LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's response to the Ministry of Justice's Green Paper – *Justice and Security*

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
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Introduction

1. While the UK has no written consolidated constitution, a cardinal principle of our constitutional arrangements is that no-one – including the Government – is above the law. It is no exaggeration to say that the proposals contained in the *Justice and Security* Green Paper[1] will change that for all time, sweeping away centuries of fair trial protections. If the central proposals in this paper are passed, the Government will (1) be handed a permanent advantage to control litigation to which it is a party and (2) effectively oust the jurisdiction of the courts to hear applications seeking to uncover wrongdoing by other States that may also uncover unlawful actions by the UK authorities.

2. These proposals have been prompted by litigation challenging the policies of extraordinary rendition, torture and indefinite detention without charge or trial pursued during the darkest periods of the War on Terror. January 2012 - the deadline for responses to this consultation - is also exactly a decade since the first individuals were incarcerated in Guantanamo Bay. It is a bitter irony that the UK Government has chosen to mark this anniversary not with proposals to afford greater scrutiny to the secret state but with a series of suggestions that, if previously in force, would have prevented the worst practices of the War on Terror from being exposed as they were through a combination of litigation and investigative journalism. However the impact of these proposals is potentially much wider than the counter-terror/national security cases that inspired them. If accepted, they would fundamentally re-cast the entire civil justice system in favour of the Government, badly undermining the Courts' ability to hold the Executive to account in areas as diverse as civil actions against the police; claims against the armed forces and even claims brought by public authorities against individuals.

3. It is important to point out that to oppose the central proposals of the Green Paper is not to oppose to the Security Services and the protection of national security. Liberty accepts the incredibly valuable work undertaken by the Agencies and understands that there were distinct pressures on their work following the atrocities of 9/11. But this Green Paper is either unnecessarily pessimistic about the future practices of the Services and their partner organisations or naively optimistic. If we believe that during the War on Terror the shaming practices adopted by our

[1] See *Justice and Security* (October 2011) available at - http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf.

closest ally were an aberration then this Green Paper is unnecessarily cynical and is not needed. Alternatively, its supposed premise – that the introduction of these proposals could help enhance accountability and procedural fairness – is naively optimistic.

4. Whichever of these is true, Liberty is incredibly disappointed that the proposals now being mooted emanate from two political parties that, when in Opposition spoke against earlier attempts to corrupt fair trial rights (in the form of control orders), and upon taking Office promised a judicial inquiry into the rendition and torture practices that came to light through the very legal routes that they now propose to shut down. To this end, we hope that the Government reflects on the level of criticism that has come from those on whom it wishes to build this new system. Of the 69 currently appointed to the list of Special Advocate, 57 are signatories to the collective Special Advocates response to the Green Paper which says of the proposal to extend secret processes to the civil law:

> "*The introduction of such a sweeping power could be justified only by the most compelling of reasons. No such reason has been identified in the Green Paper, and, in our view, none exists".*[2]

Further, the response from the Constitutional and Administrative Law Bar Association (ALBA), which has over 1000 members including judges, solicitors and barristers who have acted both for and against the Government in national security cases adopts the submissions made by the Special Advocates. Liberty also shares the conclusions of the Special Advocates and in responding to this consultation, we draw on our significant litigation experience in relevant areas including Interventions in -

- Chahal v UK (1996) 23 EHRR 413
- A v Secretary of State for the Home Department [2005] 2 AC 68
- Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65
- Secretary of State for the Home Department v MB [2008] 1 AC 440
- RB (Algeria) and others v Secretary of State for the Home Department [2009] UKHL 10

[2] See Paragraph 2(6) of the Special Advocates response to the Green Paper available at: http://adam1cor.files.wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf

- A v UK (2009) 49 EHRR 29
- Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London (7/7 Inquests) [2010] EWHC 3098 (Admin)
- Al-Rawi v the Security Service and others [2011] UKSC 34

Extension of Closed Material Procedure (CMP)

5. The most significant proposal contained in the present consultation is the suggestion that the Closed Material Procedure (CMP) and the use of "Special Advocates" (SAs) should be generally introduced into the civil justice system. CMP is a mechanism currently used in certain types of specialist proceedings and only in a very small number of cases. Its use, even to this limited extent, has been controversial and subject to unending litigation. Despite this, the present consultation proposes to extend the mechanism to "any civil proceedings in which sensitive material is relevant". It is proposed that the law should be changed so that where a Minister decides that certain material, if openly disclosed, would cause damage to the public interest, he or she should be able sign a certificate that would prevent the material being disclosed to the other side, while allowing the Government to put the material before a judge and rely on it in defending or pursuing a claim through the courts. The only prospect of challenging the Minister's decision would lie by way of judicial review meaning that the threshold for successful challenge would require the other side demonstrating irrationality on the part of the Minister. If the Minister's decision is upheld then CMP would be triggered for the material concerned. In terms of scope, paragraphs 1-3 of the Executive Summary to the Green Paper imply that the extension of CMP would cover material relating to national security. However more detailed sections of the Green Paper propose that CMP should be available in much wider circumstances, namely wherever there is a chance of "damage to the public interest".[3] The Green Paper's glossary of terms describes the public interest in the following terms

> *There are different aspects of the public interest, such as the public interest that justice should be done and should be seen to be done in: defence; national*

[3] See Para 2.7 of the Green Paper which describes the proposed trigger for CMP as "a decision by the Secretary of State that certain relevant sensitive material would cause damage to the public interest if openly disclosed…"

security; international relations; the detection and prevention of crime; and the maintenance of confidentiality of police informers' identities, for example.[4]

It appears that the Government wants to extend its use not only to material which concerns national security but also to material that concerns any of these potentially broad matters. Indeed the Government argued that this was the relevant test that should apply in *Al-Rawi*[5] when, unsuccessfully, it asked the Supreme Court to authorise CMPs in civil proceedings without statutory authority.

Current position

6. The law relating to Public Interest Immunity (PII) is the current mechanism for ensuring that material harmful to the public interest is not put into the public domain in civil proceedings. PII principles have been developed by our courts over several decades and they have ensured that courts strike the appropriate balance between protecting the public interest and the need to ensure fairness. Currently, if a Minister considers that the disclosure of a document could harm national security he or she can sign a certificate to that effect. The court will then consider the issue – looking at the material in question if necessary – and balance the public interest in withholding the document against the interests of justice in disclosing it. If the court decides in favour of disclosure then it is disclosed to all parties, unless the party holding the material decides not to rely on it or to abandon its case. If the court decides against disclosure then the document is not admitted into the proceedings at all and crucially cannot be relied upon by either party. This means that litigation in which information is withheld under PII can still be conducted openly, on the basis of admissible evidence, with the parties on an equal footing. Each then receives a fair hearing and a judgment publicly explaining why the court has reached its decision. Any trial involving sensitive material may, if the Court considers it necessary, take place in part or in whole "in camera" (i.e. excluding the public) to protect the information from wider dissemination.

