



**Justice and Security Green Paper
Written Evidence**

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Written Evidence submitted by the Equality and Human Rights Commission (JS 5)

Executive summary

1. The Commission has identified a number of human rights issues in the proposals in the Green Paper, particularly in respect of the use of closed material. The Commission does not consider that the evidence base in the green paper supports the need to amend closed material proceedings. The scope of the proposals would involve a significant expansion of exceptional court proceedings into the civil justice system.

2. In the Commission's views, closed material procedures can never be completely fair, are likely to violate the principles of Article 6, the right to a fair trial. The Commission further believes that the current system of Public Interest Immunity works well as a means of protecting sensitive information that also respects the common law principles of open justice and natural justice.

3. The Commissions welcomes the government proposals to improve oversight of the activities of the security services. However the Commission considers further reforms than those proposed to the ISC are required to ensure effective oversight.

Q1. Does any evidence exist of the scale of the use of secret evidence in the 14 contexts which the Government has identified in which closed material procedures are already provided for in legislation?

4. At paragraph 2.37 of the Green Paper, the Government refers to '14 different contexts of civil proceedings' in which 'the Special Advocate system is provided for in legislation'. In the Commission's view, however, this figure does not provide an accurate indication of the extent of the use of closed material in UK courts and tribunals. For instance, the proceedings of the Investigatory Powers Tribunal rely almost entirely upon material that will not normally be disclosed to complainants, but neither the Regulation of Investigatory Powers Act nor the Tribunal's own procedural rules make any provision for the appointment of special advocates.

5. Moreover, the Green Paper's reference to legislation does not appear include the several instances in civil proceedings which special advocates have been appointed on an ad hoc basis: see e.g. *CAAT v Information Commissioner and the Ministry of Defence* [2008] UKIT EA/2006/0040. In the latter case, the Information Tribunal agreed to appoint a special advocate to represent the interests of the appellants in relation to the closed material. Although the Tribunal's procedural rules allow it to consider closed material, however, they contain no express reference to the power to appoint a special advocate. Similarly in *Roberts v Parole Board* [2005] UKHL 45, a majority of the House of Lords held that the Board's power to appoint a special advocate was implicit in its procedural rules.

6. In the Commission's view, therefore, simply counting the number of express legislative provisions which allow for the appointment of special advocates is likely to provide a misleading impression of the extent of the use of closed material. Nor does it take account of the qualitatively different role that special advocates may undertake: as Lord Dyson noted in *Al Rawi and others v The Security Service and others* [2011] UKSC 34, their appointment to represent the interests of the accused in an ex parte application to withhold material on Public Interest Immunity grounds does not violate the principles of open justice and natural justice.¹

7. More generally, the Commission is concerned that the Green Paper's proposals are being put forward without a clear indication of the extent of closed material currently being used. The Commission suspects that the great majority of cases involving secret evidence continue to be those before the Special Immigration Appeals Commission and the High Court in control order proceedings (previously under the Prevention of Terrorism Act 2005 but now under the Terrorism Prevention and Investigative Measures Act 2011). Nonetheless, the continuing lack of accurate information concerning the extent of closed proceedings remains a serious problem.

Q2. Are there any other contexts in which closed material procedures have been used which have not been included in the Government's list of 14?

8. The Commission is aware of several civil cases in which courts and tribunals have considered closed material, either without a special advocate appointed to represent the interests of the excluded party, or with a special advocate appointed on an ad hoc basis, rather than pursuant to some statutory provision. These include:

- (a) *R (Murungaru) v Secretary of State for the Home Department* [2006] EWHC 3726 (judicial review of the Home Secretary's decision to cancel the applicant's visa—no special advocate appointed)
- (b) *MH and others v Secretary of State for the Home Department* [2008] EWHC 2525 (Admin) (judicial review of Home Secretary's refusal of applications for naturalisation as a UK citizen)
- (c) *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934(QB) (application under the Data Protection Act for disclosure of psychologist's report)

¹ See *Al Rawi*, para 49: 'One particular development to note is the use of special advocates to enhance the PII process. There can be no objection to the use of special advocates for that purpose, since the PII process fully respects the principles of open justice and natural justice. There is nothing objectionable about excluding a party from the PII process. There can, therefore, be no objection to improving the position of that party in the process by the use of a special advocate'.

9. The Commission notes, however, that there is no publicly-available statistics concerning the total number of special advocates appointed since they were first introduced under the Special Immigration Appeals Commission Act 1997, fifteen years ago.²

Q3. Has the Government demonstrated the necessity of legislating to make closed material procedures available in all civil proceedings?

10. No. The Commission does not consider that the evidence base in the green paper supports the need to extend the use of closed material proceedings. Indeed, it appears to the Commission that much of the Green Paper is concerned with the outcome of just two cases: *R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 involving a Norwich Pharmacal application against the Foreign Secretary for the disclosure of intelligence material; and *Al Rawi and others v Security Service and others* [2011] UKSC 34, a civil claim for damages in respect of the alleged involvement of UK officials in the rendition and ill-treatment of UK residents and nationals overseas. Although the Commission agrees that these cases raise important issues, it remains to be convinced that either discloses a widespread or serious problem sufficient to justify the steps proposed by the Green Paper.

11. In the Commission's view, the need for a sound evidential basis for the Government's proposals is especially important given that the Green Paper's proposal to introduce closed material procedures in civil cases will have far-reaching effects on the civil justice system. In *Al Rawi*, for instance, both the Court of Appeal and the UK Supreme Court agreed that the introduction of a closed material procedure in civil proceedings, as proposed by the Green Paper, would abrogate the common law right to a fair trial. As Lord Kerr put it:

The seemingly innocuous scheme proposed by the [government] would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellants would have it. It would be, at a stroke, *the deliberate forfeiture of a fundamental right* which, as the Court of Appeal has said [...], has been established for more than three centuries (para 92, emphasis added).

12. The Deputy President Lord Hope said the adoption of a closed material procedure would 'cut across absolutely fundamental principles such as the right to a fair trial, the right to be confronted by one's accusers and the right to know the reasons for the outcome' (para 72). Lord Dyson similarly described the adoption of a closed material procedure in a civil claim as 'an invasion of [...] fundamental common law principles' (para 47). It is obvious, therefore, that any proposal in this area should therefore be based on robust evidence.

2 See JUSTICE, *Secret Evidence*, at para 359, referring to a series of Freedom of Information Act requests made to the Attorney General's Office and the Special Advocate Support Office of the Treasury Solicitor's Department.

13. Among other things, the Green Paper claims that the last decade has involved an increase in cases involving issues of national security.³ The Commission notes, however, that this increase is due at least in part to two factors of which the Green Paper makes no mention: first, there is the increased willingness of the government to advance national security claims in cases that otherwise have only limited connection to the issue: e.g. the use of stop and search powers under section 44 of the Terrorism Act 2000 against protestors at an arms fair in East London (*Gillan and another v Commissioner of Police for the Metropolis and another* [2006] UKHL 12), and secondly, the highly controversial nature of the UK government's counter-terrorism policies since 9/11, together with its participation in the conflicts in Afghanistan and Iraq. The Green Paper suggests that the rise in cases is due to 'increased recourse to judicial review and increased awareness of the importance of national security', but this underplays the importance of the human rights issues in the cases cited above. If it is correct that these cases disclose errors in policy or practice, then an increase in the number of cases in this area is not a sound basis for adopting secret evidence procedures that would limit effective public scrutiny and fair trial rights.

Q4. What evidence exists of the scale of the problems relied on by the Government to justify the proposals in the Green Paper? In particular:

- (a) Apart from the case of *Carnduff v Rock*, are there any other examples of cases in which civil proceedings against the Government have been struck out because the determination of the claim would have required the disclosure of sensitive information and the case was therefore not triable?**

14. No, the Commission not aware of any other examples apart from *Carnduff v Rock* [2001] EWCA Civ 680. Nor, in the Commission's view, does the outcome in *Carnduff* in any way justify the adoption of a closed material procedure as an alternative to the well-established principles of Public Interest Immunity ('PII'). Although it is correct that, in an exceptional case, PII principles may mean that a party cannot make out his or her claim, leading it to be struck out. As Lord Dyson in *Al Rawi* stated:

It is true that, if a closed material procedure were introduced, it might not be necessary to strike out a claim such as *Carnduff*. Looked at in isolation, that would be a good thing. But the problem cannot be looked at so narrowly and in any event it seems that cases such as *Carnduff* are a rarity. *They do not pose a problem on a scale which provides any justification (let alone any compelling justification) for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned (para 50, emphasis added).*

³ See e.g. para 1.17 of the Green Paper: 'By way of illustration, in the first 90 years of the Security Service's existence, no case impacting directly on that Service's work reached the House of Lords. In the last ten years there have been 14 such cases in the House of Lords or Supreme Court. All three Agencies have been involved in many more cases heard in the lower courts'.

In the same case, Lord Kerr similarly complained that 'claims that the present system creates impossible logistical burdens or that it produces unfair results on a massive scale are not backed up by any evidence (para 95). In the absence of any evidence to show that this has been, or is likely to become a widespread problem, therefore, the Commission doubts that the case of *Carnduff* is sufficient to justify the steps proposed by the Green Paper in this area.

(b) Apart from the 16 civil claims settled in relation to the Guantanamo civil litigation, are there any other examples of cases in which civil claims have been settled by the defendant because the only way to defend the claim would have been to disclose sensitive information?

15. The Commission is not aware of any other civil claims having been settled because of the government's reluctance to disclose sensitive information.

Q5. Is the law of Public Interest Immunity ("PII") inadequate to deal with the problem of sensitive information in judicial proceedings, and if so why?

16. No. In the Commission's view, PII works well as a means of protecting sensitive information in a way that also respects the common law principles of open justice and natural justice. This conclusion is consistent, moreover, with the findings of the Court of Appeal and the UK Supreme Court in the *Al Rawi* case. In particular, as Lord Dyson noted, the PII process is compatible with the requirements of natural justice and open justice:

If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. (para 41)

17. Throughout the Green Paper, however, PII is criticised for its alleged tendency to exclude sensitive intelligence material in a way that means the government is unable to defend itself using the most relevant evidence. In particular, para 1.32 of the Green Paper suggests that the government was obliged to settle the claims brought by the Guantanamo detainees because 'a successful claim of PII in relation to this material would have led to its exclusion but would have made progression of the case more difficult'. The Commission notes, however, that there was no guarantee that the government's PII claim in *Al Rawi* would have succeeded. As Lord Mance noted, 'it is not right to assume that the executive never errs or that material for which it claims PII is necessarily in its favour' (*Al Rawi*, para 110). Indeed, one of the main criticisms both the Court of Appeal and the Supreme Court made of the government's proposal to adopt a closed material procedure was that there was no way of determining whether such a step would be justified without first undertaking the very PII exercise that the government wished to avoid. As Lord Kerr pointed out: 'unless there is to be complete abandonment of public interest immunity procedure as a means of catering for the tension between disclosure of relevant material and protection of the public interest, the [PII] exercise cannot be avoided' (*Al Rawi*, para 93, emphasis added).

18. The Green Paper also claims, without offering any evidence, that PII ‘works well when the excluded material is *only of marginal or peripheral relevance*’ (para 1.52, emphasis added). In fact, the law on PII has been extensively considered and reviewed many times in the last four decades, either directly (see e.g. the Scott Report on the Matrix Churchill case) or in the course of a broader inquiry (see e.g. the Newton Report on the Anti-Terrorism Crime and Security Act 2001). No inquiry, whether judicial, parliamentary or governmental, has ever come close to suggesting that material withheld on PII grounds could nonetheless be used as evidence, or that a closed material procedure may sometimes be necessary. Nor has Parliament, which legislated in relation to PII in criminal cases in the Criminal Procedure and Investigations Act 1996, previously raised any concerns on this point.

Q6. What actual examples exist of current procedures resulting in the damaging disclosure of sensitive material?

19. The Commission is not aware of any proceedings, whether civil or criminal, that has resulted in disclosure of sensitive material that was both damaging to the public interest and not outweighed by the public interest in its disclosure. In particular, it notes that the summary of foreign intelligence material which the Court of Appeal allowed to be published in the *Binyam Mohamed* case was not operationally sensitive and had already been put into the public domain by the US courts.

Q7. Do you agree with the Government that a hearing in which a judge has seen all the evidence is more likely to secure justice than a hearing where some evidence has been ruled inadmissible?

20. No. As the Supreme Court made clear in the *Al Rawi* case, the right of a party to know the evidence on the other side is a core element of the principle of natural justice. Our adversarial system of justice depends, moreover, on the evidence before the court being tested by both sides. Proceedings in which one party has been prevented from knowing all the evidence before the court are therefore not only inherently unjust but are also more likely to result in unjust outcomes. As Lord Kerr noted in *Al Rawi*:

What [...] could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, 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.* It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. (*Al Rawi*, para 93, emphasis added).

Q8. Are there any circumstances in which the availability of closed material procedures in civil proceedings is preferable to public interest immunity and positively human rights enhancing?

21. No. By their very nature, closed material procedures are inherently unfair to the excluded party. The right to know the evidence given by the other side is such a fundamental principle of natural justice, it can never be fairer to adopt a closed material procedure in order to determine a claim, even if the alternative is that the claim will be struck out. The only circumstances in which such a step could even be contemplated was if, following the PII process, a claimant was faced with their claim being struck out altogether, and decided that it would be better to have his or her claim determined using closed evidence instead. A majority of the Supreme Court nonetheless held that there was no common law power for a court to adopt a closed material by consent. Such a power would therefore have to be legislated for.

22. Although it may superficially seem fairer to provide claimants with a closed material procedure in circumstances where their claim would otherwise be struck out, there is too great a risk that the very availability of such a procedure would be highly likely to distort the PII process. Knowing that there was the prospect of using a closed material procedure in the most exceptional of cases, the government would in all likelihood push for such an outcome in order to protect its sensitive material from disclosure. The court, too, may be tempted to conclude that it would be simpler to deal the evidence in closed rather than the difficulties of conducting a trial on an *inter partes* basis. Given the small number of strike-outs that have actually resulted from PII claims – only one reported instance in more than forty years of balancing the competing interests post-*Conway v Rimmer* [1968] AC 910—any hypothetical benefits are outweighed by the risks.

23. To the extent, however, that the government believes that the case of *Carnduff* illustrates a genuine, widespread problem of persons with well-founded claims being unable to proceed because of the risk that their cases would be liable to be struck out on PII grounds, it would nonetheless be open to the government to establish an *ex gratia* scheme to compensate claimants in such circumstances. This would most likely involve parties whose claims had been struck out following a PII ruling submitting their claims to an independent, security-cleared assessor who would then examine the closed material in their case, and then make a recommendation as to whether compensation should be paid. As a wholly *ex gratia* system, it would involve no automatic right to compensation and no right of the parties to either inspect or challenge the closed material in each case. Nor would it necessarily involve the finding of liability on the part of the government or other public body. Its principle advantage is that it would enable the government to compensate otherwise worthy claimants in relation to actions taken on the basis of closed material, but—as with other forms of alternative dispute resolution—would not detract in any way from the established rights of those parties in civil proceedings.

24. Aside from this, the Commission considers that the only circumstances in which closed proceedings can legitimately be used outside of PII and the established statutory exceptions is in that narrow category of cases identified by the Supreme Court in *Al Rawi* (see Lord Dyson at paragraphs 63–65), i.e. where disclosure of the closed material would defeat the very purpose of the proceedings—for example, wardship proceedings, cases involving the confidentiality of commercial material or proceedings under the Freedom of Information Act.

Q9. Should the availability of a closed material procedure be a decision for the Court, or for the Executive subject only to judicial review?

25. The Commission opposes any further extension of the use of closed material procedures. If, however, there is to be such an extension, the Commission believes that it is essential that the decision to adopt a closed material procedure should be made by the court itself—on the basis that it is strictly necessary to do so—rather than by the government.

26. Indeed, although Green Paper suggests that a closed material procedure would only be used ‘where it is absolutely necessary to enable the case to proceed in the interests of justice’ (para 2.5), the proposed trigger for the adoption of such a procedure in a civil claim would be a decision by the Secretary of State ‘that certain relevant sensitive material would cause damage to the public interest if openly disclosed, supported by reasoning and, where appropriate, by evidence’ (para 2.7). As noted below, the Green Paper does not indicate any restrictions on how the public interest would be defined. The Secretary of State’s decision would ‘be reviewable by the trial judge on judicial review principles’ (ibid), meaning that the court would not ordinarily decide for itself whether the closed material procedure was necessary but only that the decision of the Secretary of State was reasonable. As with a PII application, it would be necessary for this review to be carried out almost entirely on an *ex parte* basis, since it would not be possible to disclose to the other side the grounds for the Secretary of State’s decision without also effectively disclosing the withheld material. Indeed, it is likely that it would be necessary to appoint a special advocate at this initial stage to represent the interests of the other side in the *ex parte* proceedings.

27. Although the Green Paper claims that its proposals would lead to civil claims being tried ‘more effectively and with greater protection for sensitive material’ (para 2.8), the Commission finds it difficult to see how a court could assess whether the restriction on a party’s right to know the evidence on the other side could be justified without first having a detailed assessment of whether the material in question was in fact too sensitive to be disclosed or whether the government’s assessment about how much damage it would cause was incorrect—precisely the kind of assessment that already takes place under PII. For the Secretary of State to certify that material was too sensitive to be disclosed justifies the adoption of closed proceedings rather than PII is to put the cart before the horse.

Q10. Should there always be balancing by the court of the interests of the administration of justice on the one hand and the interests of national security on the other?

28. Yes. The Commission believes that the question of disclosure should always be approached by reference to the competing public interests at stake. Indeed, even the minority of Supreme Court justices in *Al Rawi* who thought that there might be a residual common law power to adopt closed proceedings maintained that it would not be possible to do so without first undertaking the balancing exercise according to established PII principles. As Lord Clarke, a member of the minority in *Al Rawi*, said:

whatever procedure was adopted, it would have been necessary for the appellants to identify what documents were relevant and in principle disclosable under CPR Part 31. In addition it would have been necessary for the minister to decide which of those documents should not be disclosed in the public interest. That in turn would have required officials to identify which documents potentially came into that category in order to enable the minister to carry out the appropriate balance. A detailed review of the documents would have had to be carried out whether the procedure adopted was the PII procedure described above or the proposed closed procedure. *In both cases it would have been necessary for the relevant documents to be identified and the balance struck* (para 152, emphasis added).

Q11. If there is justification for changing the current legal framework, how widely should any new regime apply? Should it be confined to information which may harm national security if disclosed, or should it apply more generally to “sensitive information” the disclosure of which is damaging to “the public interest” more broadly defined?

29. Although the focus of the Green Paper is on sensitive material held by the intelligence services and—more generally—cases involving national security, its definition of ‘sensitive material’ applies to ‘any material/information which if publicly disclosed is likely to result in harm to the public interest’ (Green Paper, p71). The Commission notes that this definition would, on its face, apply to any material which would currently be covered by the principle of public interest immunity (‘PII’) as well as any material exempt from disclosure under the Freedom of Information Act 2000. This includes not only sensitive material in relation to the work of the intelligence services or national security, but also international relations, the economic well-being of the UK, details of criminal investigations, health records, family welfare, community care, Cabinet confidentiality, legal professional privilege, and commercially sensitive information. PII claims have previously been advanced to protect, for example, internal record held by the NSPCC (*D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171) and government papers concerning BAA’s decision to increase landing fees at Heathrow (*Air Canada v Secretary of State for Transport* [1983] 2 AC 384). Indeed, as Lord Mance noted in *Al Rawi*, ‘issues regarding PII can arise between non-state

parties, as for example in *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822' (para 110).

30. The Commission finds it difficult to identify a principled distinction between the different kinds of sensitive material identified above. The need to prevent disclosure of certain material in order to protect the safety of an unidentified informant is an issue which may arise just as readily in relation to a police investigation, for example, as in relation to an intelligence operation. Similarly, the disclosure of medical records or Cabinet papers may be just as damaging in their own way as the disclosure of diplomatic correspondence. It would therefore be extremely difficult to justify restricting the use of special court procedures designed to prevent the disclosure of sensitive material to just those cases involving national security or the work of the intelligence services. Indeed, the remit of the intelligence services themselves is not just limited to national security but also includes, for example, safeguarding 'the economic well-being of the United Kingdom' (section 1(3) of the Security Service Act 1989 and section 1(2)(b) of the Intelligence Services Act 1994).

31. Even if it were somehow possible to restrict the scope of the proposals to cases involving national security, this would still involve an extraordinary expansion of exceptional court procedures into our civil justice system. After all, 'national security' has a broad definition in UK law, including not only direct threats to the UK but also any 'action against a foreign state' capable of 'indirectly [...] affecting the security of the UK' and 'reciprocal cooperation between the UK and other states in combating international terrorism' (*Rehman v Secretary of State for the Home Department* [2001] UKHL 47 per Lord Slynn at paras 16–17). If a definition of 'national security' is to be adopted, the Commission recommends adopting that in paragraph 4 of Schedule 3 to the Intelligence Services Act 1994, based as it is around the operations of the intelligence services themselves.

Q12. If closed material procedures are to be made more widely available in civil proceedings, how might their use be confined to wholly exceptional circumstances?

32. The Commission doubts whether it is possible to draw up effective, workable criteria that would prevent closed material procedures from being used in all but the most exceptional circumstances. It notes, for instance, that the use of closed material procedures have already grown considerably since they were first introduced under the Special Immigration Appeals Commission Act 1997. A similarly tendency towards 'function creep' is also apparent in relation to other so-called 'exceptional' counter-terrorism powers, such as the power to stop and search suspects without reasonable suspicion under the Terrorism Act 2000, which ultimately resulted in more than 100,000 persons being searched over the past decade. The Commission therefore cautions against the idea that it would be possible to extend the use of closed material procedures in civil proceedings more generally and still somehow restrict their use to only 'exceptional' cases.

Q13. Does any jurisdiction provide particularly pertinent comparative lessons?

33. The Commission notes that the comparative research presented in Appendix J of the Green Paper is highly selective and, in particular, makes no mention of the use of special advocates before the Canadian Security and Intelligence Review Committee. This system, which was the original inspiration for the adoption of special advocates in the UK, involved a much more relaxed system of communication between special advocates and those whose interests they have been appointed to represent.⁴ The Commission believes that the US practice of granting security clearance directly to civilian counsel in proceedings before Military Commissions may also be of relevance.

Q14. Do you agree with the Government that closed material procedures have proved that they are capable of delivering procedural justice?

34. No. The Commission strongly disagrees with the government's claim that closed proceedings are capable of delivering procedural justice. In particular, it notes that the use of special advocates as a means to ameliorate the inherent unfairness of closed proceedings has been the subject of considerable criticism since they were first introduced by the Special Immigration Appeals Commission Act 1997. As the Grand Chamber of the European Court of Human Rights noted in *A and others v United Kingdom* (2009) 49 EHRR 29:

SIAC procedures involving closed material and special advocates [have] attracted considerable criticism, including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. Following the judgment of the House of Lords in December 2004, declaring Part 4 of the 2001 Act incompatible with Articles 5 and 14 of the Convention, the House of Commons Constitutional Affairs Committee commenced an inquiry into the operation of SIAC and its use of special advocates. Among the evidence received by the Committee was a submission from nine of the thirteen serving special advocates. In the submission, the special advocates highlighted the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. *In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented* (para 199).

35. In *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28, several members of the House of Lords noted that previous assessments of the effectiveness of special advocates had been overly-confident: Lord Hope, for example, referred to the Lords' previous 'optimistic assessment' (para 79) in *Secretary of State for the Home Department v MB*

4 See e.g. Forcese and Waldman, 'Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings' (Canadian Centre for Intelligence and Security Studies, August 2007). See also the comparative material on closed proceedings and special advocates in Secret Evidence (JUSTICE, 2009), looking at Canada, Hong Kong and New Zealand

[2007] UKHL 46, and Baroness Hale conceded that she had been ‘far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure’ (para 101).

36. In *Al Rawi* too, the Court of Appeal and Supreme Court each noted the severe limitations of the use of special advocates. The former described the appointment of a special advocate in dealing with the substance of a civil claim as ‘a particularly poor substitute for the claimant’s own advocate in an open hearing’ (para 55) and that their use ‘cannot be guaranteed to ensure procedural justice’ (para 57). In the Supreme Court, Lord Dyson referred to ‘the limitations of the special advocate system’, including the February 2010 report of the Joint Committee, and in particular its conclusions that the use of closed proceedings and special advocates ‘has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system’ and involve 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’ (para 37). Lord Kerr similarly noted their limitations:

Quite apart from the reasons so clearly stated by Lord Dyson about the necessary, inevitable but ultimately inherent frailties of the special advocate system, the challenge that the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case (para 94).

37. Most recently, the Commission notes the conclusions of the Special Advocates themselves that closed material procedures have not proved that they are capable of delivering procedural fairness. Although special advocates may attenuate the procedural unfairness of closed material procedures to a limited extent, they concluded that closed material procedures remain fundamentally unfair.⁵

15. If you have experience of the operation of closed material procedures, did you consider them to be fair? If not, why not?

38. The Commission has not been involved in any proceedings that involved the use of closed material.

Q16. Can the system of special advocates be made to operate any more fairly and effectively than it currently does?

39. Although the Commission considers that although the special advocate system may be improved somewhat, it does not believe that these improvements are ultimately capable of overcoming the inherent unfairness involved in closed material procedures.

⁵ Response of Special Advocates to the Justice and Security Green Paper (16 December 2011), para 2(4).

40. At Appendix F, para 4 of the Green Paper, for instance, it is suggested that ‘Special Advocates are now open to call experts and adduce evidence’. This ignores the evidence of the special advocates themselves, however, that the government’s amendments have had ‘no effect in practice’ (See e.g. M Chamberlain, ‘Special Advocates and Procedural Fairness in Closed Proceedings’ (2009) 28 *Civil Justice Quarterly* 314–326 at p 322). As Lord Bingham pointed out in *Roberts v Parole Board* [2005] UKHL 45 at para 18:

even if a [special advocate] is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the [defendant] or divulge any of the sensitive material to the witness.

41. Since any witness or expert instructed by a special advocate would be unable to view the closed evidence, the Green Paper’s claim is problematic. Although the Green Paper notes concerns expressed about the effect of the prohibition on communication following service of the closed material (para 2.28), and the fact that special advocates ‘have only rarely sought’ permission of the court to communicate with those they represent, it shows only a limited understanding of the inherent shortcomings of the special advocate system. For instance, although it is true that special advocates do not sometimes seek permission to communicate with those they represent because they might reveal litigation strategies to the government (para 2.29), it must be assumed that special advocates do not seek permission because they know that the more the question relates to the closed material, the more likely it is that the court will simply refuse permission on the basis that it is likely to give an indication of the contents of the sensitive information to the defendant.

42. The Green Paper also suggests that special advocates might obtain clearance for their questions from a different part of the relevant agency, using a Chinese Wall mechanism to prevent disclosure to the Government’s litigation team (para 2.33). Although this might meet incidental concerns over the disclosure of tactics, it would not do enough to prevent the excluded person from learning anything about the closed material in the first place.

43. The rules governing communication between special advocates and those whose interests they represent are more relaxed in Canada: see e.g. Forcese and Waldman, ‘Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings’ (Canadian Centre for Intelligence and Security Studies, August 2007). This could be a reform that the government could undertake to ensure the most effective level of communication possible. Ultimately, however, it would not be able to overcome the inherent limitations of all closed proceedings, which is that they are designed to prevent the excluded party from knowing the closed evidence. As Lord Kerr stated, the use of special advocates should ‘never be regarded as an acceptable substitute for the compromise of a fundamental right’.

44. Again, the Commission also considers it worth noting the Special Advocates themselves, in their response to the green paper consultation oppose the proposal to extend CMP proceedings. They identify a number of shortcomings with the system, stating that CMPs

remain *fundamentally unfair* and represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own.

Q17. Is it possible to identify specific contexts in which the AF (No. 3) disclosure obligation (sometimes known as “the gisting requirement”) does not apply?

45. No. The Commission considers that the right of a person to know sufficient details of the case against him is a core part of the right to a fair trial. By portraying the basic entitlement of a person to natural justice as a ‘significant risk’ of ‘potential harm to national security’, the Green Paper illustrates the risk that fundamental rights can be eroded. Following the judgment of the UK Supreme Court in *Home Office v Tariq* [2011] UKSC 34, it goes on to recommend legislation to ‘clarify the context and types of civil cases in which the [right to sufficient] disclosure does not apply’ (para 2.43):

Clarity on these disclosure requirements would create a greater degree of predictability in CMP litigation, where in many contexts uncertainty over requirements is spawning considerable satellite litigation away from the substantive proceedings. For the Government, knowing in advance of proceedings that there will or will not be such a requirement means that the Government may embark on non-prosecution actions against (for example) suspected terrorists, or defend cases that crucially depend on sensitive material, without the risks that the case might have to be abandoned or conceded midway through, due to undeliverable and *unforeseen disclosure requirements* set out by the court (emphasis added).

46. The Commission finds it difficult to understand, however, how a disclosure requirement could ever be described ‘unforeseen’. After all, the general duty in civil litigation to disclose all evidence and relevant unused material to the other side is not a particularly difficult or onerous standard to apply. Just as the government ought to know at any early which material it believes will be too sensitive to disclose and which is not, the government also ought reasonably to know what constitutes the minimum amount of information that a person will need to defend himself in proceedings from which he is excluded. It will be able to undertake this task, moreover, irrespective of whether it believes the defendant is entitled to the information or not.

47. The Commission believes it would be both simpler and more principled to begin from the starting point that ‘every party to litigation has the right to be given sufficient information about the evidential case against him, so as to enable him to give effective instructions in relation to that case’ (Lord Neuberger in *Bank Mellat* at para 18). For this reason, in the Commission’s view the majority opinion in *Tariq* is unlikely to survive scrutiny in Strasbourg and the dissenting opinion of Lord Kerr provides the correct analysis of the UK’s obligations under article 6 ECHR:

The result of the decision of the majority is to create a different class of case from that where what Lord Brown has helpfully described as ‘A-type disclosure’ must be given. The eligibility criteria for inclusion in this privileged group are not clear. Certainly, the class is not confined to those whose liberty is at stake, as the speeches in AF (No 3) make clear. And, presumably, it must also include freezing order cases—*Kadi v Council of the European Union* Joined Cases C-402/05 P and C-415/05 P [2009] AC 1225, as applied by the European General Court in *Kadi II* Case T-85/09 [2011] 1 CMLR 24. If A-type disclosure is required in challenges to freezing orders, does it extend to property rights more generally? If it does, why should property rights be distinguished from loss of employment cases? After all, loss of livelihood may be just as devastating as having one's assets frozen. *It seems to me that there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made.* A fair trial in any context demands that certain indispensable features are present to enable a true adversarial contest to take place (paras 133–134, emphasis added).

