note however that we have recently updated the Cabinet Office guidance on Making Legislation to include a link to the Explanatory Notes to the Criminal Justice and Immigration Bill, which received Royal Assent in 2008. These were praised by the Committee in their Sixth Report of Session 2007-08 for providing a detailed analysis of the human rights issues arising.

Committee Amendments to Government Bills

12. We look forward to the House of Commons being given the opportunity to agree that amendments to bills (and motions) can be tabled in the name of a select committee, as long as the amendments have been agreed formally without division at a quorate meeting (or, in the case of a joint committee, by a quorum of Commons Members). We also welcome the Procedure Committee's recommendation that committee amendments should have priority in selection for decision under programming. (Paragraph 44)

The Government notes the Committee's view. This is a matter for the House of Commons itself.

13. ***We particularly welcome and endorse that Committee's view that "there should be a presumption that no major group [of amendments] should go undebated". (Paragraph 45)***

The Government notes the Committee's view.

Civil Society input into Legislative Scrutiny Work

14. ***The House of Commons should be given an early opportunity to debate changes to procedure arising from the report of the Wright Committee, including a new approach to the allocation of time for Report stage debates which will enable the Commons to debate legislation more thoroughly than is often possible at present. (Paragraph 45)***

The House debated the recommendations of the Select Committee on Reform of the House on 22 February and 4 March.

15. ***We welcome engagement with members of the public, NGOs and others about the human rights issues raised in bills. (Paragraph 46)***

The Government notes the Committee's position.

16. ***The publication in draft of the Government's legislative programme has helped us plan our work and attract more civil society input and should now be regarded as a routine part of the legislative cycle. (Paragraph 47)***

The Government welcomes the Committee's comments on the draft legislative programme.

UN Convention Against Torture

17. ***This formulation of the Government's view, which we had not previously encountered, does not assuage our concern that the UK may be in systematic and regular receipt of information obtained by torture overseas and may, as a result, be "complicit" in torture as that term is defined in the relevant international standards. An overseas security agency may well use torture without being encouraged to do so by the fact that the information thereby obtained ends up in London. In any event, it is unlikely that the UK Government would come to know or believe that its receipt of such information was acting as an encouragement to torture. (Paragraph 63)***

With regard to the passive receipt of intelligence obtained by torture, the Government's position on State complicity is explained in our response to the Committee's report 'Allegations of UK Complicity in Torture'.

The reality is that that the precise provenance of intelligence received from overseas is often unclear. Where there is intelligence that could save British – or other – lives, however, we believe that we cannot reject it out of hand. This is the same conclusion reached by Lord Justice Brown in his judgment in the 2005 House of Lords Appeal[i] on cases related to the Anti-Terrorism, Crime and Security Act 2001:

"Generally speaking it is accepted that the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and would be failing in its duty if it ignores whatever it may learn or fails to follow it up."

Furthermore, it is only by working with international partners and making our position on torture clear that we can seek to eradicate this abhorrent practice worldwide.

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[i] (2005) UKHL 71