[4] See page 71 of the Green Paper.
[5] Al-Rawi v the Security Service and others [2011] UKSC 34.

History of CMP

7. CMP was originally devised for application in the immigration system and was first introduced by statute[6] in 1997 when the Special Immigration Appeals Commission (SIAC), a specialist immigration tribunal, was created. The creation of SIAC and the introduction of CMP and SAs followed a European Court of Human Rights (ECtHR) judgment - *Chahal v UK*[7] - which concerned, in part, the UK's procedure for decisions about the deportation of foreign nationals considered to present a risk to national security. The UK was found to be in breach of Article 5(4) of the European Convention of Human Rights (ECHR) as a result of its then entirely closed procedure for such deportation decisions. In response to *Chahal* the UK Government sought to enhance procedural protection in this area. CMPs were introduced for SIAC appeals and SAs were appointed by the Government and instructed to act in the interests of those whose appeals went before SIAC in closed session. Unlike legal representatives, SAs are unable to disclose material to the person whose interest they represent and are instead often required to contest evidence on the basis of guesswork and estimation. The SA is not allowed to communicate with the person concerned without the permission of the Government and can never communicate with them about the secret evidence. In 2001 the mechanism was transferred into certain High Court proceedings when the use of CMP and SAs were introduced for foreign nationals seeking to appeal their indefinite detention under the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA). Following the House of Lords' Belmarsh ruling[8] the relevant section of the ATCSA was repealed and replaced with the control order regime under the *Prevention of Terrorism Act 2005* (PTA). CMP and SAs were retained as a central plank of the appeals mechanism for those subjected to indefinite house arrest and other punishing sanctions under control orders.

8. SIAC and the CMP that it introduced were intended as mechanisms to deal with a specific set of circumstances that related directly to national security. Compared to the blanket secrecy that had come before it was also a marginally progressive measure, increasing, if only slightly, the procedural protection afforded to foreign nationals facing deportation. Since 1997, the mechanism has been exported to a limited number of other areas of law. In addition to control order proceedings,

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[6] *Special Immigration Appeals Commission Act 1997*.
[7] *Chahal v UK (1996) 23 EHRR 413.*
[8] *A v Secretary of State for the Home Department* [2004] UKHL 56.

CMP is also used in: asset freezing appeals; employment cases involving issues of national security such as security clearance[9] and most recently appeals against Terrorism Prevention and Investigation Measures (TPIMs) which have replaced control orders.[10] However, tolerating the unfairness of CMPs in limited statutory contexts that are specifically linked to national security is quite a different proposition to granting Ministers a discretionary power to extend this unfairness to any area of the civil law including any case to which it could be party. If the Government is allowed to withhold information from the other side while using it to its own advantage it is difficult to see how the use of the mechanism will be kept to a minimum. If this proposal is allowed to pass it will therefore likely mark an end to the PII process.

Principled objections to the extension of CMP

Offends the basic premise of adversarial justice

9. The Green Paper acknowledges that the use of CMP in different statutory contexts has been, and will continue to be, subject to the requirements of Article 6 (right to a fair trial) of the ECHR.[11] Surprisingly, however, the Green Paper all but ignores that fact that the common law has historically provided *greater* protection to civil fair trial rights than that afforded by the Convention, in order to provide crucial protections which are necessary to the particular functioning of our legal system. Unlike many of the other European countries also bound by the Convention, ours is not an inquisitorial system where the judges' function includes the investigation of evidence or taking depositions. Ours is an adversarial system where each party must test the case of the other through the disclosure of evidence and cross examination. Our judges act as arbiters not investigators and our common law has as a result evolved principles and safeguards which best ensure that justice is served.

10. The concept of the CMP offends almost every bedrock principle of the common law notion of a fair trial. This is significant because it is these common law principles upon which our entire system of adversarial justice is based. Under a CMP a party is –

[9] See the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861).
[10] See the *Terrorism Prevention and Investigation Measures Act 2011.*
[11] Both through the domestic effect given to the Convention in UK law through the *Human Rights Act 1998* (HRA) and in cases against the UK Government before the European Court of Human Rights.

- Denied the right to attend the trial of his own case
- Denied knowledge of another party's statement of case
- Denied knowledge of, and the opportunity to challenge, the evidence on which another party may rely
- Denied the opportunity to make submissions on another party's case
- Denied knowledge of material that may support his case or harm another party's case
- Denied the right to receive a statement of the court's reasons for its decision in his case and
- Denied an effective right to appeal the decision of the court (if adverse to him) based on that court's reasons.

These are all well established rights of party in a civil claim at common law. They are essential protections which mean that parties are treated on an equal footing, each receiving a fair hearing on the basis of admissible evidence and each receiving a judgment explaining why the court has reached its decision. They also allow the administration of justice to be conducted openly, and it is this transparency which provides a vital safeguard against abuse, arbitrariness and error. This openness is also essential for public confidence in the impartial administration of justice which is essential for a parliamentary democracy under the rule of law. Confidence in impartiality is particularly essential in cases where the Government or public bodies are themselves party and it is in these cases that press, public and parliamentary scrutiny of the working of the justice system is most important. CMP overturns all of these foundational principles and hands the Government and its agents an automatic advantage in litigation. Under CMP, the Government will, unlike other parties, be able to play a full role in the litigation; knowing its own case as well as that of other parties'; knowing where and how to supplement its own case; and knowing how best to direct the cross examination of the evidence of others.

The Government's case for extending CMP

Enhanced procedural fairness?

11. The Government's main argument for extending CMP is that it will provide an advantage over the PII framework because it will allow more information to be put

before a judge therefore *enhancing* procedural fairness by allowing the court to examine "all relevant material". This argument is summarised at paragraph 2.3 of the Green Paper which asserts "*a judgment based on the full facts is more likely to secure justice than a judgment based solely on a proportion of relevant material*". This is highly misleading. Evidence submitted in secret by one party cannot be equated with "facts" let alone "full facts". In an adversarial system, findings of fact can only be carried out after one party's evidence has been challenged and tested by the other side. Under CMP evidence can be submitted in secret with the other side having no opportunity to see, let alone dispute it. While the involvement of a SA may, on the face of it, appear reassuring the ability of a SA to properly test the evidence and represent the party excluded from the closed procedure is minimal. They are prohibited from direct communication with the litigant without Government permission and can never discuss the content of secret evidence. In practice SAs are unable to challenge non-disclosure by the Government or challenge evidence relied on in secret proceedings, and they have little practical ability to call their own evidence.