48. In addition to the judgment of the General Court in *Kadi* No 2, there are now an increasing number of decisions that have a bearing on the UK's disclosure obligations: see e.g. the recent reference made by the Court of Appeal in *ZZ v SSHD* [2011] EWCA Civ 440 concerning the effect of the right to a fair trial under article 47 of the EU Charter of Fundamental Rights in proceedings before SIAC.

Q18. What will be the impact of the proposals in the Green Paper on the freedom of the press?

49. The Commission considers that the Green Paper's proposals will have a significantly negative impact on the principles of natural justice and open justice and, by extension, that this will have a correspondingly negative impact on freedom of the press. Not only will the press be prevented from reporting proceedings in a wide range of cases involving sensitive material, but media organisations and reporters would themselves be at a severe disadvantage in any proceeding to which they were party in which closed material was deployed by the government.

Q19. Does the courts' power to order disclosure of material to a claimant to assist in other legal proceedings (the so-called Norwich Pharmacal jurisdiction) risk the disclosure of material which could damage national security? If so, should that jurisdiction be removed from the courts where disclosure would harm the public interest or could further safeguards be introduced to minimise that risk?

50. No. The Commission finds it difficult to understand that why it should be necessary to take steps to restrict the jurisdiction of the courts in relation to Norwich Pharmacal applications when the disclosure in the *Binyam Mohamed* case came not as a result of the original Norwich Pharmacal application but rather the operation of PII. Indeed, the disclosure that was sought by way of the original order was not disclosure to the public at

large but only to Mr Mohamed's US security-cleared counsel (to whom it was ultimately disclosed in confidence in any event).

51. Norwich Pharmacal applications in relation to foreign intelligence material held by the intelligence services are unusual to the extent that the UK government has no obvious means of settling the claim in order to prevent disclosure, as it does in any other civil proceeding involving sensitive material. The Green Paper fails to consider, however, that it is not necessary to provide such a means. The detailed and careful judgments of the Divisional Court and Court of Appeal in the *Binyam Mohamed* case show that the UK courts will be exceedingly slow to order disclosure of foreign intelligence material. In the event that the government is unhappy with the decision, it is bound to have the opportunity to appeal to the Court of Appeal and, if necessary, the UK Supreme Court.

52. It is important to remember that the jurisdiction of the courts to make Norwich Pharmacal orders is based on what Lord Reid described as the 'very reasonable principle' that:

if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers [...] [J]ustice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. (*Norwich Pharmacal and others v Commissioners of Customs and Excise*, [1974] AC 133, para 12, emphasis added).

53. If the intelligence services have indeed been mixed-up in wrong-doing, therefore, it would be an entirely retrograde step to remove the jurisdiction of the courts to expose this. As the Lord Chief Justice said in the *Binyam Mohamed* case, that jurisdiction is ultimately part of living in a democracy governed by the rule of law, something which the intelligence services are statutorily bound to defend (see e.g. section 1(2) of the Security Service Act 1989: 'The function of the Service shall be the protection of national security and, in particular [...] from actions intended to overthrow or *undermine parliamentary democracy*').

Q20. If you have experience of the operation of the Investigatory Powers Tribunal, did you consider its proceedings to be fair? If not, why not?

54. No. The Commission has not been involved in any proceedings before the Tribunal.

Q21. Should the Investigatory Powers Tribunal have exclusive jurisdiction over Human Rights Act claims against the Intelligence Services?

55. No. The Commission is concerned at the Tribunal's lack of effectiveness and procedural fairness. First, the IPT can only act once a complaint is made—yet by the nature of secret surveillance an individual is unlikely to know that they have been subject to this and so able to make a complaint. Out of 1,120 complaints to the IPT in the past 10 years the IPT has

only upheld complaints in 6 cases. This extremely low rate of upholding complaints suggests that the IPT is failing to adequately investigate and consider complaints.

56. Secondly, the Commission has serious concerns over the lack of procedural fairness before the Tribunal. There is, for instance, no right to a hearing before the IPT, no right to disclosure, to know or cross examine evidence and witnesses. The tribunal works on a basis on neither confirm nor deny and there is only provides reasons for its decisions if it finds in favour of the applicants. The compliance of the IPT with article 6 fair trial rights was challenged in the ECtHR in the case of *Kennedy v the UK*.⁶ In this case the Chamber of the Court found that the restrictions that the IPT procedure provided did not infringe the right to a fair trial and that "the need to keep secret sensitive and confidential information" justified restrictions. This decision has been criticised in a number of quarters,⁷ and the case remains to be determined by the grand chamber of the ECtHR.

57. These significant current concerns regarding the functioning of the IPT, in particular the fairness of its procedures, should be addressed and certainly make it undesirable for the Tribunal to retain exclusive jurisdiction over HRA claims against the Services.

Q22. Do the proposed reforms to the Intelligence and Security Committee enhance the democratic accountability of the intelligence and security services sufficiently to justify increased restrictions on the right to a fair hearing and to open justice?

58. No. Although the Commission welcomes the Green Paper's proposals to strengthen the ISC in light of widespread criticisms concerning its effectiveness, independence, and transparency, the Commission considers that further reform would be needed to ensure effective Parliamentary oversight and accountability of the work of the intelligence services. In particular, the Commission makes the following recommendations:

- (a) **Status:** The ISC should be properly constituted joint committee of both houses of Parliament. It should be appointed by, and report to Parliament.
- (b) **Appointment:** To ensure independence appointments to the Committee should be made by both houses, not by the Prime Minister. The Prime Minister may be consulted on the appointments, but any role in pre approval, or a veto, should be tightly limited. Consideration could be given as to whether any such veto should lie with the Speakers of the Houses as an alternative to the Prime Minister, to ensure greater independence and ownership by Parliament. Members of Parliament, who themselves may previously, or in the future hold Ministerial appointments that necessitate access to sensitive information, should be trusted to have access to and effective oversight of secret information.
- (c) **Reporting:** to ensure the effective independence of the ISC, the committee should report to Parliament, rather than the Prime Minister. A significant criticism of the

6 *Kennedy v UK* Application number 26839/05 18 May 2010

7 See for example *Freedom from Suspicion*; Justice 2011 page 145

ISC has been that it has appeared to face more towards the Security Services and Whitehall, than to Parliament. There may be some issues that the ISC cannot report in full to Parliament- however there should be a presumption that reporting is as full as possible, within national security concerns. Other select committees, and inquiries have managed to greater or lesser extents to provide robust, and publically accessible reports, when dealing with issues of great sensitivity and state secrets. There is no reason why the ISC cannot adopt a similar approach. In the same vein, the ISC should provide public evidence sessions. Again other select committees and inquires have enabled this to occur and best practice can be followed.

- (d) **Remit:** The Commission considers that there are shortfalls in the current remit of the ISC. Formally the ISC's statutory remit covers "expenditure, administration and policy" of the Agencies. Formally the mandate does not include the Joint Intelligence Committee, the Assessments Staff and the Defence Intelligence staff. In practice the ISC has extended their mandate to include these and operational matters. There is also a lack of formal cooperation and remits between the ISC and other bodies that might have a role in oversight. In particular the ISC has no process for being able to see the confidential reports of the various Commissioners reports to the Prime Minister, or confidential whistle blowing reports. This gap should be rectified, and the ISC should be have access to all relevant information, including being provided as a matter of course confidential reports of the Commissioners. Finally there appears to be scope for improving cooperation between the ISC and other select committees. Both the ISC and other select committees should be able to effectively examine matters in relation to the security services that come within their ambit- while on the whole this has occurred, there have been occasions when access to information to other select committees has been refused on the basis that the issue fell within the remit of the ISC.
- (e) **Access to information and evidence:** The Commission welcomes the proposals from the government in the green paper to improve the ISC's ability to obtain information and evidence. In particular the Commission welcomes the proposal that the ISC should be able to take evidence from any department or body in the wider intelligence community and that the ISC should be given the power to require evidence from the intelligence agencies (as opposed to the current regime of request). However there remains a proposal that a veto on the provision of information should be exercisable by the Secretary of State. While an improvement on the current position of effective veto by the head of the agency this may still fail, in the most sensitive cases, to provide effective Parliamentary oversight. The role of the Secretary of State in previously in seeking to withhold key information in relation to Agency practices, most notably in relation to the Bin yam Mohammed case, in which the Government sought to withhold information from the court that revealed UK complicity in torture illustrates the concerns. For effective oversight to occur, the ISC must have access to all information, without ministerial or other veto. If there is a public interest that the information should not be disclosed then the ISC can operate within the "ring of secrecy", and the secrecy of such information can be preserved through closed sessions, and redaction of any public reports.

- (f) **Resources:** The acknowledgment in the green paper that the ISC needs proper resourcing staffing and accommodation as a Parliamentary committee is to be welcomed. It is vital, if the ISC is to function and be seen to function as a Parliamentary committee rather than a limb of Whitehall, that its accommodation, staff and budget come directly from Parliament. There is a need however, to specifically address the issue of expertise to support the ISC, which is not covered in the green paper. The ISC itself has recommended that it requires greater investigative and research resources.⁸ In his research Gill recognised the lack of resources for the ISC—in 2008 just 6 staff members spent the majority of their time preparing and writing up reports. This left little ability to conduct research, and leaves the ISC largely dependent on the information that is provided with by the agencies with little opportunity to check its completeness or more actively seek further information.⁹ Additionally the lack of expertise and knowledge of the operational mechanisms of the security services is a barrier to effectively challenging information that is provided. Finally the lack of an investigative function of the ISC again makes it more likely to be a passive receipt of information, that a properly functioning oversight body. To be able to effectively provide oversight of the security services it is vital that the ISC is adequately staffed. This requires both staff who are experts in the intelligence field, and an ability to investigate matters of its own accord.

59. The Commission considers there is a need for wider consideration, review and consolidation of the oversight apparatus of the security services, and in particular of the powers and remits of the various Commissioners. The Commission has undertaken a more detailed analysis of these issues, and in particular the potential for an over arching Commissioner, or Inspector General of security services, which might be linked to the ISC and carry out its investigative function, in its response to the green paper.

January 2012

Response of the Equality and Human Rights Commission to the Consultation

INTRODUCTION

Whilst the first duty of government is to safeguard its people a close second is the protection of their fundamental human rights. This includes not only their security but also their liberty and their right to a fair trial. The UN has repeatedly reaffirmed the importance of protection of human rights, in particular when combating terrorism,¹⁰ as have the domestic Courts. As Lord Brown, a Law Lord and a former Intelligence Services

8 Intelligence Services Committee Annual report 2010–11 cm 8114

9 Gill The Intelligence and Security Committee and the challenge of security networks. Review of International Studies 92009), 35 929-941

10 UN Security Council Resolution 1963 (2010); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight. United Nations A/HRC/14/46

Commissioner, said in the case of *A and others v Secretary of State for the Home Department* [2007] UKHL 46 at para 91:

I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.

In this response, the Commission has analysed the proposals put forward both in respect of sensitive material in civil proceedings (chapters 1 and 2) and proposals for reform of oversight of the work of the Agencies (chapter 3).

From its analysis the Commission has identified a number of human rights issues in the proposals in the Green Paper, particularly in respect of the use of closed material. The Commission does not consider that the evidence base in the green paper supports the need to amend closed material proceedings. The scope of the proposals would involve a significant expansion of exceptional court proceedings into the civil justice system. Our analysis shows that closed material procedures can never be completely fair, are likely to violate the principles of Article 6, the right to a fair trial, and that the current system of Public Interest Immunity works well as a means of protecting sensitive information that also respects the common law principles of open justice and natural justice. In relation to inquests the evidence shows that there is no need for closed material procedures, and that coroners and judges have significant experience of managing these issues within the current regime.

As the green paper recognises, there is a need to reform the systems of oversight of the agencies. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has developed good practices for oversight of intelligence work. Good practice 6 states “Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law”. While in places the current regime meets or excels these guidelines, in significant areas the Commission considers that the current regime of oversight falls short. There is a need for further strengthening of the oversight functions of the Intelligence Services Committee, the respective Commissioners and the Courts.

CLOSED MATERIAL PROCEDURES: CHAPTERS 1 AND 2

There are two overarching problems that the Commission wishes to highlight at the outset.

The first is a general lack of a strong evidence base for many of the proposals. Indeed, much of the Green Paper appears to be motivated by the outcome of just two cases: *R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

involving a Norwich Pharmacal application against the Foreign Secretary for the disclosure of intelligence material; and *Al Rawi and others v Security Service and others* [2011] UKSC 34, a civil claim for damages in respect of the alleged involvement of UK officials in the rendition and ill-treatment of UK residents and nationals overseas. Although the Commission agrees that these cases raise important issues, it remains to be convinced that either discloses a widespread or serious problem sufficient to justify the steps proposed by the Green Paper.

The second problem is one of scope. Although the focus of the Green Paper is on sensitive material held by the intelligence services and—more generally— cases involving national security, its definition of ‘sensitive material’ applies to ‘any material/information which if publicly disclosed is likely to result in harm to the public interest’ (Green Paper, p71). On its face, this definition would apply to any material which would currently be covered by the principle of public interest immunity (‘PII’) as well as any material exempt from disclosure under the Freedom of Information Act 2000. This includes not only sensitive material in relation to the work of the intelligence services or national security, but also international relations, the economic well-being of the UK, details of criminal investigations, health records, family welfare, community care, Cabinet confidentiality, legal professional privilege, and commercially sensitive information. PII claims have previously been advanced to protect, for example, internal record held by the NSPCC (*D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171) and government papers concerning BAA’s decision to increase landing fees at Heathrow (*Air Canada v Secretary of State for Transport* [1983] 2 AC 384). Indeed, as Lord Mance noted in *Al Rawi*, ‘issues regarding PII can arise between non-state parties, as for example in *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822’ (para 110).

The Commission finds it difficult to identify a principled distinction between the different kinds of sensitive material identified above. The need to prevent disclosure of certain material in order to protect the safety of an unidentified informant is an issue which may arise just as readily in relation to a police investigation, for example, as in relation to an intelligence operation. Similarly, the disclosure of medical records or Cabinet papers may be just as damaging in their own way as the disclosure of diplomatic correspondence. It would therefore be extremely difficult to justify restricting the use of special court procedures designed to prevent the disclosure of sensitive material to just those cases involving national security or the work of the intelligence services. Indeed, the remit of the intelligence services themselves is not just limited to national security but also includes, for example, safeguarding ‘the economic well-being of the United Kingdom’ (section 1(3) of the Security Service Act 1989 and section 1(2)(b) of the Intelligence Services Act 1994).

Even if it were somehow possible to restrict the scope of the proposals to cases involving national security, this would still involve an extraordinary expansion of exceptional court procedures into our civil justice system. After all, ‘national security’ has a broad definition in UK law, including not only direct threats to the UK but also any ‘action against a foreign state’ capable of ‘indirectly [...] affecting the security of the UK’ and ‘reciprocal cooperation between the UK and other states in combating international terrorism’ (*Rehman v Secretary*

of *State for the Home Department* [2001] UKHL 47 per Lord Slynn at paras 16–17). The Green Paper claims that the last decade has involved an increase in cases in national security, eg:

By way of illustration, in the first 90 years of the Security Service's existence, no case impacting directly on that Service's work reached the House of Lords. In the last ten years there have been 14 such cases in the House of Lords or Supreme Court. All three Agencies have been involved in many more cases heard in the lower courts.

Although it seems highly unlikely that such House of Lords cases such as the Spycatcher case (*Attorney General v The Observer* [1990] 1 AC 109 re publication of the memoirs of a former assistant director of MI5) and *Liversidge v Anderson* [1942] AC 206 (use of internment powers against suspected hostile individuals during WW2) impacted on the work of MI5, it is certainly true that the last decade has seen a rise in the number of in cases involving national security.

However, this increase is due at least in part to two factors of which the Green Paper makes no mention: first, there is the increased willingness of the government to advance national security claims in cases that otherwise have only limited connection to the issue: e.g. the use of stop and search powers under section 44 of the Terrorism Act 2000 against protestors at an arms fair in East London (*Gillan and another v Commissioner of Police for the Metropolis and another* [2006] UKHL 12), or the decision of the Serious Fraud Office to halt its investigation into alleged bribery by BAE officials as a result of apparent threats by Saudi officials to withdraw cooperation on security matters (*R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 9).

Secondly, the UK government's counter-terrorism policies since 9/11, as well as issues arising from its participation in the conflicts in Afghanistan and Iraq, has not only given rise to considerable criticism from such bodies as the Joint Committee on Human Rights (see e.g. *Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In* (HL 86/HC 111, 25 March 2010), the UN Committee against Torture (see e.g. *Concluding Observations of the Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland—Dependent Territories*, 10 December 2004, CAT/C/CR/33/3), and the Eminent Jurists Panel on Counter-Terrorism and Human Rights (*Assessing Damage, Urging Action*, February 2009), but also a large number of adverse court rulings on human rights grounds: see e.g. *Al Skeini and others v United Kingdom* (European Court of Human Rights, Grand Chamber, 7 July 2011, concerning the government's duty under Article 2 ECHR to investigate deaths of Iraqi civilians by British soldiers), *Al Jedda v United Kingdom* (European Court of Human Rights, Grand Chamber, 7 July 2011, concerning the government's use of detention without trial in southern Iraq); *Al Saadoon and Mufdhi v United Kingdom* (European Court of Human Rights, 2 March 2010, concerning the government's transfer of prisoners to Iraqi custody in breach of Art 3 ECHR); *R(Smith) v Secretary of State for Defence and another* [2010] UKSC 29 (concerning the duty to hold an inquest into the death of a British soldier in Iraq). In addition, there have been a significant number of inquests and inquiries raising

national security issues including the 7/7 Inquest, inquests into the deaths of British soldiers killed in Iraq, the Baha Mousa and Al Sweady inquiries, and the inquest into the killing of Jean Charles de Menezes by the Metropolitan Police.

The Green Paper suggests that the rise in cases is due to ‘increased recourse to judicial review and increased awareness of the importance of national security’, but this underplays the importance of the human rights issues in the cases cited above. If it is correct that these cases disclose errors in policy or practice and then an increase in the number of cases in this area is not a sound basis for adopting secret evidence procedures that would limit effective public scrutiny and fair trial rights.

Even if the Green Paper’s proposals were limited to only those cases involving national security, this may nonetheless result in an increase in national security being pleaded by the government. As the Court of Appeal said in *Al Rawi*, ‘it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances nonetheless often becomes common practice’ ([2010] EWCA Civ 483, para 69).

Question: How can we best ensure that closed material procedures support and enhance fairness for all parties?

The Commission does not accept that closed material procedures can be completely fair. It notes that the right of a party in civil proceedings to see and challenge the evidence given by the other side is a fundamental part of the common law right to a fair trial. As Lord Neuberger said in the Court of Appeal in *Al Rawi*:

Under the common law, a trial is conducted on the basis that each party and his lawyer, sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or *audi alterem partem*, the other rule being the rule against bias or *nemo iudex in causa sua*) ([2010] EWCA Civ 483 at para 14).

This was also the view of the majority of the UK Supreme Court when the case was heard on appeal.

If a closed material procedure were adopted, by contrast, this right to know the evidence on the other side would be removed completely. Instead, any person who was subject to a closed material procedure would be shut out of court while the government presented its secret evidence to the court. His or her lawyers would also be shut out. The excluded party might not even receive the barest summary of the government’s evidence.

In place of lawyers to represent an excluded party, a special advocate would be appointed to represent his or her interests. However, once the secret evidence had been disclosed to the

special advocate, the special advocate would be prohibited from communicating with the excluded party except by means of a procedure supervised by the court and the government. In particular, the special advocate would be prevented from telling the excluded party anything about the government's secret evidence. Nor would the special advocate even be allowed to ask the excluded party any question that might indicate to them what the secret evidence was about.

Once the judgment was handed down, moreover, the excluded party would not be able to know all the reasons for the court's decision. Nor would his or her lawyers be able to advise on the merits of any appeal.

In *Al Rawi*, both the Court of Appeal and the UK Supreme Court agreed that the introduction of a closed material procedure in civil proceedings, as proposed by the Green Paper, would abrogate the common law right to a fair trial. The Court of Appeal, for instance, was unanimous that the government's proposal to adopt a closed material procedure:

cuts across absolutely fundamental principles (the right to a fair trial and the right to know the reasons for the outcome), initially hard fought for and now well established for over three centuries (para 70).

In the Supreme Court, Lord Kerr agreed that:

The seemingly innocuous scheme proposed by the [government] would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellants would have it. It would be, at a stroke, *the deliberate forfeiture of a fundamental right* which, as the Court of Appeal has said [...], has been established for more than three centuries (para 92, emphasis added).

The Deputy President Lord Hope said the adoption of a closed material procedure would 'cut across absolutely fundamental principles such as the right to a fair trial, the right to be confronted by one's accusers and the right to know the reasons for the outcome' (para 72). Lord Dyson similarly described the adoption of a closed material procedure in a civil claim as 'an invasion of [...] fundamental common law principles' (para 47).

The Commission notes that the Green Paper asks only how closed materials procedures can be made to 'support and enhance fairness for all parties'. The Green Paper does not ask, for instance, (i) whether there is in fact a problem with public interest immunity; (ii) whether closed material procedures are necessary to address any difficulties that do exist; and (iii) whether in fact closed material procedures are able to support and enhance fairness for all parties at all. The Commission believes, however, that these are important questions that need to be addressed.

Is there a problem with public interest immunity?

The judgments of the UK Supreme Court in *Al Rawi and others v Security Service and others* [2011] UKSC 34 and the Court of Appeal in *Carnduff v Rock* [2001] EWCA Civ 680 do not indicate a problem with the current legal framework for handling sensitive material in civil proceedings, i.e. the principle of public interest immunity. On the contrary, the difficulties described by the Green Paper have been exaggerated. Public interest immunity ('PII') works well as a means of protecting sensitive information in a way that also respects the common law principles of open justice and natural justice.

The common law right to a fair trial not only gives each party the right to see the evidence given by the other side but also to the right to disclosure of any relevant unused material which is held by the other which would adversely affect his own case or that of another party, or which support another party's case (CPR Part 31.16(1)). PII operates as an exception to this right to inspect relevant unused material.

If a party is concerned that the disclosure of certain unused material would damage the public interest, it can apply to the court for an exemption from the normal requirement to disclose that material (CPR 31.19). The court will then decide whether 'the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice' (*R v Chief Constable of West Midlands, ex p Wiley* [1995] 1 AC 274 at p280F per Lord Templeman).

The principle of public interest immunity ('PII') is a just and effective means of balancing the public interest in the non-disclosure of sensitive material with the public interest in the administration of justice. If the court agrees that the public interest in non-disclosure is greater than that in disclosure, then the unused material is withheld from the other side despite the fact that it is relevant. There is no prospect, however, that the withheld material could also be used as evidence. This is because of the importance of the prior principle, set out above, that both sides are entitled to see the evidence put before the court as part of their right to a fair trial.

If the judge does not agree that disclosure would damage the public interest, or if she agrees that disclosure would damage the public interest but not as much as the damage that would be caused to the fairness of the trial, then the party's application for immunity from disclosure is refused. The party then has the option of either disclosing the material as directed, or conceding the issue it relates to. Conceding the issue may in turn lead it ultimately to settle the entire matter out of court. Nonetheless, Lord Dyson in *Al Rawi* described the workings of PII as consistent with the principles of natural justice and open justice:

If documents are disclosed as a result of the process, they are available to both parties and to the court. If they are not disclosed, they are available neither to the other parties nor to

the court. Both parties are entitled to full participation in all aspects of the litigation. There is no unfairness or inequality of arms. (para 41, emphasis added)

Lord Dyson is clear view that special advocates can be used ‘to enhance the PII process’, as signaled by the House of Lords in *R v H* [2004] UKHL 3, by representing the interests of the party excluded from ex parte PII proceedings. As Lord Dyson noted, ‘there can be no objection to the use of special advocates for that purpose, since the PII process fully respects the principles of open justice and natural justice’ (para 49). More frequent use of special advocates during PII proceedings is likely to make the procedure even fairer than it is at present.

Throughout the Green Paper, PII is criticised for its alleged tendency to exclude sensitive intelligence material in a way that means the government is unable to defend itself using the most relevant evidence: see e.g. where the Green Paper describes the civil claim brought by the Guantanamo detainees against the government in *Al Rawi*:

In [its] defence the [government] wished to rely on material the disclosure of which would cause harm to the public interest and asked the court to determine the preliminary issue of whether a court could adopt a CMP [closed material procedure] in such a claim. *A successful claim of PII in relation to this material would have led to its exclusion but would have made progression of the case more difficult.* The [government] argued that [it] should be able to defend [itself] by relying on important evidence in a CMP (para 1.32, emphasis added).

However there was no guarantee that the government’s PII claim in *Al Rawi* would have succeeded. As Lord Mance noted, ‘it is not right to assume that the executive never errs or that material for which it claims PII is necessarily in its favour’ (*Al Rawi*, para 110). Indeed, one of the main criticisms both the Court of Appeal and the Supreme Court made of the government’s proposal to adopt a closed material procedure was that there was no way of determining whether such a step would be justified *without first* undertaking the very PII exercise that the government wished to avoid. As Lord Kerr pointed out: ‘unless there is to be complete abandonment of public interest immunity procedure as a means of catering for the tension between disclosure of relevant material and protection of the public interest, *the [PII] exercise cannot be avoided*’ (*Al Rawi*, para 93, emphasis added).

The Green Paper also claims, without offering any evidence, that PII ‘works well when the excluded material is *only of marginal or peripheral relevance*’ (para 1.52, emphasis added). In fact, the law on PII has been extensively considered and reviewed many times in the last four decades, either directly (see e.g. the Scott Report on the Matrix Churchill case) or in the course of a broader inquiry (see e.g. the Newton Report on the Anti-Terrorism Crime and Security Act 2001). No inquiry, whether judicial, parliamentary or governmental, has ever come close to suggesting that material withheld on PII grounds could nonetheless be used as evidence, or that a closed material procedure may sometimes be necessary. Nor has Parliament, which legislated in relation to PII in criminal cases in the Criminal Procedure and Investigations Act 1996, previously raised any concerns on this point.

It is clear that the Green Paper's proposal to introduce closed material procedures in civil cases will have far-reaching effects on the civil justice system. Any proposal in this area should therefore be based on robust evidence. As Lord Kerr complained in *Al Rawi*: 'claims that the present system creates impossible logistical burdens or that it produces unfair results on a massive scale are not backed up by any evidence (para 95).

To the extent that there are any problems associated with PII, are closed material procedures needed to address them?

The outcome in *Carnduff v Rock* [2001] EWCA Civ 680 in any way does not justify the adoption of a closed material procedure as an alternative to PII. Although it is correct that, in an exceptional case, PII principles may mean that a party cannot make out his or her claim, leading it to be struck out. As Lord Dyson in *Al Rawi* stated:

It is true that, if a closed material procedure were introduced, it might not be necessary to strike out a claim such as *Carnduff*. Looked at in isolation, that would be a good thing. But the problem cannot be looked at so narrowly and in any event it seems that cases such as *Carnduff* are a rarity. *They do not pose a problem on a scale which provides any justification (let alone any compelling justification) for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned (para 50, emphasis added).*

And as Lord Kerr said:

What [...] could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, 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.* It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. (*Al Rawi*, para 93, emphasis added).

It is not obvious how many other civil claims have been struck out on PII grounds. In the absence of any evidence to show that this has been, or is likely to become a widespread problem. It is doubtful that the case of *Carnduff* is sufficient to justify the steps proposed by the Green Paper in this area.

In addition, the proposals in the Green Paper would not only deprive the excluded party of the right to know the evidence on the other side, but they also appear to preempt any possibility that a party will be in an effective position to challenge the adoption of closed proceedings.

Although Green Paper suggests that a closed material procedure would only be used 'where it is absolutely necessary to enable the case to proceed in the interests of justice' (para 2.5), the proposed trigger for the adoption of such a procedure in a civil claim would be a decision by the Secretary of State 'that certain relevant sensitive material would cause damage to the public interest if openly disclosed, supported by reasoning and, where appropriate, by evidence' (para 2.7). As noted previously, the Green Paper does not indicate any restrictions on how the public interest would be defined. The Secretary of State's decision would 'be reviewable by the trial judge on judicial review principles' (ibid), meaning that the court would not ordinarily decide for itself whether the closed material procedure was necessary but only that the decision of the Secretary of State was reasonable. As with a PII application, it would be necessary for this review to be carried out almost entirely on an *ex parte* basis, since it would not be possible to disclose to the other side the grounds for the Secretary of State's decision without also effectively disclosing the withheld material. Indeed, it is likely that it would be necessary to appoint a special advocate at this initial stage to represent the interests of the other side in the *ex parte* proceedings. The Green Paper nonetheless claims that this would lead to claims being tried 'more effectively and with greater protection for sensitive material' (para 2.8).

However, the effectiveness and workability of using closed proceedings as an alternative to PII procedures was considered at length by both the Court of Appeal and the Supreme Court and both times the government's claims were rejected. As Lord Neuberger wrote on behalf of the Court of Appeal:

There is [...] an inherent conflict between the two claimed advantages of the defendants' proposed closed material procedure. If the court has to decide whether the trial is more likely to be fair because the judge will be able to rely on relevant material which would be excluded from the trial process altogether under the PII procedure, then the defendants' proposals would be more expensive and time consuming, as the exercise of deciding whether to have a closed material procedure would be an add-on to the PII procedure. If, on the other hand, the defendants are suggesting that the closed material procedure is to be adopted without first carrying out the PII procedure, it may be potentially less expensive and time consuming in some cases, but it would mean that material which would not be excluded from the trial process on a traditional PII procedure will not be disclosed to the claimants, but will be considered by the court in closed session, *which would be to the claimant's obvious disadvantage* ([2010] EWCA Civ 482 at para 54, emphasis added).

In the Supreme Court, Lord Dyson similarly noted that:

It is obviously true that party A who is in possession of the closed material will know whether there is material on which it may wish to rely and will therefore be in a position to decide whether to ask the court to order a closed procedure in relation to that material. But it is difficult to see how opposing party B will know whether his case will be assisted by, or even depend to a significant extent on, the closed material held by A without knowing what the material is and what it contains. If a special advocate is appointed, he might be able

to assess the importance of some of the documents, but the scope for doing so without being able to take instructions from B is bound to be limited. It follows that, if the power to order a closed material procedure turns on such considerations, it is likely to operate in favour of A and to the disadvantage of B. *In my view, this is an approach which is inherently unfair. It is certainly not necessary in the interests of justice* (para 43, emphasis added).

