



*The Chairman: The Rt. Hon. Sir Malcolm Rifkind, MP*  
**INTELLIGENCE AND SECURITY COMMITTEE**  
35 Great Smith Street, London SW1P 3BQ

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Sir Peter Ricketts  
National Security Adviser  
Cabinet Office

*Dear Peter,*

**Green Paper on Justice and Security: ISC Response**

The Intelligence and Security Committee welcomes the Government's Green Paper on Justice and Security. The issues it addresses are of critical importance when it comes to protecting the UK and its citizens.

We see, from our role overseeing the Agencies, the excellent work they do on a day to day basis, and the very real challenges that they face. However we have also seen the damage that has been done by the allegations that they have faced over the last few years. We recognise that the Agencies are not always able to defend themselves, and the fact that cases have had to be settled – often at considerable cost to the UK purse – in order not to jeopardise the UK's national security, and that questions have been left unanswered, is deeply unsatisfactory. It is essential that our courts are able to handle intelligence material, and that that material is properly protected.

This is not a simple matter. However the Committee considers that the Green Paper takes a pragmatic approach to the problems involved and has made a number of sensible proposals which will go some way to resolving these issues.

*Protecting intelligence*

In our 2007 Report on Rendition we explained the importance of intelligence exchanges with foreign liaison partners, including intelligence relating to detainees. We concluded that:

*Our intelligence sharing relationships, particularly with the United States, are critical to providing the breadth and depth of intelligence coverage*

*required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue.*

It is a fundamental principle of intelligence sharing that such exchanges are kept confidential. Publication of other countries' intelligence material, whether sensitive or otherwise, undermines the key principle of confidentiality on which relations with foreign intelligence services are based and has the potential to cause serious harm to future intelligence cooperation and thereby undermine the national security of the UK. Put simply, if we do not respect the confidentiality of the sensitive information we receive, we won't get given any.

The release in a UK court of a summary of US intelligence material in the Binyam Mohamed case was therefore of serious concern. Following the release of the information, the Office of the Director of National Intelligence in the US issued a statement: *"The protection of confidential information is essential to strong, effective security and intelligence co-operation among allies. The decision by a United Kingdom court to release classified information provided by the United States is not helpful, and we deeply regret it."* This is a message that cannot be ignored.

This Committee has heard such concerns first-hand. We have been struck by the force with which certain interlocutors within the US intelligence community have told us their concerns about the actions of the UK courts. We must ensure that we are able to protect foreign intelligence material from disclosure if we are to be able to protect UK citizens. We therefore strongly welcome the proposals contained in the Green Paper designed to protect this material, and to extend such protection to civil proceedings.

However, while the proposals are a good step in the right direction they do not, in the Committee's opinion, go far enough. The use of Closed Material Procedures and special advocates will increase the protection which can be given to foreign intelligence material, but we do not consider that they offer sufficient surety to our allies. This lack of a guarantee is acknowledged in the Green Paper itself, which states that CMPs would only *"reduce the risk of damaging disclosure of sensitive material"*.

The Green Paper does however mention two alternative options for providing protection for such material: first, a rebuttable statutory presumption against disclosure of any intelligence material, and second an executive veto, along the lines of that used in the US.

A statutory presumption against disclosure of intelligence material would have the advantage of providing a clear indication to judges of Parliament's intention in relation to such material. We consider that judges themselves would welcome such clarity. The courts are usually interested as to whether they can divine Parliament's intentions from the wording of an Act. Such a presumption would be invaluable in this respect. Any presumption would, of course, be rebuttable and therefore the final decision would still

lie with the courts, although there would need to be compelling reasons for a judge to rule against.

The Green Paper presents this statutory presumption as an alternative to Closed Material Procedures. However the Committee considers that it should be in addition to CMPs. Whilst the combined package would still not offer an absolute guarantee to our allies (since the final decision would continue to rest with the courts), it would nevertheless provide greater protection than CMPs alone. In the case of foreign intelligence material, where it is clear that the UK has a duty to protect the information, we believe that this is particularly necessary and should be accepted even if a general presumption is not.