12. SAs who have experience of CMPs have repeatedly sought to highlight its flaws. Dinah Rose QC has said of the CMP procedure:

> *"It is impossible for me adequately to convey the frustration and helplessness felt by a barrister seeking to represent a client when a closed material procedure applies. I have sought to do it in control order and SIAC cases on many occasions. Most of your time is spent outside court, waiting to be allowed back in. when you are able to cross examine, you have no idea whether the questions you are asking are pertinent, or unhelpful. You do not know whether your submissions are on point, or wholly irrelevant. Representing a client in these circumstances has been described as like taking blind shots in the dark at a hidden target."*[12]

Indeed, these sorts of frustrations have led a number of SAs to resign from their appointment on principled grounds. In 2004 Ian MacDonald QC resigned as a Special Advocate "*for reasons of conscience*" and said:

> *"I resigned because I felt that whatever difference I might make as a special advocate on the inside was outweighed by the operation of a law,*

[12] In the Atkin Memorial Lecture 2011 "Beef and Liberty: Fundamental Rights and the Common Law".

fundamentally flawed and contrary to our deepest notions of justice. My role was to provide a fig leaf of respectability and a false legitimacy to indefinite detention without knowledge of the accusations being made and without any kind of criminal charge or trial. For me this was untenable."[13]

In their collective response to the Green Paper the SAs are unequivocal about the inherent unfairness of the CMP mechanism saying: "*no effective challenge to closed material can be made in the absence of both instructions on it and any practical ability to call evidence to rebut it*".

13. It is a fallacy therefore to suggest – as the Green Paper does – that putting a greater volume of evidence before the judge necessarily results in better justice, or is more likely to lead to the "right" outcome. If the evidence is untested it is likely to be unreliable. Worse still, it may positively mislead, resulting in perverse outcomes in individual cases. This risk was articulated by Lord Kerr in *Al Rawi* where the Government had sought to persuade the Supreme Court that the power to initiate a CMP could be drawn from the common law and that the CMP could lead to greater procedural fairness. In response to this submission, at paragraph 93 of the Supreme Court judgment Lord Kerr said:

The central fallacy of that argument…lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead."[14]

14. Huge amounts of litigation has been generated around the use of CMPs and there is widespread consensus amongst those involved in their operation (both the judiciary and SAs) that they don't afford procedural justice. One of the oddest aspects of the Green Paper then, is the ease with which it skates over widespread concern that CMP affords little more than a fig leaf of procedural fairness. It completely ignores the flaw identified by Lord Kerr in Al Rawi that the use of CMP can actively mislead the court.

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[13] See: http://www.gcnchambers.co.uk/index.php/gcn/content/download/1161/7517/file/Counsel_200503_mcdonald.pdf

[14] Para 93 of Supreme Court judgment in *Al Rawi*.

Ensuring that cases can be heard

15. The Green Paper also argues that without the general availability of CMPs in the civil law, claims will be unnecessarily struck out or discontinued in circumstances where the operation of PII would remove so much material from the case that a fair trial of the claim could not proceed. Although this is a central plank of the supposed case for extending CMPs, the Government has managed to find only one previous example of this which dates back to 2001. In *Carnduff v Rock and another*[15] a former police informer sought to recover payment for information he supplied to West Midlands Police. The police denied any contractual liability to make the payments pr that the information provided by the claimant had led to the arrests of prosecutions which the claimant suggested and argued that the claim should be struck out due to the sensitive information in would necessarily have to continue. The Court of Appeal agreed to strike out the claim and the case was then taken all the way to the EctHR where the Court found no breach of Article 6 ECHR.[16] This case involved very unusual factual circumstances and was arguably wrongly decided, not least because relevant PII case law was not put before the Court. The case also did not involve national security matters which the Government claims is the driving concern behind the current proposals.

16. Liberty believes that the likelihood of future cases being struck out due to the unavailability of CMP is exaggerated. Even if there exist hypothetical cases that would not be able to be heard because too much relevant material is PII protected, the risk and potential fallout is not sufficiently great to justify the general introduction of CMP across the full spectrum of civil proceedings. For all sorts of reasons, individuals are sometimes unable to make out a civil claim. That this might happen in future in an exceptional case where a large proportion of the relevant evidence attracts PII cannot justify fundamentally re-working the civil justice system.

Financial liability

17. The Government also argues that without the general availability of CMP, it faces the risk of having to settle expensive claims that can't be defended in open court. The *Al Rawi* case is cited by the Government in this respect. In that case a

[15] *Carnduff v Rock and another [2001] EWCA Civ 680.*
[16] *Carnduff v United Kingdom (App No. 18905/02) (unreported) 10 Febraury 2004.*

number of men who had been subject to extraordinary rendition, torture and extended detention without charge or trial in Guantanamo Bay brought civil claims for damages against the UK Government and the Agencies alleging that the Government was liable for assault, negligence and other torts and because it had been complicit in their rendition, torture and extended detention. In the Court of Appeal, the Government sought to argue that the court should find it within their jurisdiction to create a CMP to hear the Government's defence to the claim. After the Court of Appeal ruled against the Government on this point the Government was granted permission to appeal to the Supreme Court, but chose to settle the claims out of court for an undisclosed sum. PII procedures were never put to the test. The Government's use of *Al Rawi* as an example of it being forced to settle is therefore disingenuous. We do not know the Government's reasons for settling the case and it is quite possible that the scale of the litigation and the embarrassing – but not security sensitive - material that the Government would have been forced to disclose in open court was motivation enough to settle rather than any inherent problems with PII. Liberty agrees with the SAs conclusion that "*we do not think that the experience from Al Rawi establishes either that the operation of PII procedures would have led to harmful disclosures of significantly sensitive material, or that a CMP would have been any less of a procedural challenge and burden to all parties*".[17] Perhaps most importantly, it is to be hoped that such litigation is exceptional arising as it does from one of the darkest chapters in the UK's counter-terror operations and in particular our involvement in the CIA's programme of extraordinary rendition and torture.

18. In addition to *Al Rawi*, the Government has, on several occasions in recent times, claimed that without CMP or something akin to it, it will be unable to properly put its case in civil proceedings. Legislative proposals for "secret inquests" have twice been attempted (and defeated) on the basis that that certain inquests would grind to a halt without additional secrecy measures. In the end the Government's fears were not borne out and several high profile and sensitive inquests have been transparently and successfully completed in recent years.