It is difficult to see how a court could assess whether the restriction on a party's right to know the evidence on the other side could be justified without first having a detailed assessment of whether the material in question was in fact too sensitive to be disclosed or whether the government's assessment about how much damage it would cause was incorrect—precisely the kind of assessment that already takes place under PII. For the Secretary of State to certify that material was too sensitive to be disclosed justifies the adoption of closed proceedings rather than PII is to put the cart before the horse. Even the minority of Supreme Court justices in *Al Rawi* who thought that there might be a residual common law power to adopt closed proceedings maintained that it would not be possible to do so without there first being an assessment of what might be disclosed by way of PII. As Lord Clarke, a member of the minority in *Al Rawi*, said:

whatever procedure was adopted, it would have been necessary for the appellants to identify what documents were relevant and in principle disclosable under CPR Part 31. In addition it would have been necessary for the minister to decide which of those documents should not be disclosed in the public interest. That in turn would have required officials to identify which documents potentially came into that category in order to enable the minister to carry out the appropriate balance. A detailed review of the documents would have had to be carried out whether the procedure adopted was the PII procedure described above or the proposed closed procedure. In both cases it would have been necessary for the relevant documents to be identified and the balance struck (para 152).

In other words, none of the nine members of the Supreme Court who heard the government's appeal in *Al Rawi* thought that there was any merit in the approach it suggested. The only workable approach would be to have the PII stage first, and only then would the court be in a position to assess whether closed proceedings to hear the potentially relevant material would be justified. Although the government in *Al Rawi* made much of the expense of the PII disclosure process (see e.g. the reference at para 9 of the Court of Appeal judgment to 'as many as 250,000 potentially relevant documents, and that PII may have to be at least considered in respect of as many as 140,000 of them' and the government's estimate that 'the PII exercise may take three years before the relevant Ministers can conscientiously decide in respect of which documents PII can properly be claimed') it is apparent that this is an expense that it will have to bear in one form or another and in any event.

In light of the above, it is clear that the various claims made for savings in the Impact Assessment, e.g. that the 'extension of CMPs would lead to a reduction in Public Interest

Immunity (PII) applications by the Government, which would lead to lower costs for hearings and preparatory work' are deeply flawed.

To the extent, however, that the government believes that the case of *Carnduff* illustrates a genuine, widespread problem of persons with well-founded claims being unable to proceed because of the risk that their cases would be liable to be struck out on PII grounds, it would nonetheless be open to the government to establish an *ex gratia* scheme to compensate claimants in such circumstances. This would most likely involve parties whose claims had been struck out following a PII ruling submitting their claims to an independent, security-cleared assessor who would then examine the closed material in their case, and then make a recommendation as to whether compensation should be paid. As a wholly *ex gratia* system, it would involve no automatic right to compensation and no right of the parties to either inspect or challenge the closed material in each case. Nor would it necessarily involve the finding of liability on the part of the government or other public body. Its principle advantage is that it would enable the government to compensate otherwise worthy claimants in relation to actions taken on the basis of closed material, but—as with other forms of alternative dispute resolution—would not detract in any way from the established rights of those parties in civil proceedings.

Are closed material procedures ever able to support and enhance fairness for all parties?

By their very nature, closed material procedures are inherently unfair to the excluded party. The right to know the evidence given by the other side is such a fundamental principle of natural justice, it can never be fairer to adopt a closed material procedure in order to determine a claim, even if the alternative is that the claim will be struck out. The only circumstances in which such a step could even be contemplated was if, following the PII process, a claimant was faced with their claim being struck out altogether, and decided that it would be better to have his or her claim determined using closed evidence instead. A majority of the Supreme Court nonetheless held that there was no common law power for a court to adopt a closed material by consent. Such a power would therefore have to be legislated for.

Although it may superficially seem fairer to provide claimants with a closed material procedure in circumstances where their claim would otherwise be struck out, there is too great a risk that the very availability of such a procedure would be highly likely to distort the PII process. Knowing that there was the prospect of using a closed material procedure in the most exceptional of cases, the government would in all likelihood push for such an outcome in order to protect its sensitive material from disclosure. The court, too, may be tempted to conclude that it would be simpler to deal the evidence in closed rather than the difficulties of conducting a trial on an *inter partes* basis. Given the vanishingly small number of strike-outs that have actually resulted from PII claims—only one reported instance in more than forty years of balancing the competing interests post-*Conway v Rimmer* [1968] AC 910—any hypothetical benefits are plainly outweighed by the risks.

Question: What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other persons?

The proposal to allow closed material in inquests has been put forward twice before: first as Part 6 of the Counter-Terrorism Bill in 2008 and secondly as clauses 11 to 13 of the Coroners and Justice Bill in 2009. On both occasions, the proposals were withdrawn by the government following defeats in the House of Lords. Although the Green Paper claims that its proposals are materially different, there is little difference in principle. Given that Parliament has already rejected the same broad proposals twice before, it is unfortunate that the Green Paper puts forward little evidence to show that it is necessary to address this issue a third time.

The previous government secured a compromise amendment which gave the Secretary of State the power to order an inquiry under the Inquiries Act 2005 (which provides for the use of closed proceedings) as an alternative to a closed inquest. The Commission is aware of only one occasion so far in which that power has been exercised: the Azelle Rodney Inquiry (see statement of Justice Secretary Ken Clarke MP, Hansard, 10 June 2010, Col 31WS).

The need for closed proceedings in this case appears to stem from the statutory bar on the use of intercept material as evidence under section 17 of the Regulation of Investigatory Powers Act 2000. The use of intercept material as evidence has been excluded from consideration in the Green Paper (see p 11): the question of whether intercept could be made available as evidence—as it is in virtually all other common law and EU jurisdictions—is surely relevant to determining whether it is necessary to legislate to provide for closed inquests.

There no doubt about the difficulty of legislating in this area, in light of the clear requirements of Article 2 ECHR—particularly the need for an ‘effective investigation’ that is open to public scrutiny and the importance of allowing a victim’s next-of-kin and other properly interested persons to be ‘involved in the procedure to the extent necessary to safeguard his or her legitimate interests’ (see e.g. *Edwards v United Kingdom* (2002) 35 EHRR 19. As Lord Bingham held in *R(Amin) v Secretary of State for the Home Department* [2003] UKHL 51 at para 31:

In this country [...] effect has been given to [the state's duty to investigate] for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

The 7/7 Inquest did not provide a basis for suggesting that it is necessary to introduce closed inquests in future despite the statement that “because of the absence of any closed procedure, the Security Service was unable to put all the material before the Coroner”. Although the Green Paper acknowledges that ‘this did not prevent this inquest reaching its conclusion’, it is suggested that the situation ‘may be more challenging in future inquests’(para 1.47):

It is conceivable that in a different case an inquest might not be able to properly investigate a death, for example if the coroner or jury were not able to take into account all relevant information (para 1.48).

The 7/7 inquest does not support the case for introducing closed inquests. On the contrary, it is a commendable example of how a coroner can, with care and diligence, conduct an effective investigation into matters than include the use of sensitive material without the need to resort to closed proceedings. Indeed, it was only the insistence of the Security Service that it was necessary to adopt a closed material procedure that threatened to derail the proceedings. Not only did the Coroner Lady Justice Hallett conclude that the Coroners Rules gave her no power to hear closed material in the absence of properly interested persons, but she also concluded that it was inappropriate and unnecessary for her to do so having regard to the interests of open justice: see p22 of her ruling dated 3 November 2010 in which she cited the judgment of the Court of Appeal in *Al Rawi* and her conclusion at p28 that ‘with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened’. As Maurice Kay VP noted when dismissing the Secretary of State’s appeal against her decision: ‘the fact that inquests are inquisitorial does not diminish their context as essentially judicial procedures which are governed by the principle of open justice’ (*R(Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 at para 24). He went on to note that:

Experience of similar problems in other areas of litigation in recent years disposes me to the view that, to a considerable extent, material in respect of which PII is rightly claimed can often be produced in a redacted, summarised or gisted way without risk to national security so as to enable properly interested persons and their legal representatives to participate effectively in the proceedings (para 32).

Rather than seek to legislate for closed inquests that are likely to be incompatible with the requirements of article 2 ECHR, greater attention should be paid to the experience of coroners and judges in managing inquests and inquires and the variety of different practical measures that can be taken to enable sensitive material to be used without damage to the public interest.

Question: What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

The use of special advocates as a means to ameliorate the inherent unfairness of closed proceedings has been the subject of considerable criticism since they were first introduced by the Special Immigration Appeals Commission Act 1997. As the Grand Chamber of the European Court of Human Rights noted in *A and others v United Kingdom* (2009) 49 EHRR 29:

SIAC procedures involving closed material and special advocates [have] attracted considerable criticism, including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. Following the judgment of the House of Lords in December 2004, declaring Part 4 of the 2001 Act incompatible with Articles 5 and 14 of the Convention, the House of Commons Constitutional Affairs Committee commenced an inquiry into the operation of SIAC and its use of special advocates. Among the evidence received by the Committee was a submission from nine of the thirteen serving special advocates. In the submission, the special advocates highlighted the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. *In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented* (para 199).

In *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, several members of the House of Lords noted that previous assessments of the effectiveness of special advocates had been overly-confident: Lord Hope, for example, referred to the Lords' previous 'optimistic assessment' (para 79) in *Secretary of State for the Home Department v MB* [2007] UKHL 46, and Baroness Hale conceded that she had been 'far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure' (para 101).

In *Al Rawi* too, the Court of Appeal and Supreme Court each noted the severe limitations of the use of special advocates. The former described the appointment of a special advocate in dealing with the substance of a civil claim as 'a particularly poor substitute for the claimant's own advocate in an open hearing' (para 55) and that their use 'cannot be guaranteed to ensure procedural justice' (para 57). In the Supreme Court, Lord Dyson referred to 'the limitations of the special advocate system', including the February 2010 report of the Joint Committee on Human Rights (*Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2010* (HL Paper 64/HC 395)), and in particular its conclusions that the use of closed proceedings and special advocates 'has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system' and involve 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' (para 37). Lord Kerr similarly noted their limitations:

Quite apart from the reasons so clearly stated by Lord Dyson about the necessary, inevitable but ultimately inherent frailties of the special advocate system, the challenge that

the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right such as is at stake in this case (para 94).

At Appendix F, para 4 of the Green Paper, it is suggested that 'Special Advocates are now open to call experts and adduce evidence'. This ignores the evidence of the special advocates themselves, however, that the government's amendments have had 'no effect in practice' (See e.g. M Chamberlain, 'Special Advocates and Procedural Fairness in Closed Proceedings' (2009) 28 *Civil Justice Quarterly* 314–326 at p 322). As Lord Bingham pointed out in *Roberts v Parole Board* [2005] UKHL 45 at para 18:

even if a [special advocate] is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the [defendant] or divulge any of the sensitive material to the witness.

Since any witness or expert instructed by a special advocate would be unable to view the closed evidence, the Green Paper's claim is problematic.

Although the Green Paper notes concerns expressed about the effect of the prohibition on communication following service of the closed material (para 2.28), and the fact that special advocates 'have only rarely sought' permission of the court to communicate with those they represent, it shows only a limited understanding of the inherent shortcomings of the special advocate system. For instance, although it is true that special advocates do not sometimes seek permission to communicate with those they represent because they might reveal litigation strategies to the government (para 2.29), it must be assumed that special advocates do not seek permission because they know that the more the question relates to the closed material, the more likely it is that the court will simply refuse permission on the basis that it is likely to give an indication of the contents of the sensitive information to the defendant.

The Green Paper also suggests that special advocates might obtain clearance for their questions from a different part of the relevant agency, using a Chinese Wall mechanism to prevent disclosure to the Government's litigation team (para 2.33). Although this might meet incidental concerns over the disclosure of tactics, it would not do enough to prevent the excluded person from learning anything about the closed material in the first place.

The rules governing communication between special advocates and those whose interests they represent are more relaxed in Canada: see e.g. Forcese and Waldman, 'Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings' (Canadian Centre for Intelligence and Security Studies, August 2007). This could be a reform that the government could

undertake to ensure the most effective level of communication possible. Ultimately, however, it would not be able to overcome the inherent limitations of all closed proceedings, which is that they are designed to prevent the excluded party from knowing the closed evidence. As Lord Kerr stated, the use of special advocates should ‘never be regarded as an acceptable substitute for the compromise of a fundamental right’.

The Commission also considers it worth noting the Special Advocates themselves, in their response to the green paper consultation oppose the proposal to extend CMP proceedings. They identify a number of shortcomings with the system, stating that CMPs remain fundamentally unfair and represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own.

Question: If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the ‘AF(No.3) ‘gisting’ requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF(No.3) does not apply?

There remains a question about the Green Paper’s description of the obligation under *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, as ‘gisting’. In *A and others v United Kingdom* (2009) 49 EHRR 29, the Grand Chamber held that the right to procedural fairness under article 5(4) ECHR meant that the defendant must be ‘provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate’ (para 220). This was the identical obligation that the House of Lords unanimously held applied to defendants in closed proceedings under the Prevention of Terrorism Act 2005 by way of article 6 ECHR. The obligation, then, is an entitlement to ‘sufficient information’, not just a summary or ‘gist’. In *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, for instance, the Court of Appeal held following the Lords judgment in *AF(No 3)* that in closed proceedings under the Counter-Terrorism Act 2008 concerning financial restriction measures, ‘the information to be provided by the Treasury must not merely be sufficient to enable the Bank to deny what is said against it. The Bank must be given sufficient information to enable it actually to refute, in so far as that is possible, the case made out against it’ (para 21 per Lord Neuberger MR).

The right of a person to know sufficient details of the case against him is a core part of the right to a fair trial. By portraying the basic entitlement of a person to natural justice as a ‘significant risk’ of ‘potential harm to national security’, the Green Paper illustrates the risk that fundamental rights can be eroded. Following the judgment of the UK Supreme Court in *Home Office v Tariq* [2011] UKSC 34, it goes on to recommend legislation to ‘clarify the context and types of civil cases in which the [right to sufficient] disclosure does not apply’ (para 2.43):

Clarity on these disclosure requirements would create a greater degree of predictability in CMP litigation, where in many contexts uncertainty over requirements is spawning

considerable satellite litigation away from the substantive proceedings. For the Government, knowing in advance of proceedings that there will or will not be such a requirement means that the Government may embark on non-prosecution actions against (for example) suspected terrorists, or defend cases that crucially depend on sensitive material, without the risks that the case might have to be abandoned or conceded midway through, due to undeliverable and *unforeseen disclosure requirements* set out by the court (emphasis added).

It is difficult to see, however, how a disclosure requirement could ever be described ‘unforeseen’. After all, the general duty in civil litigation to disclose all evidence and relevant unused material to the other side is not a particularly difficult or onerous standard to apply. Just as the government ought to know at any early which material it believes will be too sensitive to disclose and which is not, the government also ought reasonably to know what constitutes the minimum amount of information that a person will need to defend himself in proceedings from which he is excluded. It will be able to undertake this task, moreover, irrespective of whether it believes the defendant is entitled to the information or not.

It is much simpler to begin from the starting point that ‘every party to litigation has the right to be given sufficient information about the evidential case against him, so as to enable him to give effective instructions in relation to that case’ (Lord Neuberger in *Bank Mellat* at para 18). For this reason, the majority opinion in *Tariq* is unlikely to survive scrutiny in Strasbourg and the dissenting opinion of Lord Kerr provides the correct analysis of the UK’s obligations under article 6 ECHR:

The result of the decision of the majority is to create a different class of case from that where what Lord Brown has helpfully described as ‘A-type disclosure’ must be given. The eligibility criteria for inclusion in this privileged group are not clear. Certainly, the class is not confined to those whose liberty is at stake, as the speeches in *AF (No 3)* make clear. And, presumably, it must also include freezing order cases—*Kadi v Council of the European Union Joined Cases C-402/05 P and C-415/05 P* [2009] AC 1225, as applied by the European General Court in *Kadi II Case T-85/09* [2011] I CMLR 24. If A-type disclosure is required in challenges to freezing orders, does it extend to property rights more generally? If it does, why should property rights be distinguished from loss of employment cases? After all, loss of livelihood may be just as devastating as having one’s assets frozen. *It seems to me that there is no principled basis on which to draw a distinction between the essence of the right to a fair trial based on the nature of the claim that is made.* A fair trial in any context demands that certain indispensable features are present to enable a true adversarial contest to take place (paras 133–134, emphasis added).

In addition to the judgment of the General Court in *Kadi No 2*, there are now an increasing number of decisions that have a bearing on the UK’s disclosure obligations: see e.g. the recent reference made by the Court of Appeal in *ZZ v SSHD* [2011] EWCA Civ 440 concerning the effect of the right to a fair trial under article 47 of the EU Charter of Fundamental Rights in proceedings before SIAC.

Question: At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?

The proposal of introducing greater active case management or the use of specialist courts is not new, having been considered at various points by a range of bodies including the Newton Committee on the Anti-Terrorism Crime and Security Act (see e.g. para 200 of its report (HC 100, 18 December 2003)), the House of Commons Home Affairs Committee (see e.g. paras 64–66 of its report *The Government's Counter-Terrorism Proposals*, HC 43, 13 December 2007), and the independent reviewer of terrorism legislation Lord Carlile QC (see e.g. Hansard, HL Debates, 3 March 2005, col 374). The Green Paper does not identify any obvious benefit from the adoption of either greater active case management powers or a specialist court.

Question: The Government does not see any benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?

It is clear that 'there are no clear benefits to expanding the remit of the [Investigatory Powers Tribunal] through RIPA'. The Tribunal's procedures are even less compatible with the principles of natural justice, procedural fairness and the right to a fair hearing than closed proceedings in general. As such, it would be wholly inappropriate to enlarge the Tribunal's jurisdiction to include ordinary civil claims involving national security or other sensitive material.

Although the European Court of Human Rights appeared to sanction the fairness of the Tribunal's procedures in *Kennedy v United Kingdom* (Application no. 26839/05, 18 May 2010), it was Lord Kerr's analysis in *Tariq* that *Kennedy* is plainly inconsistent with the Strasbourg Court's previous ruling in *Klass v Germany* (1978) 2 EHRR 214 (see para 41) and therefore liable to be reversed in future:

the [Strasbourg] court's decision seems largely to have been influenced by the argument advanced on behalf of the government that it was simply not possible to produce the information that the applicant sought because national security would inevitably be compromised. That stance is entirely consistent with the view that surveillance cases do not engage article 6. It is surprising that more was not made of this by the government and that the court did not address the issue directly. If it had done and if it had followed its own constant jurisprudence, the anomaly, which I believe the decision in *Kennedy* represents, would have been avoided (para 126).

More generally, the Tribunal has been widely criticised for its lack of effectiveness: see e.g. the report of the House of Lords Constitution Committee, *Surveillance: Citizens and the State* (February 2009), paras 160–163, and the recent JUSTICE report *Freedom From Suspicion*:

Surveillance Reform in a Digital Age (October 2011) makes detailed recommendations concerning the Regulation of Investigatory Powers Act 2000 and the Tribunal in particular.

Question: In civil cases where sensitive material is relevant and where closed material procedures are not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

PII works well and therefore any attempt to restrict its operation needs greater justification than provided in the Green Paper and the broader thrust of the Green Paper, which is to seek to limit the disclosure of foreign intelligence material through UK courts by reference to the so-called 'control principle' is problematic.

The Lord Chief Justice in the *Binyam Mohamed* case (*R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65) took the view that important as the control principle was, it was 'not a principle of law' but simply 'an apt and convenient description of the understanding on which intelligence is shared' confidentially by the intelligence services of different countries (para 44). In any event, said the Chief Justice, the control principle was subordinate to 'well understood PII principles':

[I]n our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so (para 46, emphasis added).

The material that was ultimately disclosed by the Divisional Court in the *Binyam Mohamed* case was not in fact US intelligence material but the Court's own summary of that material. It did not disclose any sensitive operational details, surveillance methods, or identify covert sources. It was also information which had already been put into the public domain by the US courts.

As it was, the material in question indicated that UK intelligence services were well aware that the US authorities were subjecting Binyam Mohamed to techniques including continuous sleep deprivation, threats, and shackling, and that this amounted to ill-treatment that was plainly contrary to article 3 ECHR (see Annex to the Court of Appeal judgment). Despite its rather lengthy discussion of the control principle, there is nothing in the Green Paper that engages with any of the above points.

Maintaining an absolute bar on the disclosure of any category of information by a court would constitute an untenable interference with the principles of open justice and the principle of judicial supervision of executive action. The development of the law of PII over the decades has seen the idea of class-based exemptions fall away. It is therefore deeply

unfortunate that the government has sought to resurrect it in response to a judgment in which the key revelation was not sensitive information concerning a foreign government but an indication of serious misconduct by British officials concerning the torture of a British resident.

Question: What role should UK Courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?

Although the Green Paper ultimately declines to make recommendations restricting PII in the wake of the Court of Appeal's judgment in the *Binyam Mohamed* case, it does nonetheless propose limiting the role of the courts in cases in which individuals are seeking disclosure of sensitive material where the Government is not otherwise a party, particularly in relation to foreign legal proceedings (paras 2.72–2.97). Specifically, although it rejects the option of removing the ability of the courts to make such orders against any public body, on the grounds that it would be a 'disproportionate' response that would prevent such orders in relation to non-sensitive material (para 2.90), it does suggest removing the jurisdiction of the courts 'to hear Norwich Pharmacal applications where disclosure of the material in question would cause damage to the public interest' (para 2.91).

The trigger would be a Ministerial certificate that disclosure would cause damage to the public interest if disclosed. It would then be open to a claimant to challenge this decision, although the court would apply judicial review principles and any review would effectively be on an *ex parte* basis. This proposal would return the relevant law to the position it was before *Conway v Rimmer* [1968] AC 910, preventing the courts from looking behind the ministerial certificate to assess whether it was justified. A second alternative floated by the Green Paper is simply to 'legislate to provide more detail as to what will in future be required to satisfy each of the five elements of the Norwich Pharmacal test', although it gives no indication of what this detail might be (para 2.94).

It is difficult to understand that why it should be necessary to take steps to restrict the jurisdiction of the courts in relation to Norwich Pharmacal applications, however, when the disclosure in the *Binyam Mohamed* case came not as a result of the original Norwich Pharmacal application but rather the operation of PII. Indeed, the disclosure that was sought by way of the original order was not disclosure to the public at large but only to Mr Mohamed's US security-cleared counsel (to whom it was ultimately disclosed in confidence in any event).

Norwich Pharmacal applications in relation to foreign intelligence material held by the intelligence services are unusual to the extent that the UK government has no obvious means of settling the claim in order to prevent disclosure, as it does in any other civil proceeding involving sensitive material. The Green Paper fails to consider, however, that it is not necessary to provide such a means. The detailed and careful judgments of the Divisional Court and Court of Appeal in the *Binyam Mohamed* case show that the UK courts will be

exceedingly slow to order disclosure of foreign intelligence material. In the event that the government is unhappy with the decision, it is bound to have the opportunity to appeal to the Court of Appeal and, if necessary, the UK Supreme Court.

It is important to remember that the jurisdiction of the courts to make Norwich Pharmacal orders is based on what Lord Reid described as the ‘very reasonable principle’ that:

if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers [...] *Justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. (Norwich Pharmacal and others v Commissioners of Customs and Excise, [1974] AC 133, para 12, emphasis added).*

If the intelligence services have indeed been mixed-up in wrong-doing, therefore, it would be an entirely retrograde step to remove the jurisdiction of the courts to expose this. As the Lord Chief Justice said in the Binyam Mohamed case, that jurisdiction is ultimately part of living in a democracy governed by the rule of law, something which the intelligence services are statutorily bound to defend (see e.g. section 1(2) of the Security Service Act 1989: ‘The function of the Service shall be the protection of national security and, in particular [...] from actions intended to overthrow *or undermine parliamentary democracy*’).

OVERSIGHT MECHANISMS- CHAPTER 3

Introduction

The Justice and Security Green Paper provides a welcome opportunity to consider wider oversight issues in respect of the work of the Agencies and intelligence activities.

The green paper notes a number of purposes for oversight. The fundamental purpose of oversight of activities such as those of the Agencies is to ensure that the work of the Agencies is lawful and respects human rights. Integral to the purpose of the Agencies work is the protection of human rights. As the UN Special Rapporteur states in his first principle,

“intelligence services play an important role in protecting national security and upholding the rule of law. Their main purpose is to collect, analyses and disseminate information that assists policy makers and other public entities in taking measures to protect national security. This includes the protection of the population and their human rights”¹¹

11 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight. United Nations A/HRC/14/46

The Agencies undertake vital work in protecting national security. Their need to maintain the secret nature of their work and the inevitable use of covert operations, intrusive surveillance and other techniques, may cause significant intrusions into individual rights, of which the individual affected maybe unaware. In these circumstances it is vital that there is effective oversight of the Agencies activities, to hold the executive to account for its actions, to provide a check and to and prevent unlawful and arbitrary use of powers, to expose wrong doing, and to ensure that their activities protect rather than breach human rights.

The Green Paper acknowledges that there are shortcomings in the current systems of oversight. Recent cases such as Bin yam Mohammed and the Gibson Inquiry, allegations of rendition and complicity in torture, and inquiry into the death of David Kelly have all give considerable cause for concerns as to the operation of the Security Services, and the effectiveness of the oversight systems and accountability.

Although the green paper is primarily aimed at the actions of the Agencies, there is considerable overlap, both in terms of activities, and oversight between their actions and those of the other criminal justice agencies. Therefore, while this response will focus on oversight of the Agencies, there needs to be wider consideration of oversight mechanisms, in particular in relation to the use of intrusive surveillance techniques under RIPA by law enforcement agencies.

Oversight and human rights

At the extremes of fortunately rare, but extremely serious allegations of complicity to torture the actions of the Agencies engage and may breach articles 2 and 3 of the Convention.

The use of covert methods, including surveillance, other investigatory powers and gathering and sharing of information by both the Agencies and law enforcement agencies engages Article 8 of the Convention, the right to respect for family and private life. While interferences with this right can occur, they must be in accordance with the law, sufficiently clear and precise, and contain adequate safeguards against abuse. Surveillance powers can only be used "so far as is strictly necessary for safeguarding democratic institutions".¹²

The nature of the agencies activities, with their wide ranging powers, including the use of covert investigative and surveillance mechanisms, means that it is less likely that an individual will know that they have been the subject of such activities. Potentially significant numbers of individuals may be affected, and significant intrusions in particular into their family and private lives might occur, through the activities of the Agencies. The very secret nature of these activities, and the corresponding difficulties individuals might have in knowing, or effectively challenging their lawfulness, make it all the more important that there are effective independent oversight mechanisms.

¹² *Klass v Germany* (1978) 2 EHRR 214.

A series of cases from the ECtHR has underlines the necessity for safeguards in law on the exercise of surveillance powers. In particular the European Court of Human Rights has emphasised the importance of oversight, both judicial and parliamentary. In *Klass v Germany* the Court stated " The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

In *Klass* the Court did not proscribe that oversight had to be judicial; while it felt that this was the preferred form of oversight, a combination with for example a parliamentary board and commission were sufficiently independent of the authorities authorising the oversight to give a fair and objective ruling. What is clear however that in particular in terms of secret surveillance, which by its nature may be impossible for the individual to know their rights have been infringed, or effectively challenge this, there is a requirement for effective independent oversight of decisions and use of powers by the authorities.

It is clear that the current protections and oversight mechanisms for the security services, and use of intrusive investigative powers are inadequate, unsatisfactory and may on occasion breach the provisions of the Convention, in particular in respect of the right to family and private life.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has developed good practices for oversight of intelligence work. The Commission considers that oversight of the activities of the UK Agencies should seek to meet the UN Special Rapporteurs good practice guidelines. While in places the current regime meets or exceeds these guidelines, in significant areas the current regime of oversight falls somewhat short of complete compliance.

Good practice 6 states "Intelligence services are overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandates and powers are based on publicly available law. An effective system of intelligence oversight includes at least one civilian institution that is independent of both the intelligence services and the executive. The combined remit of oversight institutions covers all aspects of the work of intelligence services, including their compliance with the law; the effectiveness and efficiency of their activities; their finances; and their administrative practices."¹³

Questions: Are more far-reaching intelligence oversight reform proposals preferable, for instance through the creation of an Inspector-General?

¹³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight.* United Nations A/HRC/14/46

What combination of existing or reformed arrangements can best ensure credible, effective and flexible independent oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?

With the aim of achieving the right balance in the intelligence oversight system overall, what is the right emphasis between reform of Parliamentary oversight and other independent oversight?

The green paper identifies 4 current oversight bodies; the Intelligence Services Commissioner, the Interceptions of Communications Commissioner (ICC), the Investigatory Powers Tribunal (IPT) and the Intelligence Services Committee. As the green paper acknowledges their roles and responsibilities have developed in an ad hoc manner. There is confusion, and gaps in terms of their remits for oversight of the intelligence services. While each of the oversight bodies does carry out an important oversight function, there are significant shortcomings in their ability to provide effective and comprehensive oversight and there should be substantial reform of their remits, powers and functioning.

Effective oversight needs to occur at the judicial, independent executive (in the form of a commission or similar body) and Parliamentary level. Each level of oversight has its own particular role. However none should be seen as an exclusive or preferred method for effective oversight, and systems should be in place to ensure effective functioning and cooperation between each body.

PARLIAMENTARY OVERSIGHT—THE ROLE OF THE INTELLIGENCE SERVICES COMMITTEE.

Question. What changes to the ISC could best improve the effectiveness and credibility of the Committee in overseeing the Governments intelligence activities?

The Green Paper sensibly makes proposals to strengthen the ISC and acknowledges that the ISC has been subject to criticisms that it operates differently to other parliamentary committees, that it is appointed and answers directly to the Prime Minister, that it is insufficiently independent, that it lacks sufficient knowledge of the operational work of the Agencies, and that its appointments, operating and reporting processes lack transparency.

The concerns over the effectiveness of the ISC are highlighted by a number of its recent reports. The 2007 report by the ISC on rendition found no evidence that the Agencies were complicit in rendition to torture, and heard evidence from MI5 to this effect. However in the subsequent court proceedings 42 documents were disclosed that were not made available to the ISC, that provided evidence of UK agencies knowledge of the treatment by the US of Binyan Mohammed. As the Joint Committee on Human Rights stated, “the effectiveness of the ISC has now been seriously called into question by the Court of Appeal’s finding that the

ISC's conclusions in 2005 that the Security Services "operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" was at odds with the evidence which the Court of Appeal has now seen".¹⁴

The JCHR also criticised the ISC in its inquiry into UK complicity in torture. It stated that "we doubt whether Parliament or the public has been convinced by the ISC that the security services always operate within the law and that transgressions of the law are appropriately dealt with. We would welcome greater transparency in the ISC's proceedings, such as public evidence sessions, but procedural innovations will not be sufficient to convince us, and the public, that the Government is being held to account." It concluded that "the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services."¹⁵

Similarly the ISC has been criticised for its effectiveness in its scrutiny of allegations of weapons of mass destruction in relation to the Iraq war. The narrow report of the ISC, as compared to the wider subsequent Butler inquiry has been criticised by a number of academics and others.¹⁶

Peter Gill¹⁷ has carried out an assessment of the effectiveness of the ISC in addressing human rights concerns. He states that in relation to allegations of mistreatment of detainees in Iraq, Afghanistan and Guantanamo the ISC "abrogated its responsibilities" in failing to tackle "difficult questions" regarding the use of information possibly obtained under torture. He concludes that the ISC is "more a tool in the Whitehall armoury for the management of the intelligence community than of Parliament in maintaining democratic accountability in the interest of propriety as well as effectiveness."