The alternative would be a practice similar to the State Secrets Privilege, used in the US. The Committee considers that such an executive veto would also offer the additional layer of protection necessary. However, we recognise that the concept of an executive veto may be politically sensitive, but more importantly may not be compatible with our obligations under the ECHR.

The Committee strongly believes that one of these two options should be adopted in addition to CMPs, in respect of foreign intelligence material. Only then do we consider that our allies can feel confident sharing their information with the UK in the future.

It is also important that the UK's own sensitive material is properly protected across the full range of judicial and legal proceedings. Judgments in cases such as AF (No.3) have extended the scope of information that has to be disclosed in the gist provided to individuals who are subject to Control Orders and, in future, TPIMs. This principle has also been applied in some cases where convicted terrorists have challenged the decision to revoke their licence and return them to prison as a result of intelligence suggesting they have re-engaged in terrorism. Given the increasing number of convicted terrorists who are returning to the community on licence this is likely to become an even more pressing issues for Ministers and senior officials in the future. It is essential, therefore, that the relevant intelligence material can be considered and protected from disclosure in such cases.

Whilst this represents a call for greater restrictions generally, the Committee does consider however that the Green Paper proposals could be tempered in one respect. The Green Paper proposes that information held by, or originating from, one of the intelligence agencies would, by statute, automatically be excluded from potential Norwich Pharmacal applications. As worded, this casts the net very widely, and is perhaps too broad an exemption.

The damage to international intelligence-sharing relations is caused by the disclosure of foreign intelligence material and it is right that such material is excluded from

applications for disclosure. However, one can envisage circumstances when non-sensitive Agency-held material is relevant to a legitimate civil case between third parties. The current proposals outlined in the Green Paper would prevent a Norwich Pharmacal application to obtain disclosure of Agency information, even if there were no national security sensitivities.

The Committee does not consider that it is helpful to seek to apply a blanket ban, since that must send the wrong message in terms of the proportionality of the response to current concerns. If Agency-related material is to be excluded, it must be on grounds of national security and public interest arguments. The Committee would therefore support an automatic statutory exclusion of material which was both Agency-related and sensitive, but not simply on grounds that it is information held by the Agencies.

### *Increasing accountability*

Whatever the extent of the exclusion, and the final decision on the package of measures necessary to protect foreign intelligence material, it remains the case that if there is to be greater protection for matters of national security in terms of judicial scrutiny, then it must be balanced by more oversight of such matters in non-judicial fora.

The intelligence community, due to the sensitive nature of material involved, is not subject to the same level of public scrutiny as are other departments and agencies: it is not the subject of regular debate or questions in Parliament, academic research is limited to matters of distant history, investigative journalists cannot delve very deeply, and it is exempt from freedom of information.

The responsibility for independent oversight therefore falls to this Committee, whose role it is to provide parliamentary oversight and scrutiny, and to the Intelligence Services and Interception of Communications Commissioners, whose role it is to check the legality of the Agencies' activities.

Given the lack of other forms of independent oversight, it is essential that both the Commissioners and this Committee have the powers and resources necessary to carry out this work effectively and to compensate for those other forms of public scrutiny to which the intelligence agencies are not subject.

### *The Commissioners*

The work of the Commissioners, assisting Ministers by providing a compliance, audit and assurance function, is vital. We note the Green Paper refers to the need for their work to have a greater public profile. We would not disagree: greater awareness of the

work that they do can only increase confidence in them. We also support the proposal that their existing additional duties be placed on a statutory footing.

However, it is also proposed that these additional duties should be further expanded, “*adding a general responsibility for overseeing the effectiveness of operational policies to the statutory remit of the Intelligence Services Commissioner*”. In the Committee’s opinion this represents a blurring of boundaries which must be avoided. It is the Commissioners’ function to monitor compliance with legislation, rules and procedures. This is a quasi-judicial role, the purpose of which is to reassure Ministers, Parliament and the public that the rules governing the covert and intrusive work of the Agencies are being complied with. The Commissioners also provide advice to the Agencies to develop better rules, procedures and guidance, in order to improve compliance over time. General responsibility for oversight of the appropriateness and effectiveness of policy, including policy which impacts on the operational work of the Agencies, is now the remit of the Intelligence and Security Committee. This should not change, nor should it be a shared responsibility between the Committee and the Commissioners since this would risk confusion and duplication.