Familiarity of CMP

19. The Green Paper also seeks to justify the proposed extension of CMPs and SAs by claiming that the mechanisms are now a relatively common feature of our

[17] See paragraph 37 of the SAs response to the Green Paper.

legal system that are familiar to practitioners. The relevant practitioners refute this. As the ALBA response states:

> *"It is also not correct to state, as is done in the Green Paper, that closed material proceedings are 'familiar to practitioners'. ALBA is predominantly comprised of practitioners in the field of judicial review and public law. Very few of its members (which number in excess of 1000) would have any experience of litigation involving closed material. The use made of (CMPs) is, to date, extremely limited to a small number of specific areas, that fact further serves to emphasise the unusual and limited nature of (CMPs). They are not a familiar part of the legal landscape or of litigation. They are an unusual departure from fundamental principles."*[18]

The SAs also doubt this claim:

> *"Contrary to the suggestion in the Green Paper, CMPs are not 'familiar to practitioners.' The way in which CMPs work in practice is familiar to only a very small group of practitioners. Of the 69 currently appointed to the list of Special Advocate, only about 32 have substantial experience in the role, and almost all are signatories to this response."*[19]

Practical problems with CMP in civil proceedings

20. In addition to the injustices inherent in the operation of CMPs, there are a number of practical obstacles to its extension into the civil law which the Green Paper completely overlooks. In the statutory contexts in which CMP currently operates, it is mainly used in circumstances where an individual is seeking to challenge coercive action by the State, either in deportation proceedings; appeals against the imposition of control orders/TPIMs; appeals against asset freezing injunctions; or security vetting appeals. Extending CMPs to ordinary civil cases (as opposed to cases challenging the exercise of executive power) would make the system unworkable in practice. The whole set-up of the civil justice system, including costs rules, insurance and public funding, depends on the parties being able to assess their prospects of success. In cases involving a CMP it is highly unlikely that a SA would be able to advise on the impact of closed evidence on the merits of a claim. This would leave a

[18] See Paragraph 7 of the ALBA response to the Green Paper.
[19] See Paragraph 2(3) of the SA response to the Green Paper.

party's legal advisers unable to assess the prospects of a claim and the claimant unable to access legal aid, after the event insurance etc. The conduct of litigation will also become impossible, as without full knowledge of the evidence open representatives will not be able to properly advise a client on, for example, Part 36 offers to settle.

Inquests

21. The Green Paper suggests a number of possible changes to coronial procedures in relation to inquests that need to consider "sensitive material." Specifically, the Government suggests: amending the Coroners Rules to allow the coroner to have CMP for part or all of an inquest (and providing for the deceased's family to be represented by a SA in closed sessions, receiving 'gists' of sensitive material); security vetting of family members; asking jurors to sign confidentiality agreements; requiring jurors to undergo security clearance; light touch vetting of jurors.

22. In attempting to argue that such measures are necessary the Government's premise is that while a number of sensitive and high-profile inquests have been successfully concluded under current arrangements (including, again, the PII process) in future there may be some inquests where the current framework is insufficient to both protect sensitive material and allow inquests to continue. As with the Green Paper's general proposal on CMP, an unsubstantiated prediction does not amount to a solid case for radically overhauling centuries of justice. This is especially the case given the recent successes of the coronial system in dealing with sensitive, national security related, material in a number recent inquests such as the inquest into the shooting of Jean Charles de Menezes and the 7/7 inquest.

23. Liberty believes that CMPs are entirely unsuitable for inquests. The twin purposes of any inquest must be to conduct an independent and transparent investigation into the circumstances surrounding a death and for that process to involve the family of the bereaved. The introduction of CMPs into the coronial process will thwart both of those objectives, undermining the independence of the investigation by giving the Executive undue influence over the inquest's findings and excluding the families of the bereaved from all, or parts, of the process. Further, public confidence in the coronial process will be badly undermined if the CMP mechanism is extended to cover inquests. Almost by definition the inquests for which

CMP would be sought are likely to involve controversial or violent deaths where the State is implicated. In these circumstances it is not difficult to see how suspicions of whitewash and cover-up will emerge if CMP is adopted in those investigations.

24. With the exception of the unnecessary bar on the admissibility of intercept in inquests, Liberty believes that current coronial rules and procedures are sufficient for dealing with the disclosure of sensitive material in inquests. The Coroners Rules enable coroners to direct that the public be excluded from an inquest or any part of an inquest if he or she considers that it would be in the interest of national security so to do. A judge can also be appointed to head up a coronial inquest and PII certificates can be issued if necessary. In addition to PII, the *Coroners and Justice Act 2009* effectively allows Ministers the discretion to halt an inquest and substitute it for a public inquiry under the *Inquiries Act 2005*.

25. The proposal for the introduction of CMP to inquests is the latest in a long line of Government attempts to introduce greater secrecy into the coronial system. Over the past four years proposals for "secret inquests" (which would have allowed a Minister to order the removal of juries in particularly controversial inquests) were twice defeated in Parliament. It is disappointing that despite the role played by both Coalition parties in defeating those unjust proposals, the present Green Paper proposes something very similar. The argument put in the Green Paper – that in future inquests may be unable to continue due to requirements to disclose sensitive material – is the same as the argument previously used to justify secret inquests. This fear has frequently been shown to be ill-founded in practice.

Specialist court

26. The Green Paper briefly considers whether the establishment of a specialist court for civil cases that concern sensitive material would be preferable to the extension of CMP. For the same reasons that the Green Paper fails to make the case for extending CMP generally to civil proceedings, the case has not been made for a specialist court. As an alternative proposal, the only possible advantage is that a specialist court could potentially contain the spread of this unjust mechanism throughout the civil justice system. However the precedent of the Investigatory

Powers Tribunal (IPT)[20] which operates under a cloak of absolute secrecy serves as a stark forewarning about the lack of transparency and accountability that a specialist tribunal would likely oversee. This option would also institutionalise a further departure from the principle that in ordinary civil litigation the Government should come to court as an equal party.

Clarifying/limiting the scope of AF (No.3)

27. The Green Paper's second suggestion with regard to CMPs proposes legislating "*to clarify the contexts and the types of civil cases in which the 'AF(No.3)' disclosure requirement does not apply*".[21] The AF (No.3) disclosure requirement is based on Article 6 fair trial requirements as interpreted by the ECtHR in *A v UK*[22]*.* In this case it was held, in the context of procedures for reviewing the lawfulness of an individual's detention, that the CMP/SA system was a breach of the right to a fairing hearing under Article 6 of the ECHR. While secret evidence could be used, sufficient information had to be disclosed to enable the appellant to effectively challenge the case against him. The House of Lords applied this principle to the use of CMP/SA system in control orders in *Secretary of State for the Home Department v AF (No.3)* [23] and as a result of the requirement a number of control orders have been revoked or struck down. Liberty does not believe that there would be any value in legislating to exclude the applicability of the principle in certain contexts. Its application is currently being tested on a case-by-case basis in the courts and is highly dependent on individual factual circumstances. Legislation attempting to exclude the requirement will not trump judicial adjudication on what is required by Article 6 and could serve only to generate further litigation.