Bochel, Defty and Dunn, in their consideration of Parliamentary scrutiny of intelligence, conclude that, while there is some Parliamentary interest in oversight of the intelligence services, "in some respects the ISC may be seen as a barrier to wider parliamentary scrutiny of intelligence. The existence of the ISC has been used by the Government to prevent the scrutiny of intelligence issues by parliamentary select committees which have claimed to have a legitimate interest in doing so. One might also argue that the ISC has itself limited parliamentary scrutiny. It has resisted cooperation with the select committees on the grounds that it and it alone has the right to scrutinise intelligence issues. Its reports have

14 Counter Terrorism Policy and Human Rights (seventeenth report): Bringing Human Rights Back HL 86/HC 111 2009–10

15 Allegations of UK Complicity in Torture HL 152/HC 230 2008–09

16 See for example Peter Gill. The Intelligence Security Committee and the challenge of Security networks, Review of International Studies (200), 35, 929–41

17 Gill *ibid*

arguably been written for the benefit of the executive and the agencies and appear to have done little to educate parliament about intelligence.”¹⁸

As the evidence above suggests, for there to be effective Parliamentary oversight and accountability of the intelligence services, further reform than those proposed are necessary.

Status of the ISC.

As proposed by the green paper, for the ISC to be effective it needs to become a properly constituted committee of Parliament, with direct Parliamentary accountability; that is appointed by , and reports to Parliament. Of less importance is whether the ISC is a select committee or a statutory committee of Parliament, but rather on the details of its constitution. Both models are capable of fulfilling or failing to fulfil the key requirements of independence and accountability to Parliament, depending on how constituted.

The key aspects that any reform of the ISC must include are the following:

Appointment

The Committee should be a joint committee of both houses. To ensure independence appointments to the Committee should be made by both houses, not by the Prime Minister. The Prime Minister may be consulted on the appointments, but any role in pre approval, or a veto, should be tightly limited. Consideration could be given as to whether any such veto should lie with the Speakers of the Houses as an alternative to the Prime Minister, to ensure greater independence and ownership by Parliament. Members of Parliament, who themselves may previously, or in the future hold Ministerial appointments that necessitate access to sensitive information, should be trusted to have access to and effective oversight of secret information.

Reporting

Similarly, to ensure the effective independence of the ISC, the committee should report to Parliament, rather than the Prime Minister. A significant criticism of the ISC has been that it has appeared to face more towards the Security Services and Whitehall, than to Parliament. There may be some issues that the ISC cannot report in full to Parliament- however there should be a presumption that reporting is as full as possible, within national security concerns. Other select committees, and inquiries have managed to greater or lesser extents to provide robust, and publically accessible reports, when dealing with issues of great sensitivity and state secrets. There is no reason why the ISC cannot adopt a similar approach. In the same vein, the ISC should provide public evidence sessions. Again other

¹⁸ Bochel, H., Defty, A. and Dunn, A., ‘Parliamentary scrutiny of intelligence and security beyond the Intelligence and Security Committee, or is parliament interested in intelligence?’, Political Studies Association Annual Conference, University of Edinburgh, 30 March–1 April 2010.

select committees and inquires have enabled this to occur and best practice can be followed.

Remit

There are shortfalls in the current remit of the ISC. Formally the ISC's statutory remit covers "expenditure, administration and policy" of the Agencies. Formally the mandate does not include the Joint Intelligence Committee, the Assessments Staff and the Defence Intelligence staff. In practice the ISC has extended their mandate to include these and operational matters.

There is also a lack of formal cooperation and remits between the ISC and other bodies that might have a role in oversight. In particular the ISC has no process for being able to see the confidential reports of the various Commissioners reports to the Prime Minister, or confidential whistle blowing reports. This gap should be rectified, and the ISC should have access to all relevant information, including being provided as a matter of course confidential reports of the Commissioners. Finally there appears to be scope for improving cooperation between the ISC and other select committees. Both the ISC and other select committees should be able to effectively examine matters in relation to the security services that come within their ambit—while on the whole this has occurred, there have been occasions when access to information to other select committees has been refused on the basis that the issue fell within the remit of the ISC. It has been noted that the existence of the ISC has been used by the Government to prevent the scrutiny of intelligence issues by parliamentary committees which have a legitimate interest in doing so.¹⁹ The Joint Committee on Human Rights, for example in 2006 criticised the Security Services refusal to meet them on the basis that the matters had been investigated by the ISC. As the JCHR stated it is clearly a matter of some importance that the head of the security services be prepared to answer questions from the parliamentary committee with responsibility for human rights.²⁰ The agencies should provide information to all relevant committees when requested.

The Green Paper's recognises the need to extend the ISC's remit to include oversight of operational matters. While recognising that matter of overlap with other bodies, and effectiveness and resource implications for the agencies are of concern, the overriding principle should be that of ensuring effective scrutiny. Operational oversight would need to be focussed on matters of significant national interest and based on a clear understanding between the government and Committee, either in legislation or an MOU. As part of the independence of the ISC, and to promote public confidence and Parliamentary accountability, it should be for the ISC, not the government to determine what matters it wishes to

19 Bochel, H., Defty, A. and Dunn, A., 'Parliamentary scrutiny of intelligence and security beyond the Intelligence and Security Committee, or is parliament interested in intelligence?', Political Studies Association Annual Conference, University of Edinburgh, 30 March–1 April 2010

20 Joint Committee on Human Rights (2006) Counter terrorism Policy and Human Rights :prosecution and pre-charge detention.

consider. The ISC can and should be trusted to determine what matters it considers to be of importance to exercise its powers over, and should be unfettered in this regard.

Access to information and evidence

The effectiveness and credibility of the ISC has been severely hampered by the lack of access to evidence and information. This is most starkly illustrated by the 43 documents that were disclosed in legal proceedings in relation to Bin yam Mohammed, that had previously not been disclosed to the ISC. However there are numerous other examples, including evidence that was placed before the Butler Inquiry that the ISC had not seen evidence that has been provided to select committees, but not the ISC, and the inability of the ISC to see confidential reports to the Prime Minister from the oversight Commissioners.

The Commission welcomes the proposals from the government in the green paper to improve the ISC's ability to obtain information and evidence. In particular the Commission welcomes the proposal that the ISC should be able to take evidence from any department or body in the wider intelligence community and that the ISC should be given the power to require evidence from the intelligence agencies (as opposed to the current regime of request). However there remains a proposal that a veto on the provision of information should be exercisable by the Secretary of State. While an improvement on the current position of effective veto by the head of the agency this may still fail, in the most sensitive cases, to provide effective Parliamentary oversight. The role of the Secretary of State in previously in seeking to withhold key information in relation to Agency practices, most notably in relation to the Bin yam Mohammed case, in which the Government sought to withhold information from the court that revealed UK complicity in torture, illustrate. For effective oversight to occur, the ISC must have access to all information, without ministerial or other veto. If there is a public interest that the information should not be disclosed then the ISC can operate within the "ring of secrecy", and the secrecy of such information can be preserved through closed sessions, and redaction of any public reports.

Resources

The acknowledgment in the green paper that the ISC needs proper resourcing staffing and accommodation as a Parliamentary committee is to be welcomed. It is vital, if the ISC is to function and be seen to function as a Parliamentary committee rather than a limb of Whitehall, that its accommodation, staff and budget come directly from Parliament.

There is a need however, to specifically address the issue of expertise to support the ISC, which is not covered in the green paper. The ISC itself has recommended that it requires greater investigative and research resources.²¹ In his research Gill recognised the lack of resources for the ISC- in 2008 just 6 staff members spent the majority of their time preparing and writing up reports. This left little ability to conduct research, and leaves the ISC largely dependent on the information that is provided with by the agencies with little

21 Intelligence Services Committee Annual report 2010-11 cm 8114

opportunity to check its completeness or more actively seek further information.²² Additionally the lack of expertise and knowledge of the operational mechanisms of the security services is a barrier to effectively challenging information that is provided. Finally the lack of an investigative function of the ISC again makes it more likely to be a passive receipt of information, that a properly functioning oversight body.

To be able to effectively provide oversight of the security services it is vital that the ISC is adequately staffed. This requires both staff who are experts in the intelligence field, and an ability to investigate matters of its own accord. One way in which to ensure this occurs could be to consider the role of an Inspector General, who reports directly to Parliament through the ISC. This option is discussed in more detail below.

THE COMMISSIONERS

Changes to the Existing Commissioners remits.

Question. What changes to the Commissioners' existing remit can best enhance the valuable role they play in intelligence oversight and ensure that their role will continue to be effective for the future? How can their role be made more public facing.

In addition to the Commissioners identified by the green paper, other Commissioners with oversight responsibilities in respect of RIPA may also be of relevance. As the green paper identifies in discussion of the role of Inspector General, there is overlap between the regimes for oversight of the use of investigatory powers by the Agencies and other criminal justice agencies. The Commission has previously identified shortcomings in the oversight regimes of the existing Commissioners in respect of privacy, and more particularly under RIPA, and recommended the need for reform and consolidation of their roles.²³ Below the Commission analyses the roles of the relevant Commissions in respect of oversight of the Agencies. The Commission makes recommendations for consolidation and reform of these roles to provide greater consistency and effectiveness.

It is worth noting that the powers of the Equality and Human Rights Commission itself are limited in relation to oversight of the activities of the intelligence agencies. While the Commission has a general duty under section 3 and section 9 of the Equality Act 2006 in respect of human rights the Commissions enforcement powers are limited in this aspect. In particular the Commission is specifically excluded from conducting inquiries in relation to the intelligence services under Schedule 2 ss 20(1).

The Interception of Communications Commissioner. (ICC)

22 Gill The Intelligence and Security Committee and the challenge of security networks. Review of International Studies 92009), 35 929-941

23 Protecting Information Privacy. Raab and Goold. EHRC 2011

The ICC provides oversight of the issue of interception warrants under part I of RIPA and requests for communications data. However significant concerns have been raised as to the effectiveness and transparency of his oversight. Justice in their recent report²⁴ identify 5 areas of concern in relation to the role of the ICC in oversight of the issue of warrants for interception of communications; that the remit of the ICC is too narrow; that only a small proportion of interception of communication warrants appear to be reviewed; that the ICC has no power to quash a defective warrant ; that the ICC has never publically questioned the lawfulness of a decision to issue an interception of communications warrant by the Secretary of State on human rights grounds, and that the work of the ICC lacks transparency. They identify similar issues in relation to oversight of requests for communications data—since 2004 over 3 million requests for communications data have been made, yet the ICC has not found any of these to be unnecessary or disproportionate.

Intelligence Services Commissioner.

Intrusive surveillance and warrants for property interference requested by the intelligence services are granted by the Secretary of State. This is overseen by the Intelligence Services Commissioner. This contrasts with other intrusive surveillance warrants under RIPA, which are overseen by the Chief Surveillance Commissioner. Such fragmented responsibilities causes confusion and lack of transparency, and public access to the oversight of surveillance powers.

The effectiveness of the ISC has also been questioned. There is little public information available as to how he carries out his oversight activities. Statistics are not published as to the number of warrants that are issued by the Secretary of State, on the grounds that this might damage national security. It does not appear that the ISC has ever made a finding that a warrant has been issued unlawfully on human rights grounds. This again calls into question the robustness and effectiveness of oversight by the ISC.

Surveillance Commissioner

Currently the Surveillance Commissioner does not have jurisdiction over operations of the Security Services. Intrusive surveillance and warrants for property interception by the police are overseen by the Chief Surveillance Commissioner. Unlike warrants by the intelligence services, these authorisations must be approved by the Surveillance Commissioner before they take effect, unless the matter is urgent. The Surveillance Commissioner has the power to quash or cancel an authorisation where he is satisfied there was no reasonable grounds for believing that it was necessary or proportionate.

Proposals for reform

24 Justice: Freedom from Suspicion: Surveillance Reform for a Digital Age 2011

The current regime of different Commissioners and bodies with responsibility for different aspects of oversight of the security services and the use of investigatory powers is muddled, confused and lacks transparency and effectiveness. While it is recognised that the nature of the work of the security services and of secret intelligence, by its nature may require specific provisions there can be no rational justification for the current spread of the functions of oversight between different bodies. The roles and powers of the existing Commissioners and the IPT should be rationalised to ensure that there is comprehensive, easily accessible, transparent and effective oversight of all aspects of Security Services operations and use of powers.

The following principles might be useful in providing a guide to any reforms:

1. As far as possible, oversight of the Agencies should occur within the same systems as oversight of criminal justice activities.
2. The roles of Commissioners should be consolidated and rationalised.
3. Consideration will need to be given as to how to best integrate the work of the Commissioners in relation to the use of powers under RIPA generally by other organisations, and oversight of the Agencies.
3. Commissioners should be independent of Government, reporting to Parliament rather than a particular Ministry or the Prime Minister. They should be of high standing and independently appointed. They should be properly resourced, from the Parliamentary budget, and have sufficient staff and expertise.
4. Commissioners should have wide ranging powers, including authorisations and oversight of authorisations, consideration of individual complaints, the power to investigate matters of its own initiative and oversight of policies and procedures, operational and ethical matters. They should be able to require cooperation and be able to call evidence.
5. Commissioners should have the ability to conduct public hearings, and to publish their reports.
6. There should be prior judicial authorisation of activities that most seriously interfere with individual rights.
7. The Courts should be able to consider allegations of misuse of intelligence powers, and breaches of the Human Rights Act. They should be able to investigate and adjudicate both on individual complaints, referrals by the Commission(s) of evidence of misuse of powers, and consider matters of their own accord where it appears that there have been a misuse of powers

8. The Court system should be fair and transparent, and accord with Article 6 fair trial rights.

There are different views as to how such rationalisation should occur. Justice in their report recommend the transfer of the functions of the Intelligence Services Commissioner in relation to intrusive surveillance powers under RIPA to the Surveillance Commissioner in relation to the operation of the domestic intelligence services, leaving matters of foreign intelligence only with the Intelligence Services Commissioner. There are considerable benefits to this approach. As a matter of principle, as far possible issues in relation to the intelligence services and secret evidence should be dealt with in the usual law enforcement bodies framework. As a matter of practice the Surveillance Commissioner appears to be more transparent and robust in his approach than the Intelligence Services Commissioner. Placing responsibility for intelligence services matters in the same organisation as responsibly for other forms of surveillance would lessen risk of the Commissioner becoming too close to the intelligence services. Increasingly law enforcement agencies and intelligence services may be dealing with related issues. Placing their oversight in the same body would enable expertise and learning between law enforcement and intelligence agencies to be shared and reduce the risk of duplication or matters falling between the gaps.

However there are also disadvantages to this suggestion. The distinction between domestic and foreign intelligence issues may be a false one- although the two aspects are dealt with by different agencies there are increasingly issues where there is cross over which may require oversight of both agencies. While the Surveillance Commissioner would be suitable for considering RIPA oversight matters, extending his remit to other matters which the ISC might consider, in particular broader operational matters, such as guidance on the treatment of detainees overseas, might be not be appropriate, and be outside his area of expertise.

In addition the wider issue of reform of the Commissioners roles in respect of RIPA oversight of law enforcement, and in particular the dual roles of the Surveillance Commissioner, and the Interception of Communications Commissioner would have to be considered. It is questionable whether having different Commissioners for oversight of interception of communications and intrusive surveillance provides the most effective, transparent or accessible means of oversight. The current system appears confusing and lacking in logic. Thought should be given to the consolidation of these two roles to provide clear and more rationalised oversight of RIPA powers generally.

An alternative in respect of the operation of the Security Services would be to establish a specific Commissioner for their oversight. Such a suggestion is considered in the green papers suggestion of an Inspector General.

There are several advantages to the creation of the role for Inspector General. It would enable oversight to occur in one place, so decreasing the lack of clarity, potential overlaps and gaps of the current system of inspectorates. Its remit could be increased so that it explicitly had

the ability to consider operational matters as well as matters arising from RIPA surveillance and from complaints. It could also consider guidance, policies and procedures. It would have the ability to undertake inquiries in relation to any matter concerning the conduct of the security services, including a retrospective power. It could potentially provide the investigative arm and resources to the Intelligence Services Committee.

However there are also disadvantages. It would remove oversight of the security services from the usual law enforcement processes. There is a considerable risk that, as it only dealt with the security services, and would of necessity need to work closely with them the post might in effect become too close to those it was supervising, and unable to in effect show independence. There would be a risk that learning and practice between the Commissioners responsible for non security service oversight of the use of investigatory powers, and the Inspector General would diverge. Mechanisms would need to be put in place to ensure consistency of approach and sharing of learning.

The powers, resources and background of those appointed to this post would be key. The post should have access to all information and be able to call witnesses and require cooperation. The proposals in the Green Paper that its request for evidence be subject to Ministerial veto and that its programme of work should be subject to agreement by the Prime Minister, would not provide sufficient operational independence. Rather being appointed an answerable to the Prime Minister, such a post should be appointed and answerable to Parliament, for example through the Intelligence Services Committee.

JUDICIAL OVERSIGHT—THE INVESTIGATORY POWERS TRIBUNAL (IPT)

The role of the judiciary and courts in relation to oversight should be strengthened. As recommended by the UN Special Rapporteurs best practice guidelines the most robust oversight systems will encompass a combination of judicial, inspectorate, court and parliamentary oversight. Each have different complementary roles. The advantage, and role of a court, is that it is able to make a legal, judicial determination as to whether the law has been complied with, or breached. This aids both transparency and accountability.

The role for the Courts more generally in providing oversight of the activities of the intelligence services is dealt with in more detail in response to part 1 and 2 of this consultation.

Although not specifically included in the Commissioners in Chapter 3, the IPT also potentially provides an important role in oversight of the Security Services. Individuals can raise allegations of misuse of RIPA powers to the IPT and it hears proceedings brought against the intelligence services for breach of the Human Rights Act.

The IPT appears to lack effectiveness.²⁵ The IPT can only act once a complaint is made—yet by the nature of secret surveillance an individual is unlikely to know that they have been

25 See for example Justice, *ibid*

subject to this and so able to make a complaint. Out of 1,120 complaints to the IPT in the past 10 years the IPT has only upheld complaints in 6 cases. This extremely low rate of upholding complaints suggests that the IPT is failing to adequately investigate and consider complaints.

The IPT also lacks procedural fairness. There is no right to a hearing before the IPT, no right to disclosure, to know or cross examine evidence and witnesses. The tribunal works on a basis on neither confirm nor deny and there is only provides reasons for its decisions if it finds in favour of the applicants.

The compliance of the IPT with article 6 fair trial rights was challenged in the ECtHR in the case of *Kennedy v the UK*.²⁶ In this case the Chamber of the Court found that the restrictions that the IPT procedure provided did not infringe the right to a fair trial and that "the need to keep secret sensitive and confidential information" justified restrictions. This decision has been criticised in a number of quarters,²⁷ and the case remains to be determined by the grand chamber of the ECtHR.

These significant current concerns regarding the functioning of the IPT, in particular the fairness of its procedures, should be addressed. While there will for course be a need for a court to be able to deal with sensitive and secret material in a way that protects national security, there is considerable scope for improvement of the current procedures of the IPT. There is a need to increase the adversarial nature and fairness of its procedure, possibly through the appointment of special advocates. Consideration should be given as to whether this function is best fulfilled by reform of the IPT to make its procedures more fair and better comply with Article 6, or whether judicial oversight should occur within the normal court system, and the IPT be abolished.

A major deficiency of the IPT is that it is reliant on individual complaints. As previously stated, by its very nature individuals may well not be aware they have been subject to secret surveillance and so unable to complain the neither confirm nor deny policy does not assist in this matter. The jurisdiction of an improved IPT / the courts should be widened, to require referral of matters that appear unlawful to it by the existing Commissioners and to enable it to investigate matters of its own accord, or on the basis of complaints from third parties.

RIPA

The Commission has previously recommended that there be reform of RIPA to better ensure protection of privacy rights. There is a need for further consideration of a requirement of prior authorisation for the use of intrusive surveillance techniques by the security services under RIPA. A system of prior authorisation by the Surveillance Commissioner applies to authorisations of intrusive surveillance by the police, but not the

26 *Kennedy v UK* Application number 26839/05 18 May 2010

27 See for example *Freedom from Suspicion*; Justice 2011 page 145

intelligence agencies. Under the Protection of Freedoms bill certain lower level surveillance will be subject to judicial authorisation oversight.

In principle surveillance by the security services should be treated in the same way as surveillance by law enforcement agencies. There seems to be no justification for the current different regime for the police and intelligence services, with the Secretary of State being able to grant warrants for the latter, with no form of independent authorisation, while warrants for intrusive surveillance by the police must be authorised by the Surveillance Commissioner. Authorisation of intrusive surveillance, both by the security services and by the police, should be undertaken by a judge, not a Commission. This reflects the serious nature, and intrusion into privacy that intrusive surveillance creates. A system of appropriate security cleared judges should be developed, and for emergency granting of authorisations for surveillance could be established.

The requirement for prior judicial authorisation should be extended beyond the court narrow definition of intrusive surveillance in RIPA, to other forms of surveillance by both the police and security services that have serious impact on the privacy of individuals. While wide reform of RIPA is outside the remit of the green paper further consideration needs to be given to oversight of RIPA powers generally, in particular in relation to covert and directed surveillance. Such activities will cover a range of activities, and intrusion into privacy, from observance in public through CCTV camera, to the deliberate placing of covert surveillance operatives within the private sphere (as has recently been highlighted in relation to the activities of Mark Kennedy and others in relation to covert surveillance of protestors). While it would not be practical or desirable for there to be prior judicial oversight of all these activities, in relation to some, and in particular the placement of covert surveillance operatives or agent provocateurs, where there is potentially significant intrusion into individuals privacy, prior authorisation should occur.

Written Evidence submitted by INQUEST (JS 6)

INQUEST and the INQUEST Lawyers' Group's expertise

1) INQUEST is the only independent organisation in England and Wales that provides a specialist, comprehensive advice service on contentious deaths, their investigation and the inquest process to bereaved people, lawyers, other advice and support agencies, the media, parliamentarians and the wider public. It has a proven track record in delivering an awardwinning, free, in-depth complex casework service on deaths in state detention or involving state agents. It works on other cases that also engage article 2, the right to life, of the European Convention on Human Rights and/or raise wider issues of state and corporate accountability. It monitors public interest inquests and inquiries into contentious deaths to ensure the issues arising inform our strategic policy and legal work.

2) INQUEST was fully engaged in the legislative debates around proposed “secret inquests” during the passage of both the Counter Terrorism Bill 2008 and the Coroners and Justice Bill 2009. We met with concerned parliamentarians, produced detailed briefings on the proposals²⁸ (including a joint briefing with Liberty and JUSTICE on amendments to the Coroners and Justice Bill on the admissibility of intercept evidence in inquest proceedings²⁹), gave written and verbal evidence to the Public Bill Committee on the Coroners and Justice Bill 2009 and submitted evidence to support the JCHR’s Legislative Scrutiny of the Coroners and Justice Bill. We conducted significant policy and parliamentary work on amendments to the Bills, met with the Home Office Minister Tony McNulty MP in June 2008 and the Justice Secretary Jack Straw MP on two separate occasions in March 2009 and April 2009 to discuss the underlying rationale for and the form of the government’s proposals.

3) INQUEST, jointly with Liberty and JUSTICE, intervened in *R (on the application of) the Secretary of State for the Home Department and The Security Service v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin). This was the recent judicial review arising from the 7/7 London bombing inquests,³⁰ in which the Home Secretary and the Security Service challenged the decision of the coroner that she was unable to exclude properly interested persons such as bereaved families and their legal teams from the hearing. As part of our intervention, we provided a witness statement which set out in detail, based on reasons of principle and experience, why we were opposed to the closing of inquest

28 For example:

- INQUEST’s Briefing on the Counter Terrorism Bill 2008 for the House of Lords—October 2008 http://www.inquest.org.uk/pdf/INQUEST_briefing_counter_terrorism_bill_lords_committee_stage.pdf
- INQUEST’s briefing on clauses 11-13 of the Coroners and Justice Bill – February 2009: http://www.inquest.org.uk/pdf/INQUEST_briefing_on_clauses_11-13_coroners_and_justice_bill_feb_2009.pdf

29 INQUEST, Liberty & JUSTICE Joint draft proposed amendments to Coroners and Justice Bill on the admissibility of intercept evidence for the report stage in the House of Lords—October 2009: http://www.inquest.org.uk/pdf/INQUEST_Liberty_Justice_Briefing_Intercept_Evidence_and_Inquiries_CJB_Lords_Report_Stage.pdf

30 Extracts from the statement provided by INQUEST is published in *Inquest Law*, 21 June 2011 and the full statement is available here <http://bit.ly/fnzjFi>

hearings or parts thereof. This was particularly bearing in mind the existing power to hold part of the proceedings *in camera* (but without excluding family members) under Rule 17 of the Coroners Rules.

4) INQUEST co-ordinates the INQUEST Lawyers Group (“ILG”) which is a national network of over two hundred lawyers who are willing and able to provide preparation and legal representation for bereaved families. Membership is open to all lawyers who represent bereaved families. The ILG also promotes and develops knowledge and expertise in the law and practice of inquests by providing training and acting as a forum for the exchange of ideas and experience. INQUEST publishes *Inquest Law*, the journal of the ILG, which is widely read by those engaged in the inquest process including lawyers, coroners and academics.

5) ILG members have been involved in thousands of inquests into contentious deaths over the last thirty years. These range from inquests into deaths in custody and following other contact with state agents, such as police shootings, through to major disasters such as the Marchioness, Hillsborough, Zeebrugge and rail crashes, as well as the deaths of military personnel. Many of these cases involve highly sensitive material touching on national security, sensitive sources, capabilities and techniques and government relationships with international partners. Particularly notable recent examples in which ILG members have been involved include the 7/7 London bombing inquests, the Azelle Rodney case and the inquests into the deaths of Diana, Princess of Wales, Jean Charles de Menezes and the Ministry of Defence research scientist Terence Jupp.

6) Our evidence to the JCHR Inquiry into the Government’s Justice and Security Green Paper is based on INQUEST’s expertise in this field in England and Wales, and has been contributed to by several leading members of the ILG with experience of representing families at inquests involving highly sensitive material.

The scope of our evidence to the JCHR

7) INQUEST is of the view that, taken as a whole, the proposals in the consultation would seriously undermine fundamental legal principles of natural justice and open justice.

8) We note with concern that the Government’s Green Paper proceeds on the premise that the current system of Closed Material Procedures (“CMPs”) has been shown to be “*capable of delivering fairness*” (see for example p.21 of the Green Paper). We have seen the collective response to the Green Paper from Special Advocates and noted their powerful statement that “*our experience as Special Advocates involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPS are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness*”.³¹

31 Paragraph 15, *Justice and Security Green Paper: Response to Consultation from Special Advocates*, December 2011

9) We also note the broad scope of “public interest” envisaged by the Green Paper. As currently set out, the proposals would extend beyond national security to a wide range of sensitive material. The trigger for the use of a CMP would be the Secretary of State’s decision that open disclosure of the material would cause “damage to the public interest”. The glossary states:

“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 security; international relations; the detection and prevention of crime; and the maintenance of the confidentiality of police informers’ identities, for example”³²

10) The glossary further defines “*sensitive material/information*” as:

“any material/information which if publicly disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily ‘sensitive’, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive”

11) It is difficult to see how proposals to introduce closed material procedures in such a potentially broad range of scenarios are compatible with fundamental legal principles of natural justice and open justice.

12) Beyond these observations, we do not intend to comment in detail on the issues relating to the extension of CMPs to civil proceedings highlighted in the JCHR’s Call for Evidence. Instead, we focus our evidence on our area of expertise and an issue which has an important human rights component—the discussion in the Green Paper about extending CMPs to inquests³³ and the UK’s obligations under Article 2 ECHR.

13) This is an issue which the JCHR, in earlier Parliamentary sessions, has extensively commented on, including as part of the previous Committee’s legislative scrutiny of the Coroners and Justice Bill.³⁴ In relation to those proposals, the JCHR was not satisfied that a case had been made for the Government’s proposals for certified investigations or “secret inquests” which provided for the conduct of at least part of an inquest without a jury and without the participation of a bereaved family at the instigation of the Secretary of State. The Committee recommended that the provisions be deleted from the Bill³⁵ noting that :

In the light of the importance of an open, transparent investigation for the purposes of Article 2 ECHR, the justification for the introduction of proposals which give the State

32 See Green Paper, Glossary, page 71

33 See Green Paper: Executive Summary, paragraph 14; Chapter 1, paragraphs 1.47-1.50; Chapter 2, paragraphs 2.10–2.19

34 Joint Committee on Human Rights, Eighth Report of Session 2008-09 (March 2009) and Sixteenth Report of Session 2008–09 (May 2009).

35 See Recommendation at para 1.42 of Eighth Report of Session 2008-09

significant power to direct or control the manner in which evidence is produced before the inquiry must be substantial. Proposals which involve the State in this process and enable the exclusion of the public and bereaved family members must be subject to close scrutiny. We take the view that, in order to be compatible with Article 2 ECHR, any proposals must be no more than necessary and accompanied by adequate safeguards, including provision for adequate judicial oversight.³⁶

14) In their next scrutiny of the Coroners and Justice Bill the Committee reminded the Government:

“We have raised concerns about the compatibility of existing procedures in SIAC closed hearings with the individual right to a fair hearing (Article 6 ECHR), including the right of the individual concerned to have access to the "gist" of the material before SIAC and for broader powers for Special Advocates appointed to represent their interests. We are concerned that the increasing trend for the use of closed procedures in judicial proceedings at the instigation of the Secretary of State. In this case, it remains our view that these proposals may operate in a manner which is inconsistent with the procedural obligations of the United Kingdom under Article 2 ECHR, which requires an independent, effective investigation of any death involving the State. The certification process may only apply in cases where a jury is appointed, including deaths in detention or after contact with the police or other state authorities.

We are not persuaded by the Minister's argument that SIAC procedure provides a transferable model for the protection of sensitive information in inquests.”³⁷

15) The Committee went on to note that the Coroners and Justice Bill made “*no specific provision for the use of special advocates to represent the interests of bereaved family members or other interested parties*”. INQUEST and the ILG argue that even if special advocates were used in inquest hearings this would still be deeply problematic given the standards set by Article 2 of the ECHR for openness and transparency in the investigation of deaths. Our view is bolstered by regular and consistent evidence from Special Advocates with direct experience of CMPs which has drawn attention to the fundamental flaws and procedural shortcomings in the current regime.³⁸

The importance of openness and transparency in the inquest process

16) The first reason why INQUEST and the ILG are opposed in principle to the use of CMPs and measures which effectively exclude bereaved families from participation in inquests, is that to take such a course would be completely contrary to the legally recognised special need for openness and transparency in inquests, and would be highly damaging to public confidence in the inquest process.