There may however be a role for the Commissioners in overseeing the effectiveness of the statutory controls (as opposed to policies). This would have some merit, and we would support such a change if it can be defined such that it does not risk confusion with the ISC’s role in relation to operational policy.

Finally, in terms of more fundamental changes to this system, we note the Green Paper’s mention of the Inspector-General model. We have held discussions ourselves with a number of Inspector-Generals in other countries, and broadly speaking their work equates to that of the Commissioners (checking the Agencies’ compliance with their legal obligations). Subsuming the work of the existing Commissioners into one Inspector-General would appear to be a largely presentational change with little substantive advantage.

### *The Committee*

The Green Paper recognises the need to modernise and strengthen Parliamentary oversight of the intelligence community, and the Committee therefore broadly welcomes the Government’s proposals which, to a large extent, reflect our own recommendations. We have not included here those matters on which we agree.

We do however have two remaining concerns, on which we would welcome reassurance. The first relates to oversight of operational activity. The work of the Agencies cannot be understood fully, let alone scrutinised effectively, without regard to their core function – intelligence operations.

The ISC has for many years reported on operations, both publicly and in confidence to the Prime Minister. This includes reports as far back as the 1999 Inquiries into Sierra Leone and the Mitrokhin Archives, when the Committee was still relatively new, through to more recent examples such as the 2007 Inquiry into the 7/7 Bombings and the 2009 Inquiry into the Binyam Mohamed case. Some of these investigations were at the express request of the Prime Minister, others were instigated by the Committee itself. They were all specific operations which gave rise to public concern and significant national interest, and they were all inquiries in which the Committee had access to specific, detailed operational material. The Committee considers however that the current arrangements should be formalised and this work placed on a statutory footing. Moreover, given that the ISC has already had substantial ongoing oversight of operations, the new legislation could hardly restrict the Committee's responsibility to policy, resources and administration as in the original Act.

In our discussions prior to the publication of the Green Paper, we were mindful of the Government's concerns in this area. To that end, we agreed that the Committee's inquiries would be retrospective and that they would be limited to matters of significant public interest. However the wording in the Green Paper remains rather circumspect, stating only that "*the Government is giving careful consideration to the ISC's proposal to extend its remit to include operational aspects of the work of the Agencies*". The Committee would welcome an early indication as to the nature of any remaining concerns in this area. Whilst we agree that it will be important to get the detail right, the principle of access to operational information is one that we cannot now start unpicking.

The second issue on which we would welcome clarification is that of staff. What is clear to us from our experience to date is that, given the lack of external experts or media working in this field whose work we can draw upon, our staff already have to do far more research and analysis than the staff of an ordinary select committee. However, the changes that are envisaged to our powers and remit will increase this requirement, and will also involve new ways of working. The key difference will be as a result of the Committee's power to "require" information to be provided. Whereas the Committee is currently reliant on the Agencies themselves considering and précising their information, in future the Committee's staff will need to be engaged in this process in order for the Committee to be assured that it has the information it requires. This simply will not be possible unless we have more staff with greater authority and seniority, and a proper investigative capacity with sufficient levels of access and powers. If we are to provide credible and effective oversight then we must be resourced to do so. This view is supported by comparisons with our counterparts in the US and Canada and by discussions with academics and practitioners in the UK.

We note however that the Green Paper states only that "*the Government – with the parliamentary authorities... - proposes to review the level of resourcing that the ISC requires to support it*". The Committee would expect to be involved from the outset in

any such discussions to determine the increases required (indeed it is difficult to see how it could not be), since this will underpin any reform of the Committee. We hope that you can offer reassurance on this point.

These two matters aside, we are pleased to note that the Government has accepted our recommendations for modernising and strengthening independent oversight of the intelligence community and we look forward to working with you on the legislation in due course.

A handwritten signature in black ink, appearing to read 'Malcolm Rifkind', with a stylized flourish above the first part of the name.

**MALCOLM RIFKIND**