Norwich Pharmacal

28. In addition to the CMP proposal and additional suggestions regarding secrecy in inquests, the other main proposal in the Green Paper relates to Norwich Pharmacal (NP) applications. These are civil applications that enable a claimant to obtain the disclosure of information from a defendant who is associated with arguable

[20] Established under section 65 of the *Regulation of Investigatory Powers Act 2000* to determine complaints about use of targeted surveillance by public bodies.
[21] See Paragraph 2.43 of the Green Paper.
[22] *A v UK (2009) 49 EHRR 29.*
[23] *Secretary of State for the Home Department v AF (No.3) [2009] UKHL 28.*

wrongdoing of a third party. In order for an application to be granted, the court will apply a five stage test –

- There must be arguable wrongdoing on the part of a third party
- The defendant must be associated with that arguable wrongdoing
- It must be necessary for the claimant to receive the information by making the NP application; i.e. if the information can be obtained by another route, the court may refuse to grant the order
- The information sought must be within the scope of the available relief; it should not be used for wide-ranging disclosure or evidence-gathering and it is to be strictly confined to necessary information
- The court must be satisfied that it should exercise discretion to make the order sought.

29. The Green Paper suggests either (1) introducing legislation to remove the jurisdiction of the courts to hear NP applications against a Government department or any other public body; or (2) removing the jurisdiction of the courts to hear NP applications where disclosure of the material in question would cause damage to the public interest. The latter seems to be the favoured option and the Green Paper explains that this proposal would automatically oust the jurisdiction of the courts in relation to applications involving information emanating from the Agencies - where material "*is held by or originated from one of Agencies there would be an absolute exemption from disclosure."*[24] In regard to non-Agency material it is proposed that where the Government believes that disclosure would cause damage to the public interest, a Minister could sign a certificate to block disclosure. As with the proposal for ministerial certificates requiring CMP, it is proposed that the courts would be obliged to give effect to a ministerial certificate blocking a NP action unless it was successfully challenged on narrow JR grounds. It is proposed that any JR would be held in closed session. The Green Paper also briefly and unenthusiastically considers a vague and alternative suggestion; that legislation is passed to provide more detail as to what will in future be required to satisfy each of the elements of the NP test.

30. The proposal to oust the jurisdiction of the courts with regard to NP applications against government bodies comes in direct response to the *Binyam*

[24] See Paragraph 2.91 of the Green Paper.

Mohamed litigation.[25] In this case both the Divisional Court and the Court of Appeal accepted that a NP action can be brought against the Government where it is suspected that it has become involved in the wrongdoing of another State. Specifically, it was held that the UK intelligence services could in principle be required to provide information which corroborated Mr Mohamed's claims of torture at the hands of the US authorities. Ironically, while the NP application was accepted in theory the domestic courts never actually ruled on the application and the material Mr Mohamed sought was ultimately passed to his security cleared lawyer in the US by other means.

31. However, importantly and contrary to what is implied in the Green Paper, the Courts' acceptance of the NP action did not, at any stage, threaten to undermine national security. Both the Divisional Court and the Court of Appeal made it clear that they gave huge weight to the Government's assessment of risk to national security. And even if the courts had ruled in favour of the NP application the relevant material would only have been released to Mr Mohamed's security-cleared lawyer in the US and would not have been publicly disclosed. It is also worth noting two exceptional aspects of the case: (1) Central to the courts' acceptance of the NP application was that the matter at issue concerned the abhorrent, medieval-style, torture that Mr Mohamed had sustained; (2) The information contained in the material concerned ultimately helped to form Mr Mohamed's defence to criminal proceedings in the US which, if he had not been able to refute with evidence of torture, could have meant that he faced the death penalty upon conviction.

32. Once the NP application had fallen away, the only issue that remained in the *Binyam Mohamed* case was whether seven redacted paragraphs of an earlier Divisional Court judgment should remain redacted. The paragraphs that the Government sought to keep redacted for "national security" reasons described reports given to the UK authorities about the treatment of Mr Mohamed during his detention by the US authorities. As the judgment containing these paragraphs emanated from the original NP application and applied long-standing PII principles, the courts' handling of this question is instructive as to whether there needs to be any legislative change. There are a number of important points to note –

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[25] *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65.*

- The Court of Appeal was clear that the previously redacted paragraphs should only be published after a detailed examination of where the public interest balance lay in relation to publication.
- No intelligence material, sources, secret surveillance techniques were contained in those paragraphs.
- The Court of Appeal indicated that it would have accepted the Government's argument that the paragraphs should remain redacted, were it not for the fact that the information had already been put into the public domain by a US Court.

The seven paragraphs read as follows -

> "(iv) It was reported that a new series of interviews was conducted by the United States authorities prior to 17 May 2002 as part of a new strategy designed by an expert interviewer.
>
> (v) It was reported that at some stage during that further interview process by the United States authorities, BM had been intentionally subjected to continuous sleep deprivation. The effects of the sleep deprivation were carefully observed.
>
> (vi) It was reported that combined with the sleep deprivation, threats and inducements were made to him. His fears of being removed from United States custody and "disappearing" were played upon.
>
> (vii) It was reported that the stress brought about by these deliberate tactics was increased by him being shackled during his interviews.
>
> (viii) It was clear not only from the reports of the content of the interviews but also from the report that he was being kept under self-harm observation, that the interviews were having a marked effect upon him and causing him significant mental stress and suffering.
>
> (ix) We regret to have to conclude that the reports provided to the SyS made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.
>
> (x) The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could easily be contended to be at the very least cruel, inhuman and degrading treatment of BM by the United States authorities."

It is as a result of the publication of these paragraphs - which while embarrassing to the Agencies do not contain any material which could jeopardise national security -

that the Government is now proposing either to entirely bar NP applications against public bodies (ousting the jurisdiction of the court altogether) or to oust the jurisdiction of the court in relation to material held by the Agencies and grant wide ministerial discretion to restrict NP applications for other material. These are sweeping immunities that could prevent crucial, in some instances life-saving, information coming to light.

Control Principle

33. The Government's main argument for barring certain NP applications is based on the "control principle" described in the Green Paper in the following terms – "*If the trust of the UK's foreign 'liaison' partners is to be maintained, there should be no disclosure of the content or fact of the intelligence exchange with them without their consent. This is known as the control principle*." The Government contends that "*if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly*". At the same time the Government is clear that "*there is no suggestion that key 'threat to life' information would not be shared*".[26] This admission is significant given past suggestions that the current legal framework could jeopardise intelligence sharing in such a way that puts lives at risk.