36 See para 1.31 of Eighth Report of Session 2008–09

37 See paras 1.22–1.23 of Sixteenth Report of Session 2008–09

38 Including in their recent response to the Green Paper

17) Families' engagement with the coronial process is important not just to enable them to come to terms with bereavement. In a number of ways it serves a vital public interest:

- (a) First, it provides a counterweight to a tendency towards secrecy where deaths may have been avoidable, particularly where state agents are involved. There is an ever-present risk of inquests into such deaths becoming opportunities for official and sanitised versions of the truth to be—or be seen as—given judicial approval if questioning of the intensity and rigour a bereaved family would naturally expect does not occur. An inadequate inquiry inevitably damages bereaved people; it also undermines public confidence in authorities whose conduct has not been properly scrutinised.
- (b) Secondly, common to virtually every family INQUEST has supported is an unswerving desire that others should not have to suffer the often preventable ordeal which they have had to endure. One of the most important roles of the coronial service, particularly in relation to contentious deaths, is the prevention of similar fatalities by identifying necessary improvements in public health and safety and the practices of public bodies. If inquests take place behind closed doors it will be hard to allay any suspicions of wrongdoing and failures in the minds of bereaved families and the public at large. If anything, such suspicions will be exacerbated; the secrecy will fuel fears that the state is attempting to deliberately prevent information about its own culpability in deaths becoming publicly known.

18) The proposals in the Green Paper represent a significant restriction on public scrutiny and family participation in inquests following contentious deaths. Though the Green Paper recognises that inquests can require “[...]the involvement of the deceased’s next of kin and a greater degree of public scrutiny”³⁹ than ordinary litigation, the need for openness and transparency in inquests cannot be overstated and is more fundamental than the consultation paper acknowledges.

Article 2 of the ECHR

19) In particular, under Article 2 of the ECHR, of which inquests are often an important part, there must be a sufficient element of public scrutiny of the investigation “to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.” These are crucial aims. For example, where death was caused by police violence: “What is at stake here is nothing less than public confidence in the state’s monopoly on the use of force.”⁴⁰

20) The investigative obligation under Article 2 requires that certain ‘minimum standards’⁴¹ are met. Those are that:⁴²

39 See paragraph 2.10

40 *Ramsahai v The Netherlands* [2008] 46 EHRR 43, at §321 and 326.

41 *R (on the application of Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653 at para 32

42 *R (on the application of D) v. Secretary of State for the Home Department* [2006] All ER 946 at para 9(iii)

- the investigation must be independent;
- the investigation must be effective;
- the next of kin must be involved to an appropriate extent;
- the investigation must be reasonably prompt;
- there must be a sufficient element of public scrutiny; and
- the state must act of its own motion and cannot leave it to the next of kin to take conduct of any part of the investigation.

21) Openness and transparency are an important part of almost all of these minimum standards. For example:

- an investigation will generally be more independent, and effective, and seen to be so, if it is open and transparent;
- the need for the next of kin to be involved in an Article 2 investigation, which is necessary for them to gain meaningful answers to their questions and for coming to terms with the death, means that family members must be fully involved in the inquest hearing and that the prospects of them discovering the truth are maximised, which all require openness and transparency; and
- an investigation cannot properly meet the Article 2 requirement of public scrutiny if it is conducted in private (although hearing some evidence in camera is permissible in narrow circumstances, so long as the next of kin are never thereby excluded).

22) Further, as the House of Lords recognised in *R v Secretary of State for the Home Department (respondent) ex parte Amin* in the speech of Lord Bingham:

The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom*, page 13. It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.⁴³

43 [2003] UKHL 51, paragraph 31

23) All of these elements in the Article 2 procedural duty make openness and transparency in inquests of the utmost importance. For example:

- in order to ensure that the full facts are brought to light and wrongdoing is exposed, it is necessary for evidence to be given publicly, and subjected to the most rigorous examination possible;
- it would be impossible for an inquest to seek to allay suspicion of wrongdoing if it was held in private: indeed such a course is only likely to increase suspicion. The importance of maintaining public confidence when a death was caused by a state agent is illustrated by the events following the fatal shooting by police of Mark Duggan; and
- the prospects of an inquest achieving its “lesson-learning” functions are vastly increased if the evidence given by state agents can be publicly and fully tested.

24) It follows from the above that any step, such as the use of CMPs, which leads to reduced openness and transparency in the inquest process, will be highly damaging to public confidence in the inquest system. It is hard to imagine the distrust that would be engendered by a system whereby it was alleged that state agents were responsible for the death of an individual, yet at the hearing to determine the cause of that individual’s death, family members were excluded, and unable to see or challenge the evidence as to the cause of death adduced by those very state agents said to have caused it. It is not trite to say that ‘Kafka-esque’ is a phrase surely appropriate for such a scenario.

25) Finally it should be noted that the Green Paper’s proposals which restrict the ability of the public and family to participate in the inquest may be unlawful when they are neither necessary nor proportionate.

Existing practical alternatives to CMPs under the current legal regime

26) The JCHR has, in the past, questioned assertions made by previous Governments that proposals for certified investigations or secret inquests were necessary to ensure that investigations went ahead in cases where disclosure may cause public interest or national security concerns and concluded that the provisions were not necessary⁴⁴ and went on to say that “*before proceeding with these proposals, the Government must explain why these measures are necessary, in light of existing procedural measures designed to protect witnesses and sensitive information (for example through PII or other measures, such as were deployed in the de Menezes case); and in circumstances other than cases involving relevant intercept evidence (ie wider national security issues, relations with another country, protection of witnesses and prevention of crime).*” We believe the Committee’s questions are equally pertinent to the proposals contained in the Green Paper.

27) The second reason why INQUEST and the ILG are opposed to the use of CMPs in inquests is that the current legal framework for inquests has proved itself sufficient for

44 See para 1.42 of Eighth Report of Session 2008–09

dealing with issues of sensitive material, except RIPA cases. Even where RIPA is relevant, the case for the use of CMPs is not made out. Other reforms referred to below at paragraphs 42–49 are the appropriate and proportionate response when RIPA material exists that is directly relevant to the circumstances of a death.

28) INQUEST recognises that there is a need to achieve a proportionate balance between the need for openness and transparency and concerns over sensitive material. We also accept that there is a difference between litigation that parties engage in through choice that can be settled or discontinued and inquests that are required to be held by law where there is no choice.

29) It is also right that in *R (on the application of) the Secretary of State for the Home Department and The Security Service v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin), the Divisional Court held that the proper interpretation of the law (in particular Rule 17 of the Coroners Rules 1984) was that, while a coroner has power to exclude “the public” from an inquest or any part of an inquest, this did not extend to holding closed hearings which would also exclude properly interested persons such as bereaved families and their legal teams.⁴⁵ On that basis, coroners do not have an inherent jurisdiction to hold CMPs or something equivalent to them.

30) Coroners have nevertheless found themselves well able, within the current legal framework, to find pragmatic solutions that properly strike the balance between the need to protect sensitive material and the need to ensure openness and transparency (except in the very rare cases where RIPA material has been directly relevant to the circumstances of a death).

31) As indicated above, INQUEST and the ILG have a breadth of experience of inquests involving sensitive material. Our collective experience of sensitive inquests is almost certainly broader and deeper than any single body or organisation, including government departments. It is therefore significant that we have encountered just one case until now, involving RIPA material, where it has proved necessary to withhold critical disclosure from the representatives of the family of the deceased. That case, involving the death in April 2005 of Azelle Rodney (referred to below and in the Appendix) is now the subject of an inquiry under the Inquiries Act 2005. In any event, there is no case, including that one, where it has been necessary or appropriate to hold “closed proceedings” of the kind envisaged by a CMP.

32) The case studies which are attached in the Appendix, the majority of which were included within our witness statement in the 7/7 judicial review (see paragraph 3 above), highlight how coroners have been able to reconcile concerns over sensitive evidence with transparency, and so avoid compromising the important principle of open justice. These cases demonstrate that the current inquest system can—and does—cope with even the most sensitive and highly classified material without the deeply troubling suggestion of CMPs.

⁴⁵ *R (on the application of) the Secretary of State for the Home Department and The Security Service v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin)

Even the very exceptional cases where RIPA material is directly relevant do not call for the introduction of CMPs.

33) As already noted above (see paragraphs 9–10) although the Green Paper specifically addresses the question of national security and counter-terrorism the potential application of the proposals is much broader. Many of the assertions made about inquests in the Green Paper actually relate to those cases in England and Wales where sensitive material about policing has been in issue. As a result, our response sets out the measures adopted within the current legal framework to conduct inquests that comply with Article 2 and protect either the interests of national security and/or sensitive policing matters. These practical measures have also protected families' participation in the inquest process and the principles of open justice and transparency.

34) As illustrated by the case studies, save only for one case apparently involving directly relevant RIPA material, the current legal framework already provides a range of different measures that can be adopted in the exceptional cases where national security or the extreme sensitivity of the material merits them. A coroner, proactively or in response to an application, is able to judge the necessity for one or more of these measures on the specific circumstances of each case. As illustrated by the case studies, the measures include:

- (a) appointing a High Court judge as coroner;
- (b) the use of Public Interest Immunity (PII) certificates;
- (c) the power to hold part of the proceedings in camera under rule 17 of the Coroners Rules;
- (d) using enforceable confidentiality agreements;
- (e) adopting special measures for witnesses such as:
 - (i) granting anonymity;
 - (ii) giving evidence from behind a screen;
 - (iii) taking evidence by video link from another location;
 - (iv) when using video also using voice fragmentation and picture blurring;
 - (v) protecting witnesses arrival and departure, using special entry and exit routes;
 - (vi) giving witnesses or evidence codenames to protect confidentiality;
- (f) the provision of safes in court for each of the interested persons to store bundles of sensitive documents;

- (g) using separate bundles for sensitive material, where the evidence is printed on easily identifiable coloured rather than white paper with each page named for specific interested parties;
- (h) prohibitions on the removal of coloured papers from the courtroom with the Coroner agreeing extended court opening hours to allow lawyers to work on the material;
- (i) all coloured pages being returned to the owner of the sensitive material at the end of the inquest;
- (j) the provision separate computers (with coloured screens) for the recording of in camera sessions, and an agreed set of rules for those sessions;
- (k) the use of special personnel such as MoD police at the Coroner's Court each day to guard papers and ensure security;
- (l) the attendance of a security adviser in court at all times to assist in resolving any emergency security issues; and
- (m) the preparation of gist documents of the most sensitive material that can be shared with the family, (their lawyers being provided with the material underlying the gist document on strict undertakings).

35) These are not, as the Green Paper suggests, "*ad hoc solutions*" but coherent, practical measures developed under the current legislative framework which balance the need for protection of sensitive material whilst ensuring proper participation of families in inquests and openness and transparency more generally.

36) There has not, however, been a co-ordinated, national effort to collate information of this nature and publicise it to all coroners so that the best practice which has developed on inquests involving sensitive material can be shared. In our response to the Green Paper, INQUEST and the ILG suggested that it might be helpful for the Chief Coroner (when appointed) to gather information based on the practices already adopted by coroners (along the lines set out above) and by the chairpersons of public inquiries held under the Inquiries Act 2005 and use his or her power under s.42(2)(a) of the Coroners and Justice Act 2009 to issue guidance to coroners about the way in which interested persons are able to participate in investigations which involve sensitive material. In addition, to give these statutory force, when Coroners Rules under s.45 of the Coroners and Justice Act have been drafted and consulted on, they could reflect and codify some of the practical arrangements coroners are already adopting in relation to sensitive material and national security concerns.

The suggested limits of the current legal framework

37) The Green Paper suggests at paragraph 1.48 that "*in some cases, coroners have concluded that the exclusion of material means that they have been unable to complete their investigation*".

38) This echoes comments made during the second reading debate of the Counter Terrorism Bill, which included proposals for inquest hearings to be conducted in secret, by the then Justice Secretary Jack Straw that:

“In a small number of cases, there has been significant difficulty in ensuring that coroners have access to all relevant information, including highly sensitive material, which cannot be made public. Agencies have used public interest immunity to refuse to disclose such material. To make the best of a difficult—and, in my view, unsatisfactory—situation, I am told that some coroners have worked with the relevant intelligence and security agencies to secure as much information as possible to ensure that a viable inquest could take place. In some circumstances, coroners have been shown withheld material in private, although they have not been able to make use of it. They have also been prevented by law from seeing any material protected by the Regulation of Investigatory Powers Act 2000, including intercept material. We have developed the proposals because we believe that the current state of the law and process is unsatisfactory. It has resulted in two inquests being unable to proceed because the coroners cannot comply with their article 2 obligation to conduct a broad inquiry into the circumstances of deaths resulting from an act or omission of the state.”⁴⁶

39) He added further on 3 February 2009 that:

“[...] I think that the House now accepts that there is a problem that cannot be dealt with simply by PII certificates. [...] I think that there are some practical problems because we are dealing with extreme circumstances in which there is a very severe risk, not of damage or embarrassment to the Government, but of an individual—a covert human intelligence source, say—being killed [...] At present there are two inquests that cannot proceed because the arrangements made in the de Menezes and Nimrod cases are not regarded as satisfactory [...] I repeat to the House that I do not regard the proposals as copyright. We are happy to consider other alternatives, but the House has to face the fact that there needs to be additional provision that is currently not in the law, because otherwise some bereaved relatives will go without an inquest at all.”⁴⁷

40) INQUEST understands from meetings with Jack Straw and civil servants during the parliamentary passages of the Counter Terrorism Bill 2008 and the Coroners and Justice Act 2009 that the two stalled inquests the Justice Secretary referred to were those of Terry Nicholas and Azelle Rodney.

41) It is interesting to note that, after the proposals for secret inquests were dropped following intense pressure from Parliament, the inquest of Terry Nicholas was able to proceed (see the Appendix for further details of the measures adopted by the coroner to enable this to happen). However, the death of Azelle Rodney is being handled under the

46 Hansard HC Deb, 26 January 2009, col 30

47 Hansard HC Deb, 3 February 2009, col 685

provisions in the Inquiries Act 2005⁴⁸ which indicates that problems do still exist where it appears likely that RIPA material is in existence that may be directly relevant to the circumstances of a death. As can be seen in the Appendix, the mother of Azelle Rodney and her legal team consider that RIPA reforms could and should have been made by Parliament that would have saved on the need and expense of a public inquiry.

42) Analysis of the proposals on inquests in the Green Paper suggests the underlying problem the Government is trying to address is, in reality, the admissibility of intercepted evidence in inquests. If that is the case, the extension of CMPs to inquests would be overly broad and disproportionate.

Regulation of Investigatory Powers Act reform

43) The Government has said they will not address issues of intercept evidence as part of their Green Paper⁴⁹ consultation on the extension of CMPs because it is not an “*appropriate means*” and the topics are “*clearly distinct*”. INQUEST and the ILG would argue that, in relation to inquests, they are inextricably linked for the reasons set out above.

44) Intercept evidence is currently inadmissible in a number of legal proceedings including coronial proceedings. However (as noted above), in Article 2-type deaths, the state is under a duty to instigate an independent, effective and prompt investigation into a death which is open to public scrutiny and which supports the participation of the next-of kin. For certain deaths then, the state will be under a duty to allow intercept evidence to be considered by the independent investigation in order for that investigation to meet the necessary standards of effectiveness, transparency, and next-of-kin involvement. INQUEST has previously argued that a change in the law is required so that inquests that necessarily involve intercept material are not unnecessarily stalled as a result of the general bar on the admissibility of intercept evidence.⁵⁰

45) The House of Lords twice amended draft legislation before it during debates on the Counter Terrorism Bill 2008 to amend RIPA with a view to making it possible for RIPA material to be disclosed during inquests in very limited circumstances and with appropriate safeguards. Those proposed legislative amendments, supported at the time by both the Conservatives and Liberal Democrats in both Houses that were ultimately rejected by the House of Commons, should be the starting point for RIPA reform in this area.

48 We are not aware of any other inquests which have been converted to a public inquiry in a similar manner in England and Wales. It is right that three public inquiries are ongoing in Northern Ireland (those into the deaths of Rosemary Nelson, Robert Hammill and Billy Wright). However these were set up following the specific recommendation to that effect made by retired Canadian supreme court judge, Peter Cory, who conducted an investigation of allegations of collusion between British and Irish security forces and paramilitaries, not because the inquests could not proceed because of problems with sensitive material.

49 See Green Paper, page 11

50 In INQUEST’s knowledge, the only inquest which has been unable to proceed as a result of the bar on the admissibility of intercept evidence is that of Azelle Rodney (see Appendix for details)

46) If resurrected, those proposed legislative amendments⁵¹ would potentially permit the disclosure of RIPA material in a highly structured, judicially-controlled manner to the family of the deceased, their counsel and the jury at an inquest. But only on the proviso that the coroner (who must be a High Court judge in such cases) believes the information contained in the intercept is central in finding out how a person died. A High Court Judge sitting as a coroner would then have sight of the material and would decide who the material would be disclosed to. The coroner's decision would be his/hers alone and any of the other parties would be able to make submissions to him/her about the decision or challenge it in the usual manner.

47) Once a security cleared coroner was satisfied of the direct relevance of the RIPA evidence to the circumstances of the death, he/she would certify that it must be disclosed to the jury and to the Properly Interested Persons (PIPs) at an inquest, which in turn will lead to an authorised disclosure of that material to jury members and PIPs on the basis of confidentiality agreements that will include a reference to the fact that any unauthorised disclosure of RIPA material is a criminal offence. In such exceptional cases, Rule 17 of the Coroners Rules can also be utilised to hold some of the inquest in camera.

48) Accordingly, *solely in the context of such RIPA reform but in no other circumstances*, INQUEST would support some of the proposed reforms mentioned at paras 2.13 and 2.15 of the Green Paper in such limited cases, namely: confidentiality agreements for jurors and PIPs (including family members) and so-called 'light touch vetting' of jurors (but NOT family members or other PIPs). INQUEST agrees with the comments made at 2.15 of the Green Paper that security vetting of family members would be highly intrusive and add that this would in any event be unnecessary given the criminal law consequences under RIPA and solemnity for family members of entering into confidentiality agreements following legal advice.

Conclusion

49) Inquests into deaths which involve sensitive material or information will continue to present practical challenges, but INQUEST and the ILG believes these can and should be resolved on a case by case basis using the current legal framework. As explained above and demonstrated by the case studies in the Appendix, the system has already proved robust enough to cope with some of the most difficult and sensitive material. Introducing new legislative provisions which would extend CMPs to inquests would be an unnecessary and retrograde step, given the particular need for openness and transparency in inquests, and would be highly damaging to public confidence in the inquest system.

January 2012

Appendix: Case Studies

I. Diana, Princess of Wales and Dodi Al Fayed⁵²

50) These inquests had to deal with a large amount of highly sensitive material. The inquest, including the jury, heard evidence from Sir Richard Dearlove, Secret Intelligence Service (“SIS”) Head of Operations at the time of the deaths and subsequently Chief of the SIS; anonymous current and former members of the SIS; and officials from Government Communications Headquarters. Richard Tomlinson, a previous member of the SIS, also gave evidence about an SIS proposal to kill a Balkan leader.

51) The evidence itself was highly sensitive and involved national security implications: it included evidence of unprecedented detail about the workings of SIS, its record systems, and the deployment of agents abroad at the time of the deaths, and of the monitoring functions of GCHQ.

52) A number of current and former SIS agents were given anonymity. Their witness statements were securely stored and only accessed by members of the legal teams and their clients. When they came to give evidence, the court convened in camera and the court was cleared of members of the public, and access was limited to a pre-agreed list of lawyers and properly interested persons. The families of the deceased were entitled to attend should they have wished to. The witnesses gave evidence in open court, but entered and left the court through the judge’s entrance, having been brought into the building discreetly so as not to be identified by the public entering or leaving. Mr Tomlinson gave evidence by video link from an undisclosed location known only to the Coroner’s solicitor. Full transcripts of all the evidence including that of the SIS witnesses was placed on the website of the inquest.

53) These practical measures, approved by the SIS and the Foreign Office, ensured that the evidence was fully explored in front of the jury and the properly interested persons, without compromising national security or the safety of individual agents.

2. Nimrod⁵³

54) The inquests into the deaths of 14 service personnel who were killed when a Nimrod reconnaissance aircraft exploded and crashed over Afghanistan involved highly sensitive material touching on national security. The aircraft was on operational duties when it was engulfed in flames shortly after being re-fuelled in mid-air near Kandahar in September 2006. An RAF Board of Inquiry report found ageing components and a lack of modern fire suppressants were contributory factors which led to the deaths. A key issue at the

52 Heard before Lord Justice Scott Baker sitting as the Assistant Deputy Coroner of Inner West London between October 2007 and April 2008. Michael Mansfield QC, Henrietta Hill and Alison Macdonald were instructed by Lewis Silkin LLP for Mohammed Al Fayed.

53 Heard before Andrew Walker, Assistant Deputy Coroner for Oxfordshire in May 2008. Mike Rawlinson QC instructed by Irwin Mitchell Solicitors for the bereaved families

subsequent inquest was the Ministry of Defence's approach to safety and failures to spot inherent dangers on the ageing aircraft.

55) The coroner was determined to hear all evidence pertinent to the case and the majority of the inquest was open to the public. The Ministry of Defence made a single PII application in relation to background material in which counsel for the families was present. A summary of the PII application was given to the families after that hearing. The families participated fully in the inquest hearing and were able to question key witnesses through counsel and, on occasion, themselves directly. The families have commented that they were grateful to the coroner for the "fearless and impartial" manner in which he conducted the inquest and the respect that he showed to the families.⁵⁴

3. Jean Charles de Menezes⁵⁵

56) As is well-known, Mr de Menezes was shot and killed by officers of the Metropolitan Police at Stockwell underground station on 22 July 2005, having been mistaken for one of those who had attempted to detonate suicide bombs on the London transport network the day before. The office of the Metropolitan Police Commissioner had been tried and convicted of a breach of health and safety legislation in 2006. That trial, and the investigation of other bodies such as the Independent Police Complaints Commission and the Metropolitan Police Authority, had revealed a series of organisational and individual failings that led to Mr de Menezes' death. The inquest was the first time that evidence from the passengers in the underground train carriage and the officers who shot Mr de Menezes was heard. It was also the first opportunity that the family (through their lawyers) had to test the evidence that was given.

57) The de Menezes inquest involved the consideration of evidence that was highly sensitive, such as the details of the Metropolitan Police's operational response to the threat posed by suicide bombers (including Operation Kratos), the assistance they had had from countries such as Israel and the USA in developing this, and other aspects of undercover and surveillance operations. The widespread concern that the Metropolitan Police had been operating a "shoot to kill" policy without any parliamentary approval or oversight made it particularly sensitive. A large number of witnesses also sought anonymity before giving their evidence.

58) The inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses, whilst remaining largely open and accessible to all.

59) This was done, firstly, by appointing a High Court judge as coroner who would be able to consider Public Interest Immunity (PII) applications by the police in respect of highly

54 See for example, the comments of Anne Squires, mother of the pilot Flight Lieutenant Allan Squires, as reported in <http://www.highbeam.com/doc/1G1-179435836.html>

55 Heard before Sir Michael Wright sitting as Assistant Deputy Coroner for Inner South London between September and December 2008. Michael Mansfield QC and Henrietta Hill were instructed by Birnberg Peirce & Partners for Mr de Menezes' family.

confidential policies and documents. National security issues were clearly central to the subject matter of the inquest, most importantly the Metropolitan Police strategy for dealing with suicide bombers. Where needed, the coroner granted PII in relation to certain documents. However, he ruled that many of the documents could be provided to the legal teams, upon strict undertakings as to confidentiality, not making copies and keeping the material secure, etc. On that basis the family's lawyers were permitted to see highly sensitive documents, and to question witnesses based on that material. In relation to the most sensitive material, a gist document was prepared summarising the material that could be shared with the family, and their lawyers were provided with the material underlying the gist document, again on strict undertakings.

60) Where discussion in open court touched upon the contents of any such protected documents, agreements were reached in the absence of the jury and the public as to what could be explored and, although some aspects were regarded as too sensitive to be investigated publicly, overall a reasonably fair public exploration of the issues was allowed whilst national security and other policing concerns were protected.

61) Secondly, suitable arrangements were made for the protection of witnesses. There were over 40 police officers who worked in highly sensitive anti-terrorist operations or covert surveillance whose witness evidence was required at the inquest. They were all granted anonymity by the coroner as a result. They gave evidence from behind a screen in court, and careful provision was made at the venue for their arrival and departure, to protect their identities. The inquest was nevertheless able to hear evidence from those witnesses. The jury, the family, one of their supporters and the lawyers were all permitted to see the witnesses giving evidence, so as to assess their demeanour (the police having carried out police checks on the family members and their chosen supporter beforehand). This was done without any risk or compromise to the identity of any of those witnesses, whose anonymity has been maintained despite the huge attention from media organisations.

62) In this case there was a huge public interest in hearing as much evidence as possible in the open, given issues raised by this very public shooting of an innocent man. By applying the safeguards such as those identified above, the inquest was able to remain public and accessible, yet with due respect for the concerns about the sensitivity of the materials involved.

4. Terry Nicholas⁵⁶

63) Mr Nicholas was shot dead in May 2007 by officers from the Metropolitan Police Service's Trident operation following a surveillance operation mounted on him. In October 2008 it emerged that the inquest touching on this death had been stalled because apparently the inquest could not receive sensitive material. The government proposals in the Counter

56 Heard before Lorna Tagliavini, Assistant Deputy Coroner for West London in September 2009. Sean Horstead was instructed by Birnberg Peirce & Partners on behalf of the family

Terrorism Bill 2008 regarding secret inquests were supposed to make it possible to resume the inquest.

64) However, after the government conceded defeat in parliament and withdrew the proposals for secret inquests contained in the Counter Terrorism Bill 2008, the coroner considered whether an inquest could, within the current legal framework, comply with article 2 of the European Convention of Human Rights where there were limitations on the evidence that can be disclosed and used at the inquest because of the possible operation of RIPA or other public interest immunity grounds.

65) In February 2009 the coroner, having herself viewed large tranches of unredacted versions of previously redacted material, ruled that notwithstanding the fact that there remained some limited areas of material that, possibly under the provisions of RIPA, could not be disclosed to her, she could “balance the tensions that arise, most notably between the requirements for openness and public scrutiny and the need to act within the current statutory framework in respect of the non-disclosure of certain evidence”.

66) Careful, practical ‘management’ of the inquest meant that it was able to proceed with the full participation of the family of the deceased, in public and with very few limitations or restrictions. The issue of officer anonymity was dealt with appropriately, and by way of agreement between the interested parties, in much the same way as in the Jean Charles de Menezes inquest, with the use of screens, ciphers and limited restrictions on media publishing the identity or images of the officers. Throughout, the family, legal representatives and the jury could see and hear and assess the witnesses.

5. Joan and John Stirland⁵⁷

67) Joan and John Stirland were shot dead by intruders to their home in August 2004. There was a substantial amount of sensitive information involved in the case in relation to: undercover and covert police operation in relation to major crime syndicate figures involved in the Stirlands’ deaths; the information known by Nottinghamshire Police at the time of the killings as a result of earlier incidents; why the Stirlands had not been given witness protection given the threat towards them and the fact that Mrs Stirland's son had been convicted of a murder which appears to have been the motive for the killing.

68) Police Officers who acted on an undercover basis or in senior and sensitive positions applied for and obtained anonymity. The majority of Police Officers who were involved in secret operations against the crime syndicate appeared via video link and had their identities further protected by the use of voice fragmentation and picture blurring. Documentation of a sensitive nature was redacted. Further anonymous witnesses to the inquest provided Statements via the Coroners Officer and these were redacted for sensitive information. Other witness statements were redacted following the interested parties having the

⁵⁷ Heard before Karon Monaghan QC sitting as Assistant Deputy Coroner for Lincolnshire in February 2010. Martin Huseyin was instructed by Stephenson Solicitors LLP for Joan Stirland’s son Michael O’Brien.

opportunity of considering the unredacted versions (ie prior to them being generally disseminated to the jury). Public interest immunity applications were heard in closed conditions by the Coroner with the appropriate interested parties. Both open and closed reasons were given for rulings on the same.

69) There were major concerns regarding security at the inquest given the background and the fact that the crime syndicate may still have influence. The public gallery was set up at a separate Court with video link and only the interested parties were allowed into the actual Court room where the inquest was being held. Mrs Stirland's son, who was serving a sentence of imprisonment, attended via a video link. Undertakings were provided by the relevant parties with regards to legal documents and these were handed back at the conclusion of the proceedings to the relevant Police Forces.

6. Terence Jupp⁵⁸

70) Terence Jupp died in August 2002 whilst working as a scientist for the Ministry of Defence ("MoD"). He was a member of a joint Anglo-American team conducting highly secret bomb making experiments at a MoD weapons testing site in Shoeburyness, Essex. It is understood he was involved in research looking at the composition of home-made fertiliser bombs and so-called "dirty bombs" which use conventional explosives to scatter radioactive material. He suffered extensive and subsequently fatal burns when an experiment went wrong and the chemicals ignited.

71) There was a huge amount of concern in both the UK and the USA about the extremely sensitive and highly classified nature of the material relating to Mr Jupp's death. It was said that secrecy was required because it would be "catastrophic" to both the UK and US national security if the results of the tests were compromised in any way by criminals or terrorists. Indeed an attempt to prosecute Mr Jupp's manager for manslaughter ended in 2007 when the Crown Prosecution Service withdrew charges but said that the case was "too sensitive" to explain the decision in open court.

72) However, eight years after his death, the inquest into Mr Jupp's death did successfully take place. The Coroner held that one of the issues to be decided was whether the extreme sensitivity of what Mr Jupp was doing led to his safety being compromised and the jury, therefore, needed to know exactly what he was doing. In his view it was essential that the jury and all properly interested parties, including the family had full access to sensitive materials which touched on national security. As a result, key parts of the four week inquest were held in camera under Rule 17 of the Coroners Rules. The family and the inquest jury had to sign confidentiality agreements. They were then able to see any of the sensitive documents and to hear all of the sensitive evidence without exception.

58 Heard before Dr Peter Dean, HM Coroner for Suffolk and South-East Essex between August and September 2010.

73) Other practical arrangements that allowed the coroner to protect the interests of national security whilst conducting the inquest included: the use of cipher lists for the chemical names; safes in court supplied by the MoD for each of the interested persons to store their 7,000 page bundle of sensitive documents; bundles printed on easily-identifiable pink rather than white paper with each page named for specific interested parties; prohibitions on the removal of pink papers from the courtroom with the Coroner agreeing to extended court opening hours to allow lawyers to work on the material; and all pink pages returned to the MoD at the end of the inquest. There were separate computers (with pink screens) for the recording of in camera sessions, and an agreed set of rules for those sessions. MoD police were at the Coroner's Court each day to guard papers and ensure security and a security adviser was in the court at all times to assist in resolving any emergency security issues that arose.

