

Justice and Security Green Paper (Cm 8194) Presented to Parliament by the Secretary of State for Justice, October 2011

This is a response to the Justice and Security Green paper on the behalf of the Haldane Society of Socialist Lawyers.

The society is gravely concerned by the proposals to extend the use of secret evidence into all civil judicial proceedings and strongly opposes any attempts to do so.

Among our executive committee and wider membership are professionals who already work on litigation where Closed Material Procedures (CMPs) are adopted and no doubt many more of our colleagues would be affected were these proposals to become law. Moreover, the proposals contained in the green paper will impact disproportionately on some of the most vulnerable sections of society, many of whom are already disenfranchised and disaffected. We are exceptionally concerned that these proposals will simply serve to further exacerbate the tensions between communities and the state, without any tangible or identifiable benefit. The justifications for these proposals are rooted in claims as opaque as the suggested changes themselves. The paper refers to non-specified difficulties and strains with international partners arising because of recent litigation without saying more on the character of these difficulties or whether those partners hold justified grievances.

It is widely acknowledged and uncontroversial that an individual's right to know the case against her or him is a fundamental feature of the common law. It is therefore extraordinary for the Government to claim at § 1.7 of the paper that what this means will vary depending on the circumstances. We do not agree. The right to know the case against you is essential to an adversarial trial.

Similarly, transparency, and the full disclosure that it demands, is a central tenet to any inquisitorial process. This applies particularly to inquests arising out of deaths in state custody where Article 2 of the European Convention on Human Rights is engaged. There is extensive and well-established case law highlighting the importance of bereaved families being able to participate in such inquests, and to do so they must have full access to all materials. Without this, there is no guarantee that failings on the part of the state may be identified and rectified, which undermines not only the very purpose of the inquest itself, but also public confidence in mechanisms to ensure state accountability.

At § 1.28 of the paper it is asserted that a CMP will represent often only a small part of the overall case and the rest of the case will be heard in open court. While this may be true in many cases, it is the nature of the secret evidence against an individual that is important and not the quantity. If the reality or the gist of a case is entirely contained in evidence withheld from one party then no amount of open evidence will assist her or him in meeting the accusations (indeed this is in effect conceded at §1.52 where the *Carnduff* case is described as involving 'substantially all and only sensitive material'). While at § 1.29 the paper is

correct in explaining that a CMP is capable of satisfying the requirements of Article 6 ECHR, this does not mean that it can be considered 'fair' by any traditional common law standard.

At § 1.55 the green paper dismisses the usefulness of 'confidentiality rings' and 'private hearings' claiming 'these mechanisms cannot give the required degree of assurance and there may be no way to manage or contain the harmful impact of making sensitive info public'. This is undermined by instances in which Treasury Solicitors have inadvertently disclosed closed material to the other party. In those circumstances the solicitor receiving the closed material has simply been required to provide an undertaking that the information would not be further disseminated and no harm has resulted.

The green paper claims at § 2.3 that '[t]he contexts in which CMPs are already used have proved that they are capable of delivering procedural fairness. The effectiveness of the Special Advocate system is central to this...' We believe this is an utterly unsubstantiated and, worse, misleading statement. As already stated common law norms demand that all parties see and are able to challenge the evidence which is relied on. A system which does not deliver this *as a minimum* cannot be said to be fair and the extent to which this deficit is mitigated by the involvement of special advocates was vividly illustrated by Lord Bingham in the case of *Roberts v Parole Board* [2005] UKHL 45 in which he described their role as 'taking blind shots at a hidden target'.

This is borne out by the evidence special advocates have given to the Joint Committee on Human Rights. In its 19th report (HL Paper 157, HC 394 30 July 2007) the JCHR reported that "The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening...has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them." To seek to extend CMPs in the face of criticism of this sort is scarcely credible.