34. The suggestion then is that the law is changed so that in future evidence of unlawful activity (such as rendition and torture) by a foreign power (in which the UK Government may well be complicit) is not put in the public domain, in circumstances where the relevant information emanates from foreign intelligence sources, even if a court would find that the interests of justice in disclosing the material outweighed any national security concerns. Liberty believes that the Government might well be overstating the extent to which intelligence sharing relationships are threatened by existing legal arrangements. There is realistically no possibility of sources, techniques, or intelligence material being put into the public domain since the courts already take great care to ensure that any disclosure will not harm the public interest. In any event ousting the jurisdiction of the court to consider foreign intelligence material in order to reassure foreign States that they will not face embarrassing revelations of wrongdoing in British courts cannot be entertained. It would effectively put the intelligence community above the law, reversing the accountability reforms of

[26] See Paragraph 1.22 of the Green Paper.

the past few decades by granting international diplomacy greater protection than universal rights and freedoms. Given that a NP order will only ever be entertained where there is an arguable case of wrongdoing by another State, the granting of absolute secrecy is tantamount to impunity and will do little to encourage better operational practices in the intelligence community.

Disclosure which could directly undermine national security?

35. The Green Paper further implies – but does not explicitly argue - that without some legislative reform there is the chance that the courts could put information in the public domain that would directly undermine national security. This fear is entirely unfounded. While legal challenges to sweeping Executive powers and changed operational practices during the War on Terror have required the courts to give greater consideration to issues concerning national security and international relations, in several relevant judgments of recent years, the courts have demonstrated a considerable amount of deference to Government claims about damage to national security. In *Secretary of State for the Home Department v Rehman*[27] Lord Steyn in the House of Lords held that it "*is self-evidently right that national courts must give great weight to the views of the executive on matters of national security*".[28] Lord Hoffman considered that "*the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive*."[29] His Lordship went on to say that in national security matters judges should "*respect the decisions of ministers of the Crown*", in part because the executive "*has access to special information and expertise in these matters*".[30] Even in the landmark Belmarsh judgment,[31] in which the court issued a declaration of incompatibility under the HRA, 6 out of the 7 judges deferred to the Executive's decision in relation to a threat to public security. Lord Bingham said this was "*a pre-eminently political judgment*";[32] Lord Hope said that "*great weight must be given to*

[27] *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122
[28] At [31]; page 135.
[29] At [50]; page 139.
[30] At [62]; page 142.
[31] *A v Secretary of State for the Home Department* [2005] 1 AC 68.
[32] At [29].

the views of the executive";[33] Lord Scott noted that "*the judiciary must in general defer to the executive's assessment*";[34] and Baroness Hale said that "*[a]ssessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government*".[35]

36. As things stand it will only be those secrets that contain information about wrong-doing (and most likely a serious degree of wrongdoing, such as the evidence of torture contained in the *Binyam Mohamed* case) for disclosure to even be considered. The courts will always give huge weight to any potential risk to national security, so there is no justification for removing a remedy which can be so vital to the interests of the individual concerned.

Government abuse of the "national security exception"

37. There are a number of recent examples of unwarranted government reliance on national security justifications to cover up embarrassment. This disturbing trend would likely increase if the NP jurisdiction was ousted where the Government asserts that disclosure of the material in question would cause damage to the public interest, or if the reach of CMPs was extended generally to civil litigation.

38. In the case of Al Sweady,[36] the Ministry of Defence (MoD) initially asserted that material relating to the techniques of "tactical questioning" of captured individual by Armed Forces interrogators could not be disclosed to the claimants. The MoD later conceded that a significant proportion of the redacted material had previously been disclosed in open hearings and was therefore already in the public domain. The Court concluded that the fact of previous disclosure must, or should have been, known within the MoD before the PII certificates were signed. This case demonstrates a worrying failure on the part of Government to respect the integrity of the PII process.

39. In the Fifth open judgment of the Divisional Court in the *Binyam Mohamed* case, MI5 had insisted that information which would ordinarily be the subject of disclosure be extensively redacted in the interests of national security. MI5's insistence on non-disclosure was unexpectedly withdrawn when the matter came

[33] At [112].
[34] At [154].
[35] At [226].
[36] *R (Al-Sweady) v SSD* [2009] EWHC 1687 (Admin).

before the Court of Appeal. On analysis of the full, disclosed text, the Court found previously redacted information to be anodyne, and already in the public domain. The Security Services were heavily criticised in this judgment following their refusal to concede that non-disclosure on national security grounds was unsustainable. This refusal was maintained despite a clear concession, first, that the material in question had no national security implications; and secondly that its substance had already been put into the public domain by an American judge. Perhaps most disturbing in this case was the intransigence of the Security Services in the face of overwhelming evidence that they could not avail themselves of the benefit of PII.

40. The case of *Secretary of State for the Home Department v AN,* handed down on 12 March 2010, is a particularly worrying example of the misuse of a national security rationale to avoid disclosure of material disadvantageous, or indeed fatal to, the merits of the Home Office's case. Following the reinstatement of redactions in documentary evidence disclosed by the Home Secretary in an appeal against a control order, it became apparent that information withheld included references to internal Home Office documents in which it was admitted that there was no necessity for a control order at all because the suspect was detained on remand in Belmarsh prison. As a result, the Home Office's case fell away and the control order was revoked.

41. In the only case decided by Proscribed Organisation Appeals Commission (POAC) to date, the intelligence services sought the redaction of a passage from a previous Court of Appeal judgment in a case relating to the status of an Iranian organisation. It transpired that the passage in question was one which stated that the decision had been a very poor piece of administrative decision making. This case constitutes yet another example of the use of subterfuge by intelligence services, in a highly sensitive context, in order to avoid embarrassing revelations.

42. It is this tendency to seek the redaction of material that is not damaging to national security, but rather unhelpful and embarrassing to the Government, that so badly undermines public and judicial trust. It is deeply worrying that the Government, a party which is in a position to withhold material on national security grounds, appears to be routinely exploiting that duty/power as a way of gaining a litigation advantage. The above examples reveal a hugely worrying trend about the misuse of secrecy in judicial proceedings under existing PII and CMP arrangements. As the Government considers yet further proposals which seek to alter fundamental

principles of open justice and undermine the ability of the judiciary to scrutinise the actions of Government or the Agencies, Liberty urges serious reflection on the extent of recent errors and abuses on behalf of the Crown.

Non-judicial scrutiny

43. Chapter 3 of the Green Paper considers non-judicial aspects of the scrutiny of government activity concerned with national security. Official non-judicial oversight in this context is primarily undertaken by the Intelligence and Security Committee (ISC) established by the *Intelligence Services Act 1994* and the Offices of the Intelligence Services Commissioner and the Interception of Communications Commissioner.