74) By adopting these measures the coroner enabled the jury and the interested persons, including the family, to see and hear all the evidence so that the inquest was a comprehensive examination of what had occurred. The jury delivered a critical narrative verdict. For eight years Mr Jupp's family had unanswered questions, and the inquest finally provided some explanations about what went wrong and why. They felt the inquest had been a fair and thorough inquiry, the jury had assessed the evidence correctly and were satisfied by recommendations made for improvements.⁵⁹

9. Azelle Rodney⁶⁰

75) The second case the former Justice Secretary was referring to during the debate on the Counter Terrorism Bill is that of Azelle Rodney. Mr Rodney's killing by the Metropolitan Police Service in April 2005 is the first police shooting case which is unlikely to ever be examined at an inquest.

76) In August 2007, Andrew Walker, Deputy Coroner for the Northern District of Greater London was told that he would not be able to see all the material in this case and that the family were also prevented from seeing it. The coroner was told by those acting for the Commissioner (and who had of course seen the closed material) that the fact that the obligation to disclose all core documents could not be complied with and that witnesses could not be openly questioned about certain core documents meant that it was 'plain and obvious' that for an inquest to proceed would be 'unfair' and would fail to discharge the requirements of article 2 of the European Convention on Human Rights.

77) Instead, Sir Christopher Holland has been invited by the Lord Chancellor to conduct a public inquiry which is taking place in a new framework, pursuant to the (not yet in force) provisions of the Coroners and Justice Act 2009 that enables ministers to suspend an

59 Mr Jupp's widow, Pat, has commented publicly on the inquest and her views have been reported in the press including The Telegraph on 1 September 2010.

60 Tim Owen QC, Leslie Thomas and Adam Straw instructed by Hickman & Rose Solicitors for Susan Alexander, Azelle Rodney's mother.

inquest in favour of an inquiry under the Inquiries Act 2005 (see particularly paragraphs 3 and 9 of schedule 1 to the Act).

78) The terms of reference of the inquiry are to inquire “how, where and in what circumstances Azelle Rodney came by his death on 30th April 2005” and to “make any such recommendations as may seem appropriate.”

79) The Azelle Rodney Inquiry (ARI) was formally opened on 6 October 2010. During the opening of the Inquiry counsel for the Home Office, James Eadie QC, stated that the Azelle Rodney Inquiry had been set up under the Inquiries Act 2005 so that it could receive all relevant material where an inquest could not. What this statement omits of course is that while the inquiry team can see sensitive material which a coroner is not allowed to see, the family are no better off in such an inquiry as they appear to be barred from seeing certain classes of sensitive material, which will therefore only be considered in secret, subject to any contrary ruling by Sir Christopher Holland.

80) The matter of whether parts of the inquiry will be held in private was adjourned.

81) The ARI has yet to commence the public hearings, likely to start in September 2012, but Susan Alexander and her legal team continue to adhere to the view that the ARI need never have been established if RIPA had been amended to enable coroners, juries and family members access to RIPA material in exceptional cases where required under article 2 ECHR, if necessary adopting the safeguards of jury vetting (as per ‘light touch vetting’ at para 2.13 of the Green Paper); and confidentiality agreements with jurors (as per para 2.13) and family members, to include reference to the criminal liability arising under RIPA. Security vetting of family members would be highly intrusive (as commented on in the Green paper at 2.15) and would not be needed in the public interest in the light of confidentiality agreements with family members and the criminal law consequences of making an unauthorised RIPA disclosures.

Written Evidence submitted by Campaign Against Criminalising Communities (CAMPACC) (JS 7)

We focus our comments on the area of secret evidence in court and immigration tribunal proceedings. We do not wish to make any specific comments on the oversight of security agencies or the ISC.

We use here the definition of ‘secret evidence’ which is given in the Justice report of June 2009 (‘Secret Evidence’), that is ‘The essential test of whether a case involves secret evidence or not is whether both parties have seen and had an equal opportunity to challenge all the evidence that is considered by the court in making its decision.’

The fundamental issue is whether evidence is disclosed in sufficient detail for an adequate cross-examination. As the Justice report states, *‘the unfairness of using anonymous hearsay or a gist of a withheld document will be tantamount to using secret evidence, because the defendant is effectively denied the opportunity to challenge it in open court [...] knowledge of the general allegation may be not be enough for the defendant to rebut the case against him via the special advocate in closed session unless sufficient detail of the evidence supporting the allegation is made known.’*

The government states in the Green Paper that *‘In certain instances, to hear a case in public or disclose information to the other party would be to endanger national security [...]’* It gives inadequate consideration to the alternatives suggested by Justice in its 2009 report; for example witnesses whose face or voice is concealed; or, *‘at the most extreme [the court or tribunal] not being told their true identity’*. In criminal cases involving drug dealing, for example, under cover police officers are protected in one of these ways. There is no real reason why this should not also be adequate for security service personnel in the types of proceedings discussed by the Green Paper. The Justice report also mentions the possibility of certain hearings being closed to the press and the public, which entails loss of transparency but is preferable to evidence being withheld from the non-state party.

Regrettably, the Green Paper takes the Special Advocate system as a model and proposes to address any injustice associated with it by mere minor modifications of the Special Advocate system. It notes that *‘the Special Advocate system is provided for in legislation in 14 different contexts of civil proceeding as well as performing a slightly different role in criminal trials in exceptional circumstances. In each context, the system operates along the same broad lines (unless affected by specific case law, such as AF (No.3) 1), based on the original model used in SIAC.’*

By taking this stance, the proposals of the Green Paper extend the systematic injustice already established in proceedings of the Special Immigration Appeals Commission. By proposing to legislate for Closed Material Proceedings (CMPs) in particular situations, they take away discretion from the courts and thus reduce government accountability. Although in rare instances a CMP may be in the interests of the non-state party if the alternative is no disclosure at all, in general the establishment of a government right to conceal evidence from

public scrutiny and to conceal its detail from the defence would be adverse to justice. It would create a routine way for the use of a 'national security' rationale that readily conceals a motive to avoid political embarrassment about illegal or unethical activity, e.g. government complicity in torture. Such a motive has been exposed in rare cases where 'security-sensitive' material has been disclosed by various means.

The Special Advocate system has been designed for CMPs. Even with the modifications suggested by the Green Paper in relation to training of SAs, and their access, after they have seen closed material, to the clients they are defending, the fundamental objection remains that opportunities for cross-examination may well be inadequate.

In our view the Green Paper's failure to challenge the basic architecture of the Special Advocate system or the routine use of closed procedures in anti-terrorism measures and in SIAC is unacceptable. We hope that the JCHR will oppose the government's assumption that the Special Advocate system is a good model, and use this opportunity to question current procedures in the anti-terrorism measures where it is used (listed in Green Paper Appendix C). We would agree with Lord Goodhart when he said, in the Lords debate on the Counter Terrorism Bill of 2008, '*It is plain that the special procedure [the SIAC model] should, in any event be used as little as possible, whether for control orders, asset-freezing or anything else [...]*' We believe that this procedure should never be used as it violates the most basic principles of fair trial.

We are concerned about six main areas of proceedings in which secret evidence either is used by the state or may be withheld from the defendant, appellant or claimant; actions to secure compensation for wrongdoing by state agents; trials abroad where an individual seeks disclosure of sensitive material from the UK authorities to assist his or her defence; SIAC; TPIMs; asset freezing orders and appeals against proscription of organisations

I) Secret evidence in civil actions to secure compensation or redress against the actions of state agents, in particular where UK officials have been implicated as bearing some responsibility in relation to instances of torture.

The main emphasis of the Green Paper concerns protecting security services and their procedures in the course of court proceedings. This has mainly come up in recent months in civil proceedings involving security-sensitive information, e.g. people such as the Guantánamo detainees seeking compensation against UK officials who have been complicit in their kidnapping, torture and/or mistreatment.

We reject the government's argument that non-disclosure of evidence to the claimant is legitimate in such instances. In defence of its position the Ministry of Justice argues that disclosure would entail disproportionate costs in conducting a search through security services' archives. Against this there are two arguments. Firstly, if appropriate procedures were in place and were enforced to ensure that UK officials never become complicit in torture or mistreatment, this would surely involve a special procedure for recording and

archiving interviews and correspondence concerning situations where this might at some point become an issue, in particular the interrogation by foreign powers of persons who had been handed over by the UK authorities. Such recording procedure would reduce the cost of archive search to extract evidential material. Secondly, if such procedures were in place and were rigorously enforced, there would be no need for court actions of this kind. For the Ministry of Justice to present the cost argument for non-disclosure is rather like a burglar saying his phone bill would be too high if he were to try to trace all the people who could bear witness that they saw him somewhere else at the time and place of the crime.

Allegations of torture and complicity in torture are amongst the most serious that could be levelled at a state, and to seek to avoid disclosure on the basis of cost could be seen to be an indication of a failure to recognize the importance of the issue.

The government also argues in the Green Paper that disclosure of intelligence material would affect the willingness of foreign powers to share intelligence. It would be far too easy for torture and wrongful detention, which are very serious crimes, to go undetected under cover of such a defence, especially given the high degree of cooperation between UK and US authorities in the international rendition, detention and interrogation of terrorism suspects. Justice is as much part of the necessary protection of the public as intelligence, not least because injustice sometimes generates a violent reaction.

The Green Paper mentions the case of *Al Rawi vs Security Service* (para. 1.32) in which the government side wanted a closed material procedure (CMP) in order to facilitate the disclosure of evidence which the government wished to remain secret, but which it thought was material to its own defence. In deciding not to grant a CMP, the Supreme Court recognized that the non-disclosure of security-sensitive evidence could possibly lead to a case being virtually impossible to try, as it had in an earlier instance (paras 1.33 to 1.34)—although in the end the *Al Rawi* case was settled out of court, precisely because the government refused to disclose information and therefore could not ‘defend’ its claim. Thus the government argument is that a CMP would prevent cases being settled which would have otherwise been defended. The risk is that ‘national security’ considerations can be used to avoid scrutiny, embarrassment and evidence of unlawful actions. If there is genuine intelligence to be protected, it can be disclosed in a redacted form.

We feel that the over-riding principle is that the court should take steps to bring into the open any material which the security services may seek to conceal, wherever its exclusion would reduce an individual’s opportunity to prove their innocence or seek redress against alleged wrongdoing by the state. To make a case impractical to try (and thus to force its abandonment) would be contrary to this principle. Where a CMP is the only way to avoid a demand from the government for a PII procedure to maintain secrecy, a CMP should be reluctantly accepted by the courts although an open procedure would be better.

Moreover there is no contradiction between the solutions we would advocate for two separate contexts. In some instances, a CMP should be available to the non-government side to obtain disclosure, in order to see information and then if desired to make an

application for it to be made public. In other instances where the government wishes certain material to remain secret but the defendant (against HMG) seeks its disclosure, a CMP should not be allowed and neither should a PII procedure. If the material is to be used as evidence, then witnesses should be made cross-examinable, although with appropriate protection of their identity where their safety requires it, and not necessarily in a public hearing. In other words, the government should not be allowed to withhold information about the detail of evidence it is using if this detail is needed for effective cross-examination of its case. The argument that such information is 'security sensitive' all too easily becomes an excuse to hide facts which are embarrassing or which would reveal wrongdoing by the security services.

In any future legislation about CMPs Parliament should seek to defend transparency and the opportunity for the less powerful party to demonstrate their innocence or to secure compensation for ill treatment at the hands of state agencies. The continuous trickle of cases involving deaths in custody, shootings of members of the public by the police, assault or wrongful arrest, etc. deserve the maximum degree of transparency in the public interest as well as in the interests of the individual victims and their families. We emphasise that the measures suggested by the Justice 2009 report, mentioned above, should be adequate to secure the safety of individual agents who become witnesses; and that in extremis, press and public can be excluded. If so, the only persons who would become party to the sensitive evidence would be defendants/claimants (who, in the case of anti-terrorism measures or SIAC, are generally in custody) and their lawyers. This hardly presents a major risk to security service operations, although there could, as a safeguard, be a ban on full publication of the court proceedings or restrictions on media reporting until arguments about open disclosure had been resolved. In practice much has been learned about security services methods from SIAC cases and no proof has been offered that national security has been subsequently harmed.

2) Non-disclosure of evidence wanted to defend an individual whose liberty is at risk in a foreign court or tribunal (for example the military tribunal of Binyam Mohamed)

The Green Paper considers at length the issues facing the government when confronted with a request that it disclose security-sensitive information for use by a defendant in a trial abroad, for example by Binyam Mohamed for his military tribunal in the USA. We believe that the over-riding principle here should be the opportunity of a British citizen or former resident to defend themselves adequately. Instances of this kind will be rather rare and in any case, if the country where the court or tribunal is taking place is concerned about media reporting or public scrutiny of material which is sensitive in relation to their own interests, it is up to them to make whatever arrangements they feel appropriate to minimise public exposure.

3) SIAC procedures as an unjust model for the Green Paper

We have been concerned for many years about the use of secret evidence by the Special Immigration Appeals Commission. The affront to the UK reputation for justice is summed up by former Special Advocate, Dinah Rose QC when she described the great difficulties she encountered taking evidence in closed sessions when the Home Office had applied to revoke a detainee's bail on the basis of secret evidence: "*I can still recall my deep feeling of shame when I heard the appellant ask the judge the question: why are you sending me to prison? To which the judge replied: I cannot tell you that. I could not believe that I was witnessing such an event in a British court. I could not believe that nobody protested or made a fuss. They simply took him to jail, without any explanation at all.*" (see <http://www.andyworthington.co.uk/2009/04/01/britains-guantanamo-calling-for-an-end-to-secret-evidence/>). Some small comfort may be taken from the House of Lords decision of December 2009, which helped people faced with refusal of SIAC bail on grounds not explained to them (<http://www.guardian.co.uk/uk/2009/dec/01/secret-evidence-trial-terrorism-government>). This is referred to in para 1.37 of the Green Paper in conjunction with the European Court decision earlier that year on which it was based. However, despite the requirement for 'gisting' which has now been established as mandatory even where 'damage to national security' may result, there is still no obligation to explain to appellants, in a way which permits of proper cross-examination, the full reasons for the proposal to deport them and the evidence on which these reasons are based. This unfortunately may allow the government side to use, without challenge, statements that are based on factual errors. For example in one case cited by Dinah Rose QC at a public meeting in 2009, a mistake by the security services was behind SIAC's case against two men. They (secretly) accused two different men of simultaneously using the same false passport to travel abroad in two separate cases. The mistake was only discovered by the coincidence that the special advocate was the same person in both cases; it would never have come to light otherwise. But even then, the security services denied that such a mistake was possible.

The Green Paper ignores the widely recognized injustice in the use of secret evidence by SIAC. In fact it dismisses decade-long criticisms by human rights organizations such as ourselves, Liberty, Amnesty, and the Haldane Society with the words '*There are already a number of specific legal contexts in which procedures are provided for in legislation so that sensitive material can be handled by the courts, most notably in the Special Immigration Appeals Commission. Such procedures have been shown to deliver procedural fairness and work effectively*'. Effectively for the government, maybe, but without justice for the appellants so that the procedures completely fail to answer the government's supposed concern for '*the UK's reputation as a free and fair democracy, respectful of human rights and the rule of law.*'

The Green Paper notes that Article 6 of the ECHR does not apply to immigration cases, including SIAC cases. Despite this obvious fact, natural justice is denied by current SIAC procedures. The Green Paper states that (para. 2.46) '*the Government sees a benefit in introducing legislation to clarify the contexts in which the [...] "gisting" requirement does not apply, and asks the question "In what types of legal cases should there be a presumption that the*

disclosure requirement [...] does not apply? It is most alarming to think there could be any instances where an individual does not deserve to know at least the gist of the allegations against them. SIAC stands out as an area where the exemption from Article 6 gives appellants no hope for change unless the UK adopts a 'natural justice' approach, independent of the ECHR.

4) Control orders/TPIMs

Secret evidence has been unjustly used in cases of preventive detention, curfews or other restrictions of liberty in relation to 'terrorism suspects'. We have spoken out against this for many years, including our 2006 submission to the JCHR (http://campacc.org.uk/uploads/jchr_submission_080206.pdf)

We were pleased to find that in June 2009, the Law Lords ruled that persons faced with control orders should know the gist of the evidence against them (see <http://www.guardian.co.uk/politics/2009/sep/07/control-orders-terror-suspects-revoke?INTCMP=SRCH> September 7 2009). However, the question is whether that ruling will hold in relation to 'TPIMs', i.e. the measure which will replace control orders, or whether the ruling will fall and a new battle for evidence disclosure will begin. The Green Paper refers in para. 1.37 to recent decisions by judges that Article 6 of the ECHR requires a summary of the intelligence case against them to be given to defendants 'in cases where the liberty of the individual is to some extent at stake' whilst noting that 'the precise extent of this has yet to be determined' (that is, by court precedents). We share the concerns expressed in 2010 by our sister organization the Scottish Campaign against Criminalising Communities (SACC) that '*There have been some indications that the Home Office may attempt to fly under the radar of the ruling, for example by making minimal disclosures, by repeated changes of the grounds for imposing a control order on the same individual, or by using control orders whose effects may be thought insufficiently severe to trigger the right to a fair trial.*' (see http://campacc.org.uk/uploads/ct_review_sacc_2010_2.pdf, the SACC submission to the government's 2010 review of counter-terrorism powers). Under the TPIMs regime, both these fears may become a reality so that despite the 2009 rulings, TPIMs may continue to present an unacceptable form of punishment without trial **on the basis of evidence which cannot be sufficiently challenged.**

5) Asset freezing orders

The use of secret evidence remains an acute issue with asset freezing orders. These orders represent a very serious deprivation of liberty (to earn money, to have access to funds for travel, for education or for major asset purchase, etc.) and can be imposed indefinitely. As we have said in our submission to the JCHR concerning the **Terrorist Asset-Freezing etc. Bill** in October 2010 (http://campacc.org.uk/uploads/CAMPACC_Submission_JCHR_Asset-freezing_Bill_2010.pdf) the right of the state to withhold evidence from the defendant may make it impossible to rebut the allegations on which the asset freezing order is based.

The Green Paper refers to asset freezing orders in para 2.39 and in Appendix C, but the intention about disclosure of evidence is far from clear. It seems that any reform will be subsumed under the minor changes to the role of Special Advocates, and that the principle of Closed Material Proceedings will remain. We feel this issue deserves far more attention.

6) Appeals against proscription of organisations

The use of secret evidence here is of particular concern, since Article 6 of the ECHR cannot be invoked as a reason why even the 'gist' of evidence should be made available to those affected by proscription of organizations; yet proscription triggers the potential criminalization of members and associates of a proscribed group under a number of anti-terrorism measures. For example collecting money for a proscribed organisation, speaking on the same platform as its members, or distributing literature, all constitute 'terrorist' offences (and expose those involved to prosecution and/or deportation). Yet despite their liberty being thus placed at risk by proscription, secret evidence can and is used in such hearings; Article 6 provides no protection. Current injustice would be worsened if the use of CMPs in such hearings was given blanket authorization by legislation.

19 January 2012

Written Evidence submitted by Dr Lawrence McNamara, University of Reading (JS 8)

Summary

1. This submission addresses the Committee's questions 1, 3, 7, 9, 13, 18 and 19.
2. Drawing on the author's recent empirical research in the UK and Australia, it pays particular attention to the press freedom issues at question 18. A copy of a key publication on the press freedom effects of closed court proceedings accompanies this submission.⁶¹
3. The Green Paper proposals are substantially at odds with open justice traditions. A commitment to open justice is absent from its statement of key principles.⁶² Open justice warrants a place in those principles; it is a fundamental feature of common law trials and of British justice.⁶³
4. The **overarching recommendation** of this submission is that CMPs should not be implemented in civil proceedings generally. Doing so would establish an unnecessary, unjustifiable and unwise regime of secrecy which has the clear potential to become widespread in a category of cases that is already beset by secrecy and in which it is by no means clear that CMPs would necessarily result in fairer trials. There is much in the observation made by Lord Brown in *Al Rawi* that closed procedures would damage 'the integrity of the judicial process and the reputation of English justice.'⁶⁴
5. **If the proposals do proceed** then there should be a sunset clause. Safeguards would be essential to limit damage to open justice, transparency and accountability. **Specific recommendations** are made on this basis. However, they should not be regarded as an endorsement of the Green Paper's proposals; rather, they seek to minimise the problems that would arise or are already evident.

The author and the research informing the submission

6. The author is Reader in Law and ESRC/AHRC Fellow at the University of Reading. He runs the 'Law, Terrorism and the Right to Know' ('LTRK') research project. This 3-year project (2009-12) is funded by Research Councils UK under its Global Uncertainties priority. LTRK examines how different arms of the state control and manage information about terrorism and security, how the media access that information, and how the media report that information.

61 L McNamara, 'Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?' (2009) 14 *Media & Arts Law Review* 1–30. The author's response to the Green Paper is available online: L McNamara & S McIntosh, 'Justice and Security Green Paper: Response' 6 Jan 2012 http://www.reading.ac.uk/web/FILES/LTRK/Green_Paper_response_McNamara_2012-01-06.pdf.

62 *Justice and Security Green Paper Cm 8194* (2011), Executive Summary at [10].

63 See, for e.g., the comments of Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [10].

64 *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [83].

7. The LTRK project includes around 60 interviews with, among others, the judiciary (with the support of the office of the Lord Chief Justice), government (including the Home Office, RICU, OSCT, the Ministry of Defence, and the Cabinet Office), ACPO and police forces, the CPS and criminal defence lawyers, and journalists, media lawyers and editorial decision-makers.

Q 1: Does any evidence exist of the scale of the use of secret evidence in the 14 contexts the Government has identified in which CMPs are already provided for in legislation?

8. There does not appear to be any systematically compiled evidence of the scale of the use of secret evidence. There does not appear to be any publicly accessible formal or informal recording of the total overall use of CMP, or the total use within the different contexts identified by the Government. Nor is there any indication that such evidence exists out of the public eye.

9. Moreover, there does not appear to be any formal or informal systematic way of identifying the scale of its use on a case-by-case basis, from which a researcher might be able to identify the total use. Even though CMPs have been a regular and controversial feature of (for example) SIAC hearings, there still appears to be no systematic evidence base for assessing the scale of their use even in that jurisdiction.

10. This is a serious shortcoming in the existing regime and likely to be exacerbated if CMPs are extended generally to civil proceedings. At paragraphs 23–24, below, **recommendations B and C** suggest ways to remedy these problems.

Q 3: Has the Government demonstrated the necessity of legislating to make CMPs available in all civil proceedings?

11. No. The necessity for CMPs does not yet seem to have been clearly established. *Carnduff* appears to be the only case not to proceed, and it is not clear that the decision to settle the recent claims by Guantanamo detainees can be attributed to risks posed to intelligence sources, methods or relationships.⁶⁵ It may be that circumstances could arise where CMPs would arguably be beneficial in individual cases, but it is not clear that the case for CMPs in civil proceedings generally has yet been made. For example, the possible dangers of withdrawing or settling a case are raised in the Green Paper at [1.10], but it is not clear that those circumstances are so frequent and so demanding that there are not other adequate solutions. On the contrary, it appears quite possible that the detriments of a CMP regime may outweigh the benefits.

Q 7: Do you agree with the Government that a hearing in which a judge has seen all the evidence is more likely to secure justice than a hearing where some evidence has been ruled inadmissible?

⁶⁵ *Carnduff v Rock* [2001] EWCA Civ 680.

12. No. It may be more likely in some individual cases, but there is no evidence nor any reason to see it as being more likely as a general principle. This is especially so where the evidence is not adequately tested, and CMPs make it difficult, if not impossible, to test the evidence properly. This *will* have a consistently negative impact on the fairness of proceedings. The comments of Lord Kerr in *Al Rawi* are compelling in this regard: ‘To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.’⁶⁶

Q 9: Should the availability of a CMP be a decision for the Court, or for the Executive subject only to judicial review?

13. It should be a decision for the Court. One of the key issues surrounding sensitive evidence is that it remains within the control of the government and, as such, makes accountability and openness inherently difficult. If the Executive expands its control over decisions about how such evidence is to be managed then it will inevitably make unjustifiable and damaging inroads into the principles, practice and traditions of open justice. Moreover, there is no demonstrated reason for shifting that control. In addition, there does not appear to be any evidence that a shift towards the Executive is required. On the contrary, it can serve only to increase the scepticism and distrust of government, which, in turn, has the potential to fuel radicalisation both in Britain and abroad.

Q 13: Does any jurisdiction provide particularly pertinent comparative lessons?

14. The Australian experience and that country’s National Security Information (Criminal and Civil Proceedings) Act 2004 warrant attention. This is discussed under question 18, below, with regard to the press freedom issues and my empirical research on the effects of those laws.

Q 18: What will be the impact of the proposals on freedom of the press?

15. A general CMP regime would have a significant detrimental impact on the ability of the press to access and report information and, consequently, on the public’s right to know. That right to know extends to both the accountability of the state and the activities of those who have been subject to the coercive powers of the state. Given that the media is effectively the eyes and ears of the public in courts, a general CMP regime represents a major retreat from open justice traditions.

16. Under a CMP regime where the parties are able to agree to CMPs, it is especially concerning that information which is *not* potentially prejudicial to national security may be considered under a CMP and therefore may never be revealed to the public or the press. For trial management reasons, closed hearings easier for judges and parties to proceedings may also not object to CMPs for similarly practical reasons. Australian research shows that under the National Security Information (Criminal and Civil Proceedings) Act 2004, once the

66 *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [93].

options were available to limit the openness of proceedings then this happened consistently. As an Australian lawyer put it in research interviews, ‘The routine order being sought [...] is that all security sensitive information be heard in closed court. That is now the default set of orders.’⁶⁷ It is an example of the kind of concern Lord Hope raised in *Al Rawi* that it becomes difficult to circumscribe the use of general provisions once they become available.⁶⁸

17. The present LTRK research suggests that the Courts in England & Wales are more inclined to keep proceedings open wherever possible and have been more successful than Australian courts in ensuring that hearings are open to the media. This is the preferable position. In LTRK interviews, journalists have noted that the courts are vitally important avenues for information to be exposed. The judicial interviews have suggested a strong preference for open hearings, while recognising that there may be some circumstances in which closed hearings are necessary. In this context, there is a strong need for mechanisms which best counter any trend towards normalising closed proceedings. Any such normalisation would fundamentally alter the nature and operation of open justice principles in national security cases.

18. If CMPs are introduced and are only to operate in exceptional circumstances then there must be safeguards within the triggers and other processes, so that press freedom and open justice are considered and given sufficient priority. **Recommendations D–F** suggest several safeguards at paragraphs 25–27, below.

19. Open justice is not among the Green Paper’s proposed criteria for determining how sensitive evidence should be managed.⁶⁹ Should CMPs be introduced then open justice should be an express criterion. In this respect, Australian legislation is not an appropriate model: that country’s Act does not include open justice as a criterion and that is a significant weakness.⁷⁰ Notably, the legislation does not follow the Australian Law Reform Commission’s recommendation that open justice be a consideration in national security laws.⁷¹ **Recommendation G** addresses this issue at paragraph 28, below.

20. If CMPs are introduced then access to information is essential. At paragraphs 23-24 below, **recommendations B and C** suggest strategies for improving that access.

Q 19: Does the courts’ power to order the disclosure of material to a claimant to assist in other legal proceedings (the so-called Norwich Pharmacal jurisdiction) risk the disclosure of material which could damage national security?

67 L McNamara, ‘Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?’ (2009) 14 *Media & Arts Law Review* 1 at 15.

68 Lord Hope in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [73].

69 *Justice and Security Green Paper*, Cm 8194 (2011) at [2.7, third bullet point].

70 Cf. National Security (Criminal and Civil Proceedings) Act 2004, ss 31, 38L.

71 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC Report 98 (2004), Recommendation 11–19 and generally [7.15]–[7.41]; see also recommendation 7–1 on non-party access.

21. No. Although there is a very real interest in maintaining the confidentiality of intelligence provided by foreign agencies—and the LTRK interviews have borne this out—it does not mean that the *Norwich Pharmacal* jurisdiction poses a danger and nor does it mean CMPs need to be implemented. The decision in *Binyam Mohammed* made it clear that there is still a very strong judicial deference to the executive on these matters, and the disclosure of material in this case would not have occurred but for its disclosure in US litigation.⁷² In the eyes of Lord Neuberger MR, it appears that even a slender risk to national security would be sufficient to prevent disclosure.⁷³

Recommendations

22. Recommendation A—sunset clause: With regard to all that follows we are of the view that given the sweeping change that these proposed laws would represent and the risks they carry, a sunset clause should be included in any proposals.

23. Recommendation B—recording of use of CMPs: In each matter where a CMP is used there should be a requirement that a judgment provide a clear and perhaps template-form statement of at least: (1) the duration of open hearings and closed hearings; (2) the number of witnesses heard in closed proceedings and the nature of those witnesses; (3) the length of a closed judgment; (4) whether national security was in issue in the proceedings. Given the length of time that a civil action may take, it could be appropriate to have ongoing records of these matters available online.

24. Recommendation C—reporting on use of CMPs: There should be annual or quarterly reports on the total use of CMPs.

25. Recommendation D—triggers and notice: The media (and the public generally) should be notified of any decision to seek a CMP. A subscription-based email alert would be a possible method. Notice of seven days may be appropriate; for example, that period is prescribed under the Criminal Procedure Rules, Rule 16.10.

26. Recommendation E—triggers and standing: Standing to challenge the decision should not be limited to other parties in the case. Significantly, media organisations should have a right to challenge the decision. It cannot be left to the parties alone to agree to a CMP.⁷⁴

27. Recommendation F—hearings and standing: In hearing arguments about how material should be used, media organisations should again have a right to be heard, or should at least be acknowledged to be representative of a particularly important public interest. While it will be difficult for them to make informed submissions given the lack of background

72 *R (Binyam Mohammed) v Sec of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [191], [295].

73 *Ibid* at [191].

74 *Cf. Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [46].

information available to them, it would at least provide the court with some input which may draw attention to open justice issues in ways the parties are unlikely to do. If practical, the ability of media organisations to be represented by special advocates may also be valuable at this point.

28. Recommendation G—hearings—criteria should include open justice: The criteria for determining the appropriate treatment of sensitive material should expressly include not only the assessment of harm caused by open disclosure but also (a) the benefits of open disclosure and (b) the harm caused by the absence of open disclosure. An explicit requirement that such considerations should inform any decision would better achieve the stated aim of ‘ensur[ing] that as much material as possible can be considered in open court’. In particular, given that non-parties would be inherently limited in their ability to make informed submissions (as mentioned above), open justice criteria are vitally important.

20 January 2012

Written Evidence submitted by Amnesty International (JS 9)

INTRODUCTION

Amnesty International is concerned by certain proposals in the Justice and Security Green Paper which, if enacted, would fail to ensure respect for the right of anyone whose human rights have been violated to receive an effective remedy.⁷⁵ This includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated and, if established, an effective remedy granted. These rights are entrenched in a range of human rights treaties to which the United Kingdom is subject, including:

- The European Convention on Human Rights article 13, as well as the procedural aspects of articles 2 and 3 as elaborated by the jurisprudence of the European Court of Human Rights.⁷⁶
- The International Covenant on Civil and Political Rights article 2(3).
- The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, articles 13 and 14.

The UN General Assembly has also adopted Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles on the Right to a Remedy and Reparation), which further elaborates on the some of the rights described above.⁷⁷ These principles affirm unequivocally that “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization”.⁷⁸

The consistency of the proposals in the Green Paper with the right more generally of all persons to a “fair and public hearing” in any “determination” of a person’s “civil rights and obligations” (as provided for by article 14 of the ICCPR and article 6 of the European Convention on Human Rights), is also of concern. Principles of open and natural justice forming a fundamental part of the UK’s common law have traditionally helped ensure that UK civil proceedings meet or exceed international fair trial standards, but it is precisely those elements of UK law that the Green Paper proposes radically to weaken.

In light of the wide-ranging and serious implications that some of these proposals would have, Amnesty International considers that the government has not sufficiently demonstrated that the measures would be compatible with its international human rights obligations.

75 Justice and Security Green Paper, CM 8194 October 2011. See Amnesty International UK: Response to the Justice and Security Green Paper, January 2012, for Amnesty International’s full response to the government’s proposals in the Green Paper

76 See, e.g., *Giuliani and Gaggio v Italy* [Grand Chamber], (App No 23458/02), 24 March 2011; *Kaya v Turkey*, (App No 22729/93), 19 February 1998; *Ilhan v Turkey* [Grand Chamber], (App No 22277/93), 27 June 2000; *Assenov and Others v. Bulgaria*, (App No 24760/94), 28 October 1998.

77 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

78 Basic Principles on the Right to a Remedy and Reparation, 60/147, para 24.

In scrutinizing proposals in the Green Paper the context in which they have been brought forward must also not be forgotten. The cases identified as demonstrating the need for change, ones in which “sensitive information is at their heart”, are those which concern allegations that the UK has been involved in serious human rights violations, including torture and other ill-treatment, rendition and unlawful detention. Amnesty International recognizes that there may be circumstances in which the government could in some proceedings lawfully restrict disclosure of certain information, for example in some cases where disclosure would put the lives or safety of identifiable individuals at risk. However, the need for sensitive material to be handled appropriately does not negate the right of victims of human rights violations to disclosure of the truth. It is of great concern, therefore, that the proposals in the Green Paper are directed at those very cases where principles of transparency, openness and fairness should be of the utmost importance—where there is credible evidence of involvement in human rights violations by the state.

The invocation of secrecy on grounds of national security, or the public interest, has repeatedly been one of the central obstacles in preventing victims of human rights violations from securing their right to remedy and reparation and obstructing efforts in achieving genuine accountability for those violations.⁷⁹ International law does not provide states with unfettered discretion as to what can be kept secret in the name of national security. Numerous international and regional experts and bodies have emphasized that “information and evidence concerning civil, criminal or political liability of the state’s representatives for serious human rights violations are not and must not be considered worthy of protection as state secrets.”⁸⁰ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Special Rapporteur on counter-terrorism and human rights) has stated that if exceptional circumstances exist where information concerning human rights violations is truly impossible to extrapolate from material genuinely harmful to national security, human rights standards require that an “appropriate mechanism” be found.⁸¹ The proposals contained in the Green Paper, however, would allow information to be kept secret in a far wider range of circumstances, and would not constitute an “appropriate” mechanism from a human rights perspective.

79 For further information see the following Amnesty International reports; *Open Secret: Mounting evidence of Europe’s complicity in rendition and secret detention*, (Index: EUR 01/023/2010); *State of Denial: Europe’s Role in Rendition and Secret Detention*, (Index: EUR 01/003/2008); *USA: Guantanamo: A decade of damage to human rights and 10 anti-human rights messages Guantanamo still sends*, (Index: AMR 51/103/2011); *USA: Investigation, prosecution, remedy: Accountability for human rights violations in the ‘war on terror’*, (Index: AMR 51/151/2008); *Germany: Briefing to the UN Committee against Torture*, (Index: EUR 23/002/2011); *Lithuania: Unlock the truth in Lithuania: Investigate secret prisons now*, (Index: EUR 53/002/2011).

80 See Parliamentary Assembly of the Council of Europe, Resolution 1562 (2007) and Recommendation 1801 (2007). See also report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), paras 58-63, 75; also the ‘Johannesburg Principles’ on national security, freedom of expression and access to information—developed in 1995 by a group of experts in international law, national security and human rights which states that “a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest” (principle 2).

81 Report of the Special Rapporteur on counter-terrorism and human rights, Human Rights Council, UN Doc A/HRC/10/3 (4 February 2009), para. 75.

CLOSED MATERIAL PROCEDURES

In light of Amnesty International's particular expertise this submission focuses on the proposal to introduce closed material procedures (CMPs) into civil claims for damages where the state is alleged to have been involved in or committed serious human rights violations. Amnesty International does not believe that the government has made the case that the introduction of CMPs in such cases would be fully compatible with respect for human rights and that it is a strictly necessary and proportionate means by which to respond to any legitimate security concerns that the government may have with respect to threats to the life or safety of the general population or particular individuals.

The right to an effective remedy and reparation for victims of human rights violations is enshrined in all major human rights treaties. International law requires that remedies are available not only in law but are accessible and effective in practice⁸² and includes the right to the following: 1) equal and effective access to justice and fair and impartial proceedings, 2) adequate, effective and prompt reparation for harm suffered and 3) access to relevant information concerning those violations.⁸³ Inherent to this is the right of victims and society as a whole to know the truth about the violations that they have suffered.⁸⁴

Allowing the government to rely on secret evidence in cases where the claimant's only effective means of seeking a remedy for human rights violations is through civil litigation, as the Green Paper proposes, would be inconsistent with a range of aspects of this right. Notably the introduction of CMP into civil claims for damages undermines the right to effective access to justice by potentially denying victims of human rights violations access to a meaningful procedure in which their claim can be fairly adjudicated and if established reparation granted. It will also restrict the ability of victims of human rights violations to access information about the circumstances of the violations they have suffered, as they are entitled to under international law.⁸⁵

82 See UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) which says that states "must ensure that individuals also have accessible and effective remedies to vindicate" the rights protected by the ICCPR (paras 14 and 15). The Committee has noted even when the legal systems of States parties are formally endowed with powers to grant an appropriate remedy, this will be insufficient if the remedy procedures fail to function effectively in practice (para 20) . See also UN Human Rights Committee, General Comment no 20, concerning prohibition of torture and cruel treatment or punishment (10 March 1992), paragraphs 14 and 15. See similarly European Court of Human Rights *Aydin v Turkey* [Grand Chamber], (App No 57/1996/676/866), 25 September 1997, para 103 and similar jurisprudence.

83 Basic Principles on the Right to a Remedy and Reparation, 60/147; UN Human Rights Committee General Comment no 31, para 16.

84 The United Nations has also formally recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", see UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005; Basic Principles on the Right to a Remedy and Reparation, 60/147, article 22(b).

85 Basic Principles on the Right to a Remedy and Reparation, 60/147, articles 11(c) and 24. Restrictions on the rights of alleged victims of human rights violations to receive information pertinent to their claim may also raise issues in relation to their rights of access to information of a personal nature as protected for

When considering the necessity of such drastic changes to the justice system, attention should be drawn once again to the fact that the cases which are the focus of the proposals are ones in which the UK is credibly alleged to have been involved in serious human rights violations, including torture or other cruel, inhuman or degrading treatment and enforced disappearance. Clearly the primary response of the UK government should be to ensure that the actions of UK authorities always comply with the highest human rights standards. This includes by ensuring effective, impartial, thorough and independent investigations into all credible allegations of UK involvement in serious human rights violation that provide the alleged victims with key findings and access to facts about their claims, and other forms of redress and guarantees of non-repetition. The repeated failure to ensure such investigations and results must be seen as contributing to occurrence of the civil litigation cases with which the Green Paper is concerned, and yet the Green Paper focuses only on establishing new latitude for the government to keep information secret without recognizing the failures of investigation and remedy as an underlying cause that must itself be addressed.⁸⁶

Further, as emphasized earlier, respect for the right of access to an effective remedy for violations of international human rights standards requires that evidence concerning the civil, criminal or political liability of the state's representatives for serious human rights violations is not subject to secrecy provisions. Amnesty International believes that there is no legitimate reason why a civil case for damages where the UK is alleged to have been involved in or committed human rights violations cannot proceed fairly and have its merits properly adjudicated under the current system.⁸⁷ As such the government's argument that CMPs must be introduced in the interests of justice because otherwise these types of cases will either be settled or struck-out is misleading. Indeed it should be noted that to strike out a civil case for damages where the state is alleged to have been involved in serious human rights violations would itself be manifestly incompatible with the right to an effective remedy and reparation. Leaving aside whether such a scenario would actually be likely to occur,⁸⁸ the

instance under article 8 of the European Convention on Human Rights ((App no 32555/96), 19 October 2005, paras 155–169) and article 19 of the ICCPR.

86 The Detainee Inquiry, established by the UK government to examine UK involvement in serious human rights violations, including torture and other ill-treatment, unlawful detention and rendition, of individuals detained abroad in the context of counter terrorism operations fell short of the human rights standards requiring an effective, impartial, independent and thorough investigation into such allegations. For further information see, *United Kingdom: Detainee Inquiry terms of reference and protocol fall far short of human rights standards*, (Index EUR 45/011/2011). On 18 January the Justice Secretary announced that the UK government has decided to conclude the work of the Detainee Inquiry in light of the commencement of new criminal investigations, but that it still intended to hold a judge-led inquiry into the allegations in the future. In light of this announcement Amnesty International hopes that that this future inquiry will be fully compliant with international human rights standards and law. See *UK: Detainee Inquiry closure presents an opportunity for real accountability* (Index EUR 45/0052012).

87 It is disappointing that there is little examination in the Green Paper of other mechanisms which could be employed alongside PII to ensure that legitimately sensitive evidence is protected from unnecessary disclosure, whilst still allowing for as fair and transparent a procedure as possible, such as the use of confidentiality rings, targeted disclosure, redactions, in camera hearings and so forth.

88 The case referred to by the government in this regard is *Carnduff v Rock* [2001] EWCA Civ 680, which was a contractual claim brought by a police informant. A number of submissions to the Justice and Security Green Paper consultation have questioned the use of *Carnduff* as a precedent to justify the proposals. See for example, *JUSTICE, Justice and Security Green Paper Consultation Response*, p.20 and *Bingham Centre for the Rule of Law, Response to the Justice and Security Green Paper*, para.22. See also Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.50 who states "cases such

government should not rely on invoking the spectre of an alternative that would contravene international human rights law, as a justification for the introduction of measures that would themselves infringe the same rights.

It is Amnesty International's view that evidence that would tend to prove allegations of human rights violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial executions or other unlawful killings, should never be capable of being kept secret from a person who alleges he or she was a victim of the human rights violations (or family members claiming on behalf of an alleged victim) or his or her legal counsel of choice, in civil proceedings in which a remedy for the violation is sought.⁸⁹ Proceedings might in some circumstances be taken before a court *ex parte* in order to allow the government to argue whether particular evidence not only is relevant to national security, but is also not relevant to the claim of human rights violations. However, once a court has found evidence to be probative of the claimed human rights violation then there should be no circumstances in which the claimant or his or her counsel can be totally deprived of meaningful access to that evidence (at least so long as the government contests the claim and fails to provide a full remedy). This would not necessarily preclude more precise measures short of keeping the evidence entirely secret from the claimant and/or his or her counsel, such as concealing the identity of a witness where there was clear evidence that to reveal his or her identity would put his or her life directly at risk. Claimants and their counsel must also always have an effective means of challenging government evidence that is intended to deny allegations that the government has been responsible for human rights violations.

Though it is the case that under the current Public Interest Immunity (PII) system it is possible that evidence concerning human rights violations may also be withheld from the alleged victim and his or her lawyer,⁹⁰ a CMP will in practice lead to considerably less disclosure than exists under the current system. There are two central reasons for this, firstly, the extremely broad definition of "sensitive material" which is used and, second, that the proposals appear to bring an end to the Wiley balancing test currently employed in the PII process.⁹¹

as Carnduff are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned".

89 The exception to this is perhaps in cases where the government is willing to acknowledge the facts of the violation to the degree of specificity required by the right of a victim of human rights violation to the truth about the violation.

90 It should be noted that Amnesty International considers the scope for such withholding under the current PII process itself raise issues in relation to the right to effective remedy of those alleging to be victims of human rights violations.

91 Several senior lawyers and judges have also emphasized that the current PII process essentially incentivizes the government to disclose as much as is possible. As Lord Kerr notes in *Al Rawi v Security Service* [2011] UKSC 34, "At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make", para 96.

The definition used in the Green Paper for “sensitive material” is as follows:

Any material/information which if publically disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily ‘sensitive’, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.⁹²

Amnesty International fears that the use of such a broad definition of the kinds of information which if disclosed would be deemed to constitute harm to the public interest will in practice result in large amounts of material being placed into closed and so never disclosed to the individuals or their lawyer, which in turn will increase the degree of secrecy surrounding these claims. Of particular concern, is the provision of what appears to be a de-facto claim to secrecy for the Security and Intelligence Services by allowing all material originated or handled by them to be automatically defined as “sensitive” and so presumably placed into a closed session. Blanket claims to secrecy represent a very real impediment to securing genuine accountability for human rights violations given that it is often the actions of these very agents under scrutiny in these cases.

The “Wiley balance” for testing disclosure in the current PII system allows the court to “hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice.”⁹³ This test recognizes that sometimes maintaining secrecy of sensitive information would on balance not be in the public interest. That recognition is crucial in cases where the state is alleged to have been involved in human rights violations, as the interest of the actual public in seeing violations such as torture or other cruel, inhuman or degrading treatment, enforced disappearance, or extrajudicial execution brought to light, and in ensuring victims have access to a fair procedure for obtaining a remedy, should be no less compelling than the possible interest of a government keeping such information confidential.⁹⁴ In a CMP, as proposed in the Green Paper, there is no balance of competing public interests.⁹⁵ Instead material falling within the very broad definition of “sensitive material” set out above (whether because it is “secret intelligence” or “secret information” or because it is any

92 Justice and Security Green Paper, October 2011, p.71.

93 *R(Wiley) v Chief Constable*, West Midlands [1995] 1 AC 274.

94 The value of this balancing exercise in cases where the state is accused of involvement in human rights violations is perhaps exemplified in the Divisional Court’s fourth decision in the Binyam Mohammed case which states “the issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place [...] It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability.” *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 18.

95 See Lord Kerr in *Al Rawi v Security Service* [2011] UKSC 34 (para 92) “[t]his seemingly innocuous scheme proposed by the appellant would bring to an end any balancing of, on the one hand, the litigant’s right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellant would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said [...] has been established for more than three centuries.”

other kind of information and the Secretary of State has identified a likely harm to the public interest) could potentially be indefinitely withheld from the claimant, however, slight the putative harm that might be caused by its disclosure and even if it were clearly evidence of the human rights violations alleged in the proceedings.⁹⁶ The government has argued that Special Advocates will be able to play a role in ensuring as much material is disclosed as possible; however, it is important to note that Special Advocates themselves have stated that because of the nature of a CMP, their ability to secure substantive disclosure by challenging the government's argument on national security grounds in these types of proceedings remains severely limited—leading one Special Advocate to state that they are simply “not in a position to do it”.⁹⁷

As a consequence there is a real concern that the introduction of CMPs into civil cases for damages where the state is alleged to be involved in serious human rights violations will lead to greater secrecy and less transparency – allowing the government to more easily avoid proper scrutiny of its human rights record. Accordingly the introduction of such measures cannot be described as a valid response to the national security challenges the government may face.

Further to these concerns, the right to an effective remedy includes the right of anyone who alleges to have been the victim of a human rights violation to have access to a meaningful procedure in which his or her claim can be fairly adjudicated.⁹⁸ More broadly, everyone has the right to a fair trial in the determination of any of his or her civil rights and obligations.⁹⁹ The government claims throughout the Green Paper that CMPs have been proven to work effectively and are capable of delivering procedural fairness.¹⁰⁰ Amnesty International believes this claim is inaccurate and misleading. CMPs have been the subject of substantial litigation which remains on-going. Concern about CMPs has been raised by human rights organizations,¹⁰¹ international human rights bodies,¹⁰² parliamentary committees,¹⁰³ media

96 It should be noted in control order hearings, following the House of Lords decision in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, Special Advocates can secure further disclosure in order to satisfy article 6 requirements even if that material is considered as sensitive—that is if disclosure is likely to result in harm to the public interest. For further information regarding the ongoing challenges in securing disclosure in such a way see *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation 2010*, HL 64/HC 395 and *Justice and Security Green Paper: Response to consultation from Special Advocates*.

97 *Uncorrected Transcript of Oral Evidence to be published as HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders*, 3 February 2010 Qu.46 (Helen Mountfield).

98 See the Basic Principles on the Right to a Remedy and Reparation which recognizes the right of victims of serious human rights violations to have “equal access to an effective judicial remedy” and that the “the right to access justice and fair and impartial proceedings” is to be reflected in domestic laws

99 See for instance article 14 ICCPR and article 6 ECHR.

100 See for example paragraph 2.2 of the Justice and Security Green Paper.

101 For example, Liberty, Justice, Reprieve and Human Rights Watch have all criticized the use of CMP.

102 See the concluding observations of the Human Rights Committee UN Doc CCPR/C/GBR/CO/6, 30 July 2008, calling on the UK to “ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made”.

103 For example, the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111; *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of the Control Orders Legislation 2010*, HL

organizations¹⁰⁴ and senior lawyers.¹⁰⁵ They have been described variously in the UK courts as “inherently imperfect” and as containing “inherent frailties”.¹⁰⁶ Special Advocates themselves have also publicly criticized CMPs stating that “they do not work effectively” and “do not deliver real procedural fairness”.¹⁰⁷

In allowing the government not only to withhold information from the claimant (as might be the case in some contexts under the existing PII framework),¹⁰⁸ but also then rely on it as secret evidence during the proceedings, a CMP can undermine the right to a fair and public hearing, especially with regard to the respect for an adversarial process and equality of arms.¹⁰⁹ The UN Human Rights Committee explains that “the right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant” and further that “the principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”¹¹⁰

In the UK, in addition to the application of the European Convention on Human rights via the Human Rights Act, these features of fair trial are also secured by longstanding rules

64/HC 395; and the Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, 3 April 2005, HC 323–II.

104 For example, see the intervention of the BBC, Guardian News and Media Limited and the Times Newspapers in the case of *Al Rawi v Security Service* [2011] UKSC 34.

105 For example, Dinah Rose QC, delivering the Atkin Lecture on 10 November 2011 said: “A common law trial is designed to enable facts to be found on the balance of probabilities through an open adversarial process [...]. If you bolt a closed procedure on to that, what you have is a process that is not adversarial, and not judicial. It may look and sound like a trial, but in fact it is nothing of the sort”. See also the evidence given by Gareth Peirce to the Joint Committee on Human Rights, Uncorrected Transcript of Oral Evidence HC 356-i, Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Control Orders, 3 February 2010 and Lord Bingham, formerly the Senior Lord of Appeal in the Ordinary, who said, with regard to United Kingdom Submission to the Joint Committee on Human Rights: the Justice and Security Green Paper Index: EUR 45/006/2012 Amnesty International January 2012 disclosure in control order proceedings: “[T]he right to a fair trial is ‘fundamental and absolute’; where a conflict arises between the use of material not disclosed to a party and the right of that party to a fair hearing his right to a fair hearing must prevail.” Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, p. 108.

106 See *Al Rawi v Security Service* [2011] UKSC 34 and *Tariq v Home Office* [2010] EWCA Civ 462. See also Lord Woolf in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 (at [59] and [67]), that the involvement of a special advocate “[must] not be used to justify a reduction in the protection available to the person affected by the non disclosure [...] the appointment of [such an advocate] should not be used as a justification for reducing the rights that [an individual] may otherwise have but only as a way of mitigating the disadvantage he would otherwise suffer if his rights were to be reduced with or without [such an advocate].”

107 *Justice and Security Green Paper: Response to consultation from Special Advocates*, para. 15.

108 As noted earlier, the existing PII framework itself is not free from human rights concerns.

109 It should also be noted, in this regard, that the right to a fair trial is broader than the sum of the individual guarantees within article 14, and depends on the entire conduct of the trial. (See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44 (A/44/40) annex X, sect. E: Communication No. 207/1986, *Yves Morael v. France*, para. 9.3).

110 See UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32, 23 August 2007, para 13. See also Communication No. 1347/2005, *Dudko v. Australia*, Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 79/1997, *Äärelä and Näkkäläjärvi v. Finland*.

under common law as recognized in the UK's domestic jurisprudence.¹¹¹ A CMP, where one party to the case cannot see all the evidence being relied upon by the court and cannot directly cross examine the witnesses in a case, represents a radical departure from the normal principles of fairness that currently apply in civil trials. The use of Special Advocates has not been demonstrated to sufficiently mitigate this unfairness, indeed the Joint Committee on Human Rights has in the past concluded that Special Advocates are simply "not capable of ensuring the substantial measures of procedural justice that is required".¹¹²

It should also be noted that the argument that CMPs will necessarily lead to a fairer outcome because the judge is able to consider more material is by no means clear. As Lord Kerr states in the case of *Al-Rawi*, "The central fallacy of the argument lies in the unspoken assumption 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."¹¹³

Finally, one of the central pillars of a fair hearing is the open administration of justice.¹¹⁴ The principle of open justice acts as an essential safeguard of the fairness and independence of the judicial process, ensuring that the administration of justice is open to public scrutiny, which in turn provides a means of protecting and maintaining public confidence in the justice system.¹¹⁵ By rendering the administration of justice visible, publicity contributes to the achievement of the aim of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.¹¹⁶ Though international human rights law allows for the exclusion of the press and public in certain circumstances for reasons of national security, this is permissible only to the extent strictly necessary.¹¹⁷ The relevant articles make no

111 For further discussions regarding common law see *JUSTICE, Justice and Security Green Paper Consultation Response*, January 2012; *Bingham Centre for the Rule of Law, Response to the Justice and Security Green Paper*.

112 The Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In*, 25 March 2010, HL 86 HC 111 paragraph 90.

113 *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34, para.93.

114 See *Malhous v Czech Republic*, (App No 33071/96) 12 July 2001; *Bakova v Slovakia*, (App No 47227/99), 12 November 2002; *Pretto and Others v Italy*, (App No 7984/77), 8 December 1983; *Barberà, Messegueé and Jabardo v Spain*, (App No 10590/83) 6 December 1988; *Yakovlev v Russia*, (App No 72701/01) 15 March 2005; *B and P v United Kingdom*, (App No 36337/97; 35974/97) 24 April 2001.

115 See in this regard Special Rapporteur on counter-terrorism and human rights report of 6 August 2008, UN Doc A/63/223 and UN Human Rights Committee, General Comment No. 32, para. 67.

116 *Pretto and others v Italy*, (App. No 7984/77), 8 December 1983. This principle was also reflected by the House of Lords in *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28, para.63 "If the wider public are to have confidence in the justice system, they need to be able to see that justice is done rather than being asked to take it on trust".

117 See UN Human Rights Committee, General Comment no 32, para 29 [only exception is in cases involving children or matrimonial disputes]. See also the judgment in the case of *Romanova v Russia*, (App No 23215/02), 11 October 2011, where the European Court of Human Rights considered a case where an entire criminal trial had been held in camera, with only part of the trial and appeal judgments having been delivered in public (it appears the defendant and her lawyers were not excluded from any part of the trial). In finding the exclusion of the public in the circumstances to have violated article 6 of the Convention, the Court observed: "it may be important for a State to preserve its secrets, but it is of infinitely greater importance to surround justice with all the requisite safeguards, of which one of the most indispensable is publicity." Such considerations must apply with even more force when the issue is whether evidence of a

similar explicit provision for the exclusion of litigants or their counsel for any reason or any period of time.¹¹⁸

The right to a fair and public hearing also requires that “the judgment, including the essential findings, evidence and legal reasoning must be made public”.¹¹⁹ The use of a CMP, however, invariably leads to the issuing of a closed judgment alongside an open judgment, which elaborates on the reasoning for the decision of the court and which relies on the secret evidence. The issuing of closed judgments has the potential to undermine public confidence in fair administration of justice in cases where the state is involved in or has committed human rights violations and that those responsible for violations will be held to account. The implications of this were well recognized by the Court of Appeal in *Al-Rawi* which emphasized that:

“[i]f the court was to conclude after a hearing, much of which had been in closed session attended by the defendants but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants but not the claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater”.¹²⁰

Amnesty International would emphasise that the onus is always on the state to demonstrate that any restrictions it wishes to impose on human rights, including restricting the right to a fair trial (in the limited range circumstances for which such limitations permitted), are necessary and proportionate to the pursuance of legitimate aims. Even where restrictions are allowed they may not “be applied or invoked in a manner that would impair the essence of a Covenant right.”¹²¹ While the European Court of Human Rights has held that national

government’s involvement in serious violations of human rights can be withheld from the public, or even indeed from the very persons who are claiming to be the victims of the violations in question.

118 Nowhere in its discussion in General Comment no 32 of the possibility of excluding the public on grounds of national security does the Human Rights Committee discuss any possibility that litigants or their counsel could be validly excluded. The government has cited the decision in *Kennedy v the United Kingdom*. The particular facts of that case, however, are markedly different from and far narrower than the wide range of courts and tribunal proceedings to which the Green Paper would apply, and the measures the Green Paper proposes. The court also emphasized as relevant its understanding that where the Investigatory Powers Tribunal found there had been wrongful interference it could in fact disclose the otherwise sensitive documents and information to the complainant, even over objections of the government that they should remain secret. Amnesty International does not necessarily agree with the reasoning or conclusions of the Court in the *Kennedy* case.

119 See UN Human Rights Committee, General Comment No 32, para 29 (noting an exception only in cases involving children or matrimonial disputes).

120 *Al Rawi and Others v Security Service and Others* [2010] EWCA Civ 482 para 56. See also *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 54 where the court concluded that “it is our clear view that the requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture”.

121 UN Human Rights Committee, General Comment no 31 para 6. The ECtHR has similarly held that restrictions on the fair trial guarantees ordinarily required of court proceedings can only be compatible

security can be a legitimate aim that could justify certain restrictions on the ordinary rules for disclosure of evidence to a litigant, any such restrictions must still satisfy all of the other requirements in the circumstances of the case, namely proportionality, not impairing the essence of the right to fair trial and sufficient counterbalancing of any restrictions within the judicial process.

Amnesty International believes that the introduction of a CMP in a civil claim for damages where the state is alleged to have been involved in serious human rights violations risks substantively impairing both the right to an effective remedy and reparation and the right to fair trial in such cases and as such cannot be considered a valid measure to address any legitimate national security concerns.

RESTRICTION TO “EXCEPTIONAL CIRCUMSTANCES”?: In this submission we have focused on the introduction of CMPs into civil trials for damages where the state is alleged to have been involved in serious human rights violations. However, it is clear that the introduction of legislation to allow for a CMP in any civil proceeding would have far-reaching consequences. Amnesty International is concerned that even though the government has stated that its intention is that this procedure should only be used in exceptional circumstances, the Green Paper includes no thorough examination of the human rights implications of a CMP in different types of civil trials, for example, civil actions against the police, civil proceedings between private parties, habeas corpus claims, claims brought by public authorities against individuals. Even leaving aside the more fundamental objections to any application of CMPs in certain proceedings as outlined above, there is no description or analysis in the Green Paper of what actual safeguards would or could be put in place to ensure that invocation of a CMP did not in fact become the norm wherever “sensitive information” might be involved in a proceeding. We note that in fact the initial introduction of CMPs by the government in response to the *Chahal* judgment¹²² and in the particular context of national security deportation cases was also, at the time, said to be restricted to that exceptional context. However, subsequently CMPs have leached across the civil justice system, and can now be used in a range of different contexts including control order hearings, terrorist asset freezing and financial restrictions proceedings, appeals before the Proscribed Organisations Appeal Commission, employment tribunal hearings and parole board hearings amongst others. The Green Paper proposals are themselves part of a process of expanding the role of just such so-called “exceptional” procedures far beyond their original stated scope.

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with article 6(1) of the ECHR if they pursue a legitimate aim and the means employed are United Kingdom Submission to the Joint Committee on Human Rights: the Justice and Security Green Paper Amnesty International January 2012 Index: EUR 45/006/2012 proportionate to the aim sought to be pursued. Even measures that meet these tests are only valid if the limitations do not have the effect of impairing the very essence of fair trial rights and if any restrictions are sufficiently counterbalanced by the procedures followed by the judicial authorities, *Rowe and Davis v the United Kingdom* [Grand Chamber], (App No 28901/95), 16 February 2001.

122 *Chahal v United Kingdom*, (App No 22414/93), 15 November 1996.

The proposal put forward in the Green Paper is to legislate to remove the jurisdiction of the courts to hear Norwich Pharmacal applications where disclosure of the material in question would cause damage to the public interest.¹²³ There would be an absolute exemption from liability to disclosure for material held by or originating from one of the intelligence agencies; other material would be exempted from disclosure on a case-by-case basis by Ministerial Certificate. This second category (non-agency material) could be challenged by way of judicial review with the use of CMP for consideration of the nature of the material and the potential damage caused by disclosure. The Green Paper argues that this proposal is necessary to “reduce the potentially harmful impact of such court-ordered disclosure”.

The Green Paper argues that “the UK’s critically important and hard earned secrets and those of our intelligence partners may be obtained by individuals though a recent development in our justice system. It is crucial that we rebuild the trust of our foreign partners in order to ensure that they can be satisfied that the range of sensitive material they share with us, and the communications on diplomatic channels, all of which take place with an understanding of confidentiality, will indeed remain confidential.” This refers to the so-called ‘control principle’, used in intelligence-sharing relationships under which the originator of the intelligence material should retain control over the dissemination of that material. The government has claimed that the intelligence-sharing relationship with the US is already being negatively impacted by the risk that US originated intelligence material could be made public by the courts as a result of future Norwich Pharmacal actions.