The Intelligence and Security Committee (ISC)

44. Liberty has long-standing concerns about the level of scrutiny provided by the ISC and firmly believes it must be comprehensively reformed if it is to provide effective oversight of our Security and Intelligence Services. To date the Committee has consistently, and sometimes very publically, failed in its duty to provide effective scrutiny of the Agencies. In a report published in 2009, the Joint Committee on Human Rights (JCHR) were markedly critical of the ISC noting that its limitations were exposed by its handling of the case of former British Guantanamo detainee Binyam Mohamed *"in which the Security Service's account of his treatment is presented apparently without challenge and relevant extracts of the Director General of the Security Service's oral evidence are so heavily redacted as to make them incomprehensible."*[37] In his judgement in the case Master of the Rolls Lord Neuberger concluded that the Security Services had misinformed the ISC that they *"operated a culture that respected human rights and that coercive interrogation techniques were alien to the services' general ethics methodology and training"* when in fact *"at least some Security Services officials appear to have a dubious record when it comes to actual involvement and frankness about such involvement with the mistreatment of Mr Mohamed*".[38]

45. A further flurry of public criticism followed the revelation, during the course of the Inquest into the 7/7 bombings, that there were *"inaccuracies"* in the information

[37] *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR session 2008-2009, paragraph 60.
[38] *R (on the application of Binyam Mohamed) v SSHD [2010] EWCA Civ 158*.

provided to the ISC by the Security Services.[39] In her Coroner's Report, Lady Justice Hallett made clear her concern at having initially been *"addressed on the basis that a statutory body had conducted, effectively, the very exercise upon which* [she] *was being asked to embark."*[40] It later transpired that *"the statutory body, the ISC, may have been inadvertently misled and thus that its reports may not have sufficiently addressed some of the central issues before it."*[41] Concerns have further frequently been expressed about the extent to which the operation of the Committee is obscured by non-disclosure. Whilst Liberty recognises that some sensitive information can not be put in the public domain, as the JCHR has noted, the level of redaction of ISC reports is sometimes so great that *"it can be difficult to follow the Committee's work and to understand its reports."*[42] The internal workings of the Committee therefore remain largely obscure, but comments by a former ISC investigator, reported in the Guardian in February 2010, allude to the impotence of a Committee which receives *"carefully crafted written submissions"* from the Security Services.[43]

46. Whilst Liberty welcomes the Government's commitment to implement some of ISC's own suggestions for strengthening its role, the measures proposed in the Green Paper will provide at best a marginal level of additional protection. One aspect of the ISC's operation which has attracted considerable criticism is a marked accountability deficit. The JCHR, in particular, has concluded that *"the missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services"*.[44] Liberty recognises the sensitivity of much of the material which will fall to be considered by the ISC, but is underwhelmed by Government proposals which are limited to formalising a duty to report to Parliament in addition to pre-existing duties to report to the Prime Minister. This option was preferred to a proposal to align the status of the ISC with that of a departmental Select Committee – a measure which would have provided significantly

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[39] *Coroner's Inquests into the London Bombings of 7th July 2005, Report under Rule 43 of The Coroner's Rules 1984.* See in particular paragraphs 111-113. In reaching her conclusions Lady Justice Hallett found that in two inquiries conducted by the ISC prior to the inquest that MI5 had failed to correct serious and obvious misunderstandings.
[40] *Ibid,* paragraph 115.
[41] *Ibid,* paragraph 115.
[42] *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR session 2008-2009, paragraph 58.
[43] *Human rights groups call for reform of government's security committee*, the Guardian, 26th February 2010. Available at: www.guardian.co.uk/uk/2010/feb/26/m15-torture-security-service-committee.
[44] *Ibid*, paragraph 65.

greater Parliamentary oversight of the activities of the Committee and removed the Government's veto on the publication of material alleged to be of a sensitive nature.

47. The Green Paper considers proposals made by the ISC which would involve the extension of the Committee's remit to scrutinise operational aspects of the work of the Agencies. No concrete proposals are set out in this regard due, in part at least, to concerns about potential impact on the Agencies both in terms of cost and operational effectiveness. The Green Paper contains no more than a vague expression of the Government's intent to consider the practical implications of extending the remit of the ISC in this way. The Government does make a more concrete commitment to formalise the ability of the ISC to take evidence not just from the Agencies, but from any department or body in the wider intelligence community. Whilst this is a welcome clarification, it is likely to have little practical impact and will not address overarching concerns such as the governmental veto over the information made available to the Committee, the extent of public reporting undertaken by the Committee and Prime Ministerial control over appointments.

48. Chapter 3 includes some consideration of appropriate procedures for the appointment of Committee members. The Committee's appointment procedure underwent some modest reform in 2008 with a role created for the House of Commons in making recommendations for the membership of the ISC on the basis of proposals set up by a Committee of Selection. This notwithstanding, the ultimate decision on the constitution of the ISC rests with the executive albeit with limited opportunity for parliamentary debate if objection is expressed to the recommendations of the Committee of Selection. The Green Paper discusses proposals put forward by the ISC itself which would see the ultimate selection of Committee members left to Parliament, but there is no indication that the Government is seriously considering such a reform. The Green Paper is similarly non-committal about proposals made by the Wright Committee that ISC members be selected through a Parliamentary ballot. The legitimacy deficit created by a Committee whose members are ultimately selected by the executive remains unresolved. Limited commitments made to *'review the level of resourcing that the ISC requires to support it in the discharge of its function'* do little to promote confidence that a substantially more independent and robust body will emerge from the Government's tentative proposals.[45]

[45] See Paragraph 3.32 of the Green Paper.

49. Whilst the Government claims to recognise the importance of publishing material produced by the ISC wherever possible, it is disappointing to see that there is again no real reassurance in the Green Paper that the procedures of the Committee will change in any significant way. Liberty welcomes the Government's commitment to making the concept of public evidence sessions *'work'*, but notes that even this vague proposal is made only to *'the extent this can be achieved without compromising national security'*.[46] Similarly whilst the Government accepts that the Committee should be given the power to require information from the intelligence agencies, this proposed power will be subject to a power of veto exercisable by the Secretary of State.

50. To the extent that Chapter 3 represents an attempt to grapple with the obvious weaknesses in the system of scrutiny provided by the ISC it is a welcome addition, but the proposals as they stand are variously vague, weak and heavily caveated. They will do little to alleviate the concerns of those who wish to see the more robust scrutiny which would be provided by an organisation made significantly more accountable to Parliament, and will do little to assuage concerns about the extent to which the Committee's deliberations and conclusions are made publically available. Liberty believes that as a bare minimum the ISC should have the status of a Committee of Parliament answerable to directly to Parliament rather than to an executive upon which is supposed to act as an effective check. It is further critically important for the real and perceived legitimacy of the ISC that concrete measures are put in place to ensure that that evidence sessions take place in public save where genuine issues of national security arise. Liberty is disappointed that there has been no substantial attempt to deal with executive control over decisions about reporting and publication of ISC materials - a body capable of effective scrutiny must be in a position take its own decisions on reporting and publication.

51. An effective ISC must be appropriately funded and staffed with independent experts able to undertake detailed forensic investigations. The ISC has been critiqued, not just on the basis of its appointment procedures, but also in light of the fact it is staffed by Government employees.[47] Liberty supports the findings of the JCHR to the extent they conclude that an effective and robust ISC must have an

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[46] See Paragraph 3.35 of the Green Paper.
[47] *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR session 2008-2009, paragraph 58.

independent secretariat, including independent legal advice.[48] An effective ISC should have strengthened powers not simply to require the production of information, but also to compel the attendance of witnesses. Whilst none of these additional protections will offer anything approaching the level of scrutiny provided by our judicial institutions, they will help to create a Committee which plays a valuable subsidiary role in securing Parliamentary scrutiny of the operation of Government functions branded matters of national security.

The Role of the Intelligence Services Commissioner and the Interception of Communications Commissioner

52. Liberty has consistency expressed concern about the level of scrutiny provided by both Commissioners. Like the ISC the Commissioners report to the Prime Minister, although their reports are laid before Parliament. The bulk of the Intelligence Services Commissioner's Reports are taken up with the restatement of the duties of his office and Liberty is concerned that the remainder represents little more that a rubber stamping exercise. This appears to be a view shared by the JCHR which, in its *Report into Allegations of UK Complicity in Torture* noted that *"the reports of the Commissioners, after redaction, give an indication of workload but are not otherwise illuminating."*[49] The annual reports which have emerged to date have been conspicuously short, devoid of concrete examples and have provided scant reasoning for conclusions such as that that contained in the 2010 report that personnel have *"performed their duties, in the areas over which I exercise oversight, conscientiously and well"*.[50] The Commissioner has consistently declined to publish statistics on warrants or authorisations issued to the Security and Intelligence Services on the basis, repeated verbatim in every annual report, that disclosure would *"assist those unfriendly to the UK were they able to know the extent of the work of the Security Service, Secret Intelligence Service and Government Communications Headquarters in fulfilling their functions."*[51] It is further far from reassuring that, at a time when credible allegations of complicity in torture were

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[48] *Ibid*, paragraph 66.
[49] *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR session 2008-2009, Paragraph 68.
[50] *Report of the Intelligence Services Commissioner for 2010,* paragraph 32. Available at: www.official-documents.gov.uk/document/hc1012/hc12/1240/1240.pdf.
[51] See *Report of the Intelligence Services Commissioner for 2007, 2008 and 2009*, at paragraph 35 in each report and paragraph 46 of the 2010 Report.

emerging, the overarching message of the Commissioner's reports was that the security services were *"conscientious, trustworthy and dependable."*[52]

53. Liberty's concerns about the limitations of the Interception of Communications Commissioner's remit are well documented. Oversight occurs after the event and the Commissioner's reports acknowledge that he is unable to review the operation of all the public bodies that fall within his limited remit. Whilst the Green Paper points out that, to be eligible for selection, candidates for either Commissioner role must have held high judicial office, this requirement provides no guarantee that the scrutiny provided is in anyway comparable to judicial oversight. Neither Commissioner is acting in a judicial capacity and as the Paper explains, both ultimately report to the Prime Minister.

54. Liberty is far from convinced that the limited reforms to the role of the Commissioners mooted in the Green Paper will substantially improve the level of scrutiny that either office is able to provide. The Government's proposal to place additional duties already undertaken by the Commissioners, such as monitoring compliance with new policies, on a statutory footing, is unlikely to make any practical difference to the way the Commissioners operate. Steps to increase the public profile of the Commissioners by publishing more accessible annual reports and launching a website are welcome, but do little to assuage more fundamental concerns about the way the Offices operate.

55. The Paper moots the possibility of creating an Inspector-General ('IG') role, to provide, in one body, oversight of the covert investigative techniques of the Agencies. It is suggested that the IG could take over the role of the Intelligence Services Commissioner and perform the role of the Interception of Communications Commissioner in so far as it relates to interceptions carried out by the Security Services. The role suggested for the IG would include giving legal advice to the Agencies on the use of covert investigation techniques and reviewing their policies and procedures. As such it is difficult to see what a new IG role would add to current arrangements, aside from the benefit the Government claim may result from the consolidation of the role of the two Commissioners. The Green Paper makes clear that the IG would have a limited remit of retrospective review and his right to request intelligence would be subject to a Ministerial veto. The Government envisages that

[52] *Report of the Intelligence Service Commissioner for 2008*, paragraph 32. Available at: www.official-documents.gov.uk/document/hc0809/hc09/0902/0902.pdf.

the IG would report to the Prime Minister in the same way as the current Commissioners and that he would be appointed by and answerable to the Prime Minister. On this basis Liberty seriously doubts that this supposed innovation would bring any substantial improvements in the level or nature of non-judicial scrutiny of the Intelligence and Security Services.

Conclusion

56. The *Justice and Security* Green Paper contains two significant proposals. The first – that CMPs should be introduced generally into the civil law – would overturn centuries of common law fair trial protections for those seeking to challenge the actions of the State. The second would effectively put the Secret Services – and potentially all public bodies – above the law in relation to civil actions seeking to uncover the wrongdoing of a third party in which the UK is involved. Neither of these proposals must be allowed to stand. In each area, the Green Paper fails to make a coherent case for the need for change and in its more reflective passages appears to accept that current arrangements have not lead to unfairness nor allowed the courts to act in a way which would jeopardise national security.

57. Indeed any increase in the amount of litigation relating to national security over recent has more to do with the Executive powers and operational practices adopted in the years following 9/11 than any difference in the approach taken by the courts. In approaching this litigation, far from demonstrating a great willingness to review Executive action, the courts have applied longstanding common law principles and ECHR protections which safeguard among other things, the right to know the case against you, equality of arms, an absolute prohibition on torture etc. Ironically it appears that in response to litigation which challenged and uncovered the worst excesses of the War of Terror the Government proposes to forever undermine the ability of individuals to hold the State to account. But perhaps most disturbing is the way in which the Green Paper fails to engage with, or even acknowledge, the significance of suggestions that it makes. On this point at least, the Government must be put to the test.

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