Amnesty International would take this opportunity to emphasise that the information involved in these cases has often concerned allegations of serious human rights violations, including torture and/or other deliberate cruel, inhuman or degrading treatment, in respect of which the UK is alleged to have been involved in or in receipt of information about. The most notable of these cases is that of Binyam Mohamed, a former Guantanamo detainee, who brought a Norwich Pharmacal action against the Foreign Secretary, in order to obtain material he argued was necessary for his defence before a Military Commission in the United States, where he faced potential capital charges.¹²⁴ The lengthy litigation around Binyam Mohamed’s case resulted in the disclosure of seven-paragraphs—contained in the initial Divisional Court’s judgment but which had been redacted on the government’s request—summarizing reports provided by US authorities to MI5 and MI6. The paragraphs describe reports of mistreatment faced by Binyam Mohamed at the hands of the US which the Court said “could readily be contended to be at the very least cruel, inhuman and degrading treatment by the United States authorities”, and demonstrated that the UK had knowledge of that mistreatment. It should also not be forgotten that it is a requirement of a *Norwich Pharmacal* action that the defendant, who holds the information sought, must have been mixed up in the wrong-doing concerned. It is, therefore, only because the Court found that

123 The Green Paper rejects as disproportionate the option of scrapping entirely the ability to bring Norwich Pharmacal proceedings against any Government Department.

124 *Mohamed, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2973 (Admin)

the UK was sufficiently involved in Binyam Mohamed's mistreatment that his case could be brought.

Information relating to torture and other serious human rights violations should not be protected, either by resort to national security arguments or by diplomatic principle. The UK has international and domestic legal obligations to prevent and prosecute the commission of torture and the prohibition of torture is a jus cogens obligation under international law which takes precedence over any diplomatic protocol. The Green Paper asks "what role should the courts play in determining the requirement for disclosure of sensitive material?", the answer—in line with international human rights standards—is that in all cases where serious human rights violations are at stake, judges must be the ultimate arbiters in assessing the merits of a claim to secrecy by the state over information potentially relevant to a claim for serious violation of human rights. The proposals by the government in the Green Paper seek to arrogate the power of judges to be the final arbiter in cases which the government deems as sensitive. In so doing an avenue by which victims of human rights violations are able to seek and obtain information about these violations in such cases would be closed to them.

It is also deeply problematic that the proposals seek to provide a complete exemption for any material held or originated by the intelligence agencies from disclosure. Amnesty International recognizes that in principle there may be genuine national security reasons for not disclosing information which will endanger the lives or safety of individuals or the general population. However, this cannot justify the provision of a blanket claim to secrecy for the intelligence agencies. Intelligence material, as with other types of sensitive material, must be subject to possible disclosure if a court determines that it contains evidence of human rights violations.

It may also be noted that the UN Human Rights Committee has pointed out that the obligation of each state party to the Covenant to respect human rights is not owed only to individuals but to every other state party as well. As such, the Committee emphasizes that "To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."¹²⁵ This principle should be taken into account in evaluating claims that restrictions on disclosure in cases claiming for violations of human rights can be justified on the basis of the desire to preserve diplomatic relations or intelligence-sharing arrangements with other states.¹²⁶

¹²⁵ UN Human Rights Committee General Comment No.31, para 2.

¹²⁶ See *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) para 69, stating that it was, in the court's view, "difficult to conceive that a democratically elected and accountable government could possibly have any rational objection to placing in the public domain such a summary of what its own officials reported as to how a detainee was being treated by them". The court asked why a "democracy governed by the rule of law would expect a court in another democracy to suppress a summary of evidence contained in reports by its own Officials [...] where the evidence was relevant to allegations of torture [...] politically embarrassing though it may be".

It is also Amnesty International's view that the arguments set out the Green Paper in favour of limiting the Norwich Pharmacal jurisdiction are overstated. In the Binyam Mohamed case the Divisional Court made it clear that "there is nothing secret or of an intelligence nature in the seven paragraphs redacted from the first judgment. In providing the summary of the treatment of BM in those seven redacted paragraphs we are not in the judgment 'giving away the intelligence secrets of a foreign country' or making public 'American secrets'[...] of itself, the treatment to which BM was subjected could never be properly described in a democracy as 'a secret' or an 'intelligence secret' or 'a summary of classified intelligence'".¹²⁷ In fact, what is clearly demonstrated in Binyam Mohamed is that in *Norwich Pharmacal* cases, as with most litigation involving national security, the courts are particularly deferential to the government in the decision as to whether material is sensitive and whether disclosure would harm national security, and will tend only to order disclosure where the evidence of serious human rights violations is particularly compelling—certainly no fear of sweeping disclosure of a 'fishing expedition' nature can be said rationally to be raised by the cautious approach of the Court in Binyam Mohamed.

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¹²⁷ *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2009] EWHC 2973 (Admin), para 13 It can also be noted in relation to the Binyam Mohamed case that by the time of the final judgment of the Court of Appeal the documents originally sought by Binyam Mohamed and his legal team had been disclosed by the US authorities directly to Binyam Mohamed's US counsel, albeit with redactions.

Written Evidence submitted by Dinah Rose QC (JS 10)

I. What are the objections to the use of a closed material procedure in a civil trial?

1. The proposal breaches the first principle of natural justice, under which a party is entitled to know the case against him. This is and always has been a fundamental part of a common law civil trial, as the Supreme Court emphasised in *Al Rawi*.

2. The point is not simply one of fairness (though a closed material procedure is inherently unfair). It is more basic than that. A common law civil trial is an adversarial process which depends on the presentation by each side of its case and the evidence to support its case; the testing of that evidence by cross examination; and the adjudication by the judge, making findings of fact and law. A civil trial under our system can be *defined* as the determination of disputes by this process. If a closed material procedure is bolted on to a civil trial, a trial cannot take place. The process, under which the judge sees material which the claimant has not seen, and is required to make findings of fact based on evidence which has not been put to the claimant and which could not be challenged or tested by him, is fundamentally different. The role of the judge is fundamentally different. As Lord Kerr said in *Al Rawi*, such a process “cannot lay claim to the marque of judicial proceedings”.

3. The Green Paper shows no sign of recognising that its proposal is so fundamental in its effect.

4. The proposal breaches the second principle of natural justice, that no one is to be judge in their own cause. It is suggested that the Minister, who is likely to be a party to the proceedings, should decide if the closed material procedure is to be used, and that his decision may be challenged only on judicial review grounds (essentially irrationality). This is fundamentally different from the PII process, under which the Minister signs a certificate setting out his belief that disclosure would harm national security, but the *judge* then conducts the balancing of that harm against the proper administration of justice. The decision whether a document should be withheld or disclosed (and if disclosed, subject to what safeguards) is made by the judge, not the Minister.

5. The proposal also breaches the principle of equality of arms. Not only does it permit a party to decide the procedure under which the proceedings are to be conducted, but it permits him to select a procedure which places him at a very significant advantage over the Claimant (subject only to a challenge based on irrationality).

6. The proposal gives rise to serious practical difficulties. These include:

- (a) the impossibility for a lawyer of giving advice on the merits where he or she does not know the case the claimant has to meet, or the evidence on which it has based. This is not a question of the difficulties which are normal in litigation, where a lawyer may have imperfect knowledge of the other side’s evidence and tactics. How

can any sensible advice be given where a lawyer does not know what the defence is, and what material supports it? This has serious consequences for every aspect of the conduct of a civil trial, from the obtaining of funding (whether legal aid, insurance, CFA) to advising on settlement and the acceptance of a Part 36 offer (with its attendant costs consequences).

- (b) the impossibility of a judge assessing the credibility of the evidence to make findings of fact. As Lord Kerr said in *Al Rawi*, “to be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead”. This problem is often presented as a problem facing the Special Advocate who cannot take instructions from the claimant with which to cross examine secret witnesses giving evidence in the closed procedure. But it is equally serious the other way round. The claimant cannot be cross-examined by reference to secret material. Thus, his evidence is also insulated from challenge, though the judge is left with the difficulty of oral evidence and apparently inconsistent written (or other oral) evidence. This difficulty explains why the insistence of the Agencies that the closed material procedure is “fairer” than PII because the judge sees more evidence is fallacious: Lord Kerr explains the point fully at paragraph 93 of *Al Rawi*.
- (c) The difficulty for appellate courts. Appeals lie on issues of fact as well as law in civil claims (by contrast with SIAC and control order cases which may only be appealed on questions of law). The proposal thus gives rise to the real prospect of closed procedures in the Court of Appeal and the Supreme Court, and secret judgments by courts at all levels in common law cases. It is incompatible with the proper development of the common law that there should be a body of caselaw accessible only to the Government and certain privileged advocates with security clearance.

II. Is there a need for change?

7. The case for such a radical change to the basic nature of a common law trial has not been made out.

8. The law of PII has been developed over decades to deal with precisely the problem addressed in the Green Paper: of how to balance the conflict between the need for the proper administration of justice and the need to protect material disclosure of which would harm national security. It is a subtle and elegant solution, which includes the following features:

- (a) it maintains the principles of natural justice and equality of arms: each side has access to the same material at trial, and the decision as to disclosure is made by a judge, not the Defendant.
- (b) it includes considerable flexibility as to the nature of the protection that may be given to sensitive material. The powers which judges already have include:
 - (i) **sitting in private;**
 - (ii) **protecting the identity of witnesses** who are giving evidence;

- (iii) **requiring/permitting disclosure of a gist** rather than full documents. Note that in this situation, both sides rely only on the gist: one side may not deploy the full material which is concealed from the other;
- (iv) **using a confidentiality ring.** This permits lawyers to see material, enabling them to advise on the merits and to conduct cross examination (in private). It is very commonly used in cases concerning commercial confidentiality, including appeals in the Competition Appeal Tribunal. It works well as a last resort. If necessary, the lawyers could themselves be required to have security clearance. There is no good reason why disclosure to a Special Advocate should be acceptable to the Agencies, but disclosure to a lawyer instructed by the party, but subject to a confidentiality undertaking, should not be acceptable. The usual concern raised is of inadvertent disclosure. However:
 - 1. there is simply no evidence that such a risk materialises in confidentiality ring cases. In competition appeals, the consequences of inadvertent disclosure could be very serious.
 - 2. this objection leads logically and necessarily to the situation in which the Special Advocates are barred from communicating with the claimant or his legal team: any communication could give rise to the hypothetical risk of inadvertent disclosure. This refusal to permit any instructions to be taken is one of the fundamental reasons why the current system used in SIAC does not work effectively, as the Special Advocates have explained. If the Government considers that this requirement ought to be relaxed in the interests of justice, there is no reason in principle to reject the far better solution of confidentiality rings.

9. The Green Paper fails to make a case as to why PII should be rejected, and why its proposals are superior. The only case identified in which it is said that PII was a problem was the Guantanamo litigation. Leaving aside the questionable wisdom of fundamentally undermining the historic common law system of adversarial trial because of one difficult case, the Agencies' view of the Guantanamo case should be treated with scepticism. There was no full blown PII process in that case. Some disclosure was given, but the case settled before full claims for PII had been made or examined by a judge. It is therefore difficult to see how the Agencies could be sure that PII would not have provided a solution. It ought also of course to be borne in mind that the views of a party to litigation ought to be treated with considerable caution: by definition, the Agencies are not in a position to provide an impartial assessment of the operation of PII in the Guantanamo case.

Conclusion

10. Overall, the Green Paper shows a worrying lack of understanding of the implications or consequences of its proposals, and fails to present any evidence that might justify doing such serious damage to our justice system.

11. It is right, of course, that where national security is in play, there is no ideal solution to the trial of actions. There is an inevitable tension between the demands of safety and the requirements of open justice. This is a conflict with which courts have grappled for many years, and in relation to which a sophisticated set of principles have been developed.

12. PII is not perfect—it does result in some cases being tried without all evidence being available. That is true in many situations in an adversarial process—the operation of legal professional privilege may also result in a judge being deprived of relevant evidence. Parties are not obliged to call all relevant witnesses and may choose not to do so for all sorts of reasons.

13. PII may also result in rare cases in a situation in which a party is ordered to disclose a document which it is not prepared to disclose, leaving it no alternative but to settle the claim. This is far from an unusual situation in litigation: it happens in many situations in which there is no issue of national security. Many defendants would rather pay compensation than have their internal documents publicly scrutinised.

14. But PII is much better than what is now proposed, which ignores all questions of balance, fairness, and proper judicial oversight, and gives far too much power to the Agencies to decide in what circumstances evidence of their own potential misconduct should see the light of day. In short, the Green Paper is fundamentally incompatible with our system of civil justice.

24 January 2012

Written Evidence submitted by David Anderson QC, Independent Reviewer of Terrorism Legislation (JS 12)

Introduction

1. This memorandum summarises my views on the proposals in the Green Paper **[GP]** relating to closed material procedure **[CMP]** and *Norwich Pharmacal*. It is submitted in advance of the oral evidence that the Committee has invited me to give on 31 January 2012. I express no view on the issue of intelligence oversight, or on the international parallels which have been touched upon in the response of my Special Adviser, Professor Clive Walker.

2. My functions as Independent Reviewer of Terrorism Legislation include reporting to Ministers and through them to Parliament on the operation of various executive measures (proscription, asset-freezing, control orders, TPIMs) in which court challenges are heard via CMP.¹²⁸ As a practising Q.C. and Criminal Recorder, I have some experience of dealing with secret material in court, via public interest immunity and confidentiality rings.

3. For the purposes of this exercise, I have had the additional benefit of reading a number of consultation responses supplied with the authors' consent (though regrettably in my view, there is no practice of publishing responses to consultations of this kind).¹²⁹ I have also discussed the issues with a range of people within Government and the legal profession, including advocates on all sides of the type of case to which CMPs are currently applied. I express my views in five propositions, below.

CLOSED MATERIAL PROCEDURE

(1) There are likely to be some cases in which secret evidence renders cases untriable under existing procedures.

4. The case for making a CMP available in civil litigation rests principally on fairness rather than national security. It relies upon the identification of a significant category of cases whose resolution under current procedures (including notably PII) is unfair to one side or the other.

Fairness

5. The PII system (as acknowledged at GP §2.75) is in most cases effective in balancing two vital interests: open justice and the protection of material whose disclosure could compromise national security. Thus:

¹²⁸ Those reports are on my website <http://terrorism-legislation-reviewer.independent.gov.uk>.

¹²⁹ The initiative taken by the blog <http://ukhumanrightsblog.com/> to collect consultation responses is commendable, but its harvest will inevitably be incomplete.

- (a) The court, not the Government, is the ultimate arbiter of whether the disclosure of sensitive material is required in the interests of justice.
- (b) National security is not thereby jeopardised, because in a case where it feels strongly that disclosure was wrongly ordered, it is always open to the Government to concede the issue to which such material relates (though sometimes at the cost of dropping a prosecution or abandoning a important contention).
- (c) Where sensitive material is supportive of the Government's position, it is incentivised to overcome any natural inclination towards secrecy and produce it in open court: what has been aptly described as a "healthy dilemma".¹³⁰

6. There are however said to be cases in which PII does not produce a fair result. These are cases in which highly sensitive material is central to the whole case, to the point where if such material is excluded by PII, the case will be rendered "quite simply untriable by any remotely conventional open court process".¹³¹ The result is:

- (a) either a strike-out of a potentially meritorious claim, as in *Carnduff v Rock*, which cannot be said to represent justice for the claimant;¹³²
- (b) or the forced settlement of a claim to which there is a potentially meritorious defence, which cannot be said to represent justice for the defendant.

As was remarked recently in the Supreme Court, "Neither of these possibilities is one which the law should readily contemplate."¹³³ If public authorities or agencies have acted unlawfully, this should be exposed, and compensation awarded. If they were not, they should have an opportunity to clear their name without being forced into settlements and the serious reputational damage that is associated with perceptions of guilt.

7. I am prepared to accept that such cases are likely to exist. If there are cases sufficiently saturated in secret material to require the use of a CMP in other contexts (SIAC, control order/TPIMs), it is logical to suppose that there may be civil cases of which the same can be said. One example given in the Green Paper is the Government's decision to settle the damages claims brought by former Guantanamo inmates (after a CMP was held in one such case, *al-Rawi*, not to be available). Faced with a PII exercise that might have taken three years,¹³⁴ the Government threw in its hand, presumably because it took the view that success in its PII claims would have left it without the evidence it needed to defend the claims.

¹³⁰ *Al-Rawi v Security Service* [2011] UKSC 34, 13 July 2011, per Lord Kerr at §96.

¹³¹ *Al-Rawi*, per Lord Brown at §86.

¹³² Some consultees have sought to characterise this case as eccentric or wrongly decided (e.g. SA Response §37). The courts have been slow to apply it. It should be noted however (1) that the European Court of Human Rights rejected an application by the disappointed claimant and (2) that *Carnduff* received the implicit support of at least five members of the Supreme Court in *al-Rawi*, and was criticised by none of them: see Lord Mance at §108; see also *Tariq* §110. It may yet acquire a new lease of life in the national security context.

¹³³ *Tariq v Home Office* [2011] UKSC 35, per Lord Mance at §40; cf. Lord Brown at §84.

¹³⁴ *Al-Rawi* per Lord Clarke at §135.

8. Lack of information prevents me from expressing any firmer view in relation to the size of the problem. At my request, I was helpfully provided with further information on the pending cases referred to in GP Annex J para 11. Their subject-matter is various, ranging from damages claims for complicity in detention, rendition and torture to judicial reviews of naturalisation decisions. The Green Paper claims that “*sensitive information is central*” to them (which I do not doubt), and asserts that “*in many of these cases judges do not have the tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts*”. It stops short however of stating whether each of these cases could be fairly resolved only by means of a CMP. When I sought discreetly to pursue this question with the Treasury Solicitors’ Department or with counsel instructed by them, I was told on instructions that it could not be discussed.¹³⁵ Accordingly, while I think it likely that a problem does exist, I am unable to assist the Committee with any informed estimate of its size or gravity.

9. One may ask why, if there is a significant problem, it is emerging only now. It is true that civil claims directed specifically to the alleged activities of the intelligence services have only recently become widespread. One should be cautious however in concluding that novel subject-matter requires the introduction of novel (and secret) procedures. There is after all a long history of civil litigation and judicial review against the police and prison service. The response to an allegation of wrongful arrest, or wrongful re-categorisation of a prisoner, may well depend on human intelligence sources whose safety would be jeopardised by disclosure. Yet such cases have generally been resolved in the past without recourse to a CMP.¹³⁶ It may be that not all such resolutions were satisfactory: *Carnduff v Rock* after all was a police case, and some claimants with weak cases have no doubt been paid to go away. But CMP has not previously been advanced as a necessary response to such litigation, and is now advanced only tentatively (and only in relation to prisons, not police) in the Green Paper.

10. It would materially assist the debate if the views of the police and prison service on the necessity or otherwise for CMPs could be expressed or, if already expressed in response to the consultation, be made publicly known.

Security

11. The case for change is not principally advanced in the Green Paper on the basis of any risk that secret material could, under the current procedures, be damagingly and wrongly disclosed. That is a correct judgement: as noted at 5(b) above, the Government can always

¹³⁵ This reaction is not at all typical of my experience as Independent Reviewer. On all other issues, including those of the highest sensitivity, I have been allowed to form my opinions on the basis of full inspection of Government documents and uninhibited (though confidential) conversations with those involved.

¹³⁶ As to the police, see the consultation response of the Bingham Centre at §44.2. See GP Appx C §§9–12 for the position in some Northern Irish prison cases. A special advocate procedure may also be used in parole board proceedings “*in rare and exceptional cases*” and “*as a course of last and never first resort*”: *R (Roberts) v Parole Board* [2005] UKHL 45 §144.

press the eject button (albeit at some cost) if it believes that national security (or, where foreign intelligence material is concerned, the control principle) is unacceptably threatened by the refusal of a PII application.

12. There are respects in which it might be suggested that national security could be indirectly threatened by the current system. Take the example of a judicial review challenge to a refusal of naturalisation on national security grounds. If the Government is unable to defend itself because material evidence cannot safely be placed in open court, the consequence could be the quashing of a decision to refuse citizenship (and hence the right of abode) to someone whom it correctly judged to be a threat to national security. It is however unlikely that a court of judicial review would in such circumstances order naturalisation to be granted: rather, it would remit the decision to the Secretary of State, who would once again take it in the light of all the relevant information including that which is secret.¹³⁷ Such a consequence would be messy, and potentially circular, but it would not threaten national security.

(2) If CMP is to be made available in such cases, it must be on strict conditions

13. It is hard to resist the argument for applying a CMP to cases which would otherwise be “untriabable”. Whatever the drawbacks of a civil CMP in terms of participation in the hearing, invisibility of precedent, procedural inflexibility and cost,¹³⁸ it would have the important benefit of allowing a civil court to determine a case on the basis of all the evidence. Indeed, as suggested below, it should enable domestic intercept evidence, currently excluded from civil proceedings by RIPA, to be considered as well. For those reasons, and assuming that a significant problem can be demonstrated to exist (see (1) above), I would favour adding a CMP to the procedural armoury of the civil courts.

14. The claim that CMPs “*have been shown to deliver procedural fairness and work effectively*” (GP §13) is however overstated. It is true that the concept of a CMP is not in itself contrary to Article 6 ECHR, as recent authority has made clear.¹³⁹ That fact is however not conclusive either of the lawfulness of a specific CMP under the common law,¹⁴⁰ or of its fairness. The Green Paper gives no voice to the misgivings concerning any system of secret justice that are regularly expressed by some of those who work in the system.

Views of the Supreme Court

15. The judgment of a 9-member Supreme Court in *al-Rawi*, handed down three months before the Green Paper was issued, displays a far more cautious and qualified approach to the question of fairness. Lord Kerr described the Special Advocate system (*al-Rawi* §94) as:

¹³⁷ In accordance with *A (No. 2)* [2006] 2 AC 221.

¹³⁸ Some of the practical difficulties of a civil CMP are referred to in the SA response §38.

¹³⁹ *Kennedy v UK* 18 May 2010 (IPT), *Tariq v Home Office* [2011] UKSC 35 (employment tribunal).

Immigration proceedings fall outside Article 6, as (it seems) may asset-freezing proceedings: *Bhuta v HM Treasury* [2011] EWHC 1789 (Admin), under appeal.

¹⁴⁰ *Al-Rawi*, Lord Dyson at §68.

“a distinctly second best attempt to secure a just outcome to proceedings”,

adding:

“It should always be a measure of last resort, one to which resort is had only when no possible alternative is available.”

Reservations about the fairness of CMPs in the context of civil litigation, and caution as to the circumstances in which Parliament might authorise them to be used, were also expressed, in varying degrees, by the Court of Appeal in that case and by Lord Dyson §§35-37, Lord Hope §73, Lord Brown §83, Lord Mance and Baroness Hale §115 and Lord Clarke §167.

16. It is fair to point out that the appellate courts, by their own wish, do not examine the closed material;¹⁴¹ and that I am not aware of similar views having been expressed, judicially or extra-judicially, by the High Court judges who have hands-on experience of the operation of existing CMPs.

Views of the Special Advocates

17. The Special Advocates have submitted, in a carefully-argued response to the Green Paper consultation (§§13, 15):

“The reasons why [...] criticisms have been made is that CMPs represent a departure both from the principle of natural justice and from the principle of open justice. They may leave a litigant having little clear idea of the case deployed against him, and ultimately they may prevent some litigants from knowing why they have won or lost. Furthermore, and crucially, because the SA appointed on his behalf is unable to take instructions in relation to that case, they may leave the SA with little realistic opportunity of responding effectively to that case. They also systematically exclude public, press and Parliamentary scrutiny of parts of our justice system.

[...]

Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness.”

That response was signed by 57 of the 69 Special Advocates, including almost all those with substantial experience of CMPs. Of the remaining 12, not one has expressed active disagreement with its contents (§1). The Special Advocates rely for their instructions on

141 *SSHD v AF* (No. 3) [2010] 2 AC 269, §121 (Lord Brown).

solicitors acting for the individuals confronted with CMPs; but they are security-cleared and appointed by the Law Officers. They know the ins and outs of the system. The detailed reasons for their position have been rehearsed before this Committee on previous occasions¹⁴² and I do not repeat them here.

Significance of gisting

18. The Special Advocates' criticisms have particular force, as it seems to me, in those categories of case where there is currently said to be no requirement to give the individual even the "gist" of the allegations against him. The provision of a gist means that the person in question is given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. As the Supreme Court has held in the control order context, giving effect to a prior ruling of the Strasbourg Court:

"Provided that this requirement is satisfied **there can be a fair trial** notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations.

Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials **the requirements of a fair trial will not be satisfied**, however cogent the case based on the closed material will be."¹⁴³

19. Gisting is required in certain categories of case in order to comply with Article 6 ECHR or with EU law. In other cases it has been held not to be mandatory, even if Article 6 applies.¹⁴⁴ The Government has recently done everything it can to resist the spread of the gisting obligation, both in the legislative process¹⁴⁵ and in the courts.¹⁴⁶ It believes, no doubt rightly, that the obligation to gist can compromise sources, particularly where evidence comes from a single source. To fight a case without even the gist of the allegations against you is, however, self-evidently to fight with one hand behind your back. There are cases in which "very little indeed" is disclosed to the individual.¹⁴⁷ A Special Advocate may still be of value in such cases; but it is likely that his effectiveness will be compromised by the inability to take instructions.

142 See e.g. *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Ninth Report of Session 2009–10, HL Paper 64 HC 395, cited by Lord Dyson in *al-Rawi* §37. Lord Brown §83 described the Committee's views as "extreme" but endorsed a version of them. See also the articles by Martin Chamberlain, a Special Advocate, in (2009) 28 CJK 314-326 and 448-453.

143 *SSHD v AF* (No. 3) §59 (Lord Phillips), giving effect to *A v United Kingdom* (2009) 49 EHRR 625.

144 *Tariq v Home Office* [2011] UKSC 35. Lord Kerr (following the Court of Appeal) was alone in considering that gisting is always required where Article 6 applies.

145 It refused amendments which would have acknowledged an obligation to gist the allegations giving rise to onerous executive measures in both the Terrorist Asset-Freezing &c. Act 2010 and the Terrorist Prevention and Investigation Measures Act 2011.

146 For example in *Bhuta v HM Treasury* [2011] EWHC 1789 (Admin), under appeal, in which the Government successfully resisted the obligation to gist allegations that had given rise to an asset freeze with highly restrictive effects.

147 *AF* [2008] EWCA Civ 1148, §64(iv).

20. The suggestion that legislation might define the categories of case in which gisting is not required (GP §2.43) is unwelcome, both because the Government is likely to err on the side of caution and produce an over-long list, and because the courts rather than Parliament are best equipped to determine what the justice of a particular case requires.¹⁴⁸

21. It would in any event be surprising, in the light of its past approach, if the Government were to accept a gisting obligation in a civil litigation CMP. Until the courts in the UK or Strasbourg have decided otherwise, therefore, it seems prudent to assume that the CMP proposed for civil proceedings would operate on the basis of disclosure that will not always be adequate to allow a special advocate to receive effective instructions.

Conditions

22. The CMP has the capacity to operate unfairly, particularly in cases where a gist is not provided. This dictates considerable caution. Every effort should be made to prevent its adoption in cases where it is not strictly necessary. Thus:

- (a) The availability of a CMP should be strictly tailored to the problem as it can be demonstrated to exist. Its proposed application to any case involving “*sensitive material*”, as broadly defined (GP Glossary), is overbroad and unsupported by evidence.
- (b) A starting point could be that the court’s power to order a CMP should be exercisable only if, for reasons of national security connected with disclosure, the just resolution of a case cannot be obtained by other procedural means (including not only PII but other established means such as confidentiality rings and hearings *in camera*).¹⁴⁹
- (c) Detailed rules similar to CPR Part 76 would have to be drafted. They should not be too prescriptive in relation to such matters as whether PII need be exhausted before a CMP can be triggered: the complexity of such issues is evident from the speeches in *al-Rawi*. They should be left to the good sense of the courts themselves.

23. The major benefit of existing CMPs are that they allow the court or tribunal to decide the issues before them on the basis of all the evidence—including the intercept evidence that is otherwise not admissible in legal proceedings. If a CMP is to be introduced into civil proceedings, it should be on condition that section 18(1) of RIPA be amended so as to add

¹⁴⁸ As Lord Hope put it in *Tariq* §83, “*There are no hard-edged rules in this area of the law.*”

¹⁴⁹ Confidentiality rings have a function but are no panacea. Where the material covered by a confidentiality ring is substantial and highly sensitive, counsel for the individual may be placed in a very difficult position, and “*a certain paralysis in the procedure*” may result. See the characterisation of the practice as “*wrong in principle*” by the House of Lords in the prison case *Somerville v Scottish Ministers* [2007] 1 WLR 2734, §§ 152–153.

civil litigation CMPs to the list of proceedings in which intercept evidence can be admitted.¹⁵⁰

(3) The decision to trigger a CMP must be for the court, not the Government

24. The Green Paper §2.7 proposes that a CMP would be triggered in civil proceedings on the basis of a decision taken by the Secretary of State, subject only to the possibility of judicial review by the other party or parties.¹⁵¹

25. That proposal seems to me profoundly wrong in principle. The decision whether to order a CMP is properly for the court in the exercise of its case management functions. In the words of Lord Hope in *Tariq* §78, describing the regime applicable in security vetting cases before the Employment Tribunal:

“The fact that the decision [as to whether closed procedure is resorted to] rests with the tribunal or the employment judge. The fact that the decision is taken by a judicial officer is important. It ensures that it is taken by someone who is both impartial and independent of the executive.”

His concerns about impartiality may readily be illustrated: given the choice, the Government might for example elect not to initiate a CMP in a case which, without a CMP, might be struck out under *Carnduff v Rock*. The issue is one of fairness: and the court (rather than the parties before it,¹⁵² let alone just one of those parties) is the best judge of that. Public mistrust of “secret justice”, and a perception that the Government holds all the cards, will only be enhanced if this Green Paper proposal is adopted.

26. It is difficult to see how this proposal could be considered, even by the Government, to be a necessary part of a civil CMP regime. In *al-Rawi*, counsel for MI5 argued only that “**the court** has the power to order a closed material procedure in exceptional cases where this is necessary in the interests of justice” (§39, emphasis added). If a judicial power to order CMP would have been satisfactory as a statement of the common law, it is not clear why an executive power should be required in the proposed legislation.

(4) Continuing efforts should be made to improve the CMP procedure

¹⁵⁰ It does not seem adequate, in this context, to omit the issue of intercept evidence from the Green Paper on the basis that it is being considered elsewhere (GP §6 and p. 11). The onus in this context should be on anybody seeking to resist the admissibility of intercept evidence, which is already the norm in other CMP proceedings.

¹⁵¹ The only parallel for this of which I am aware is in Rule 54 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, which allows a CMP (normally in vetting cases) to be triggered by the Tribunal or by ministerial direction. As I understand it, however, the latter course has never been taken.

¹⁵² In *Al-Rawi*, Lord Brown at §84 described the principle of open justice as one that “cannot be sacrificed merely on the say so of the parties”.

27. The Special Advocates rehearse in their response to the Green Paper a number of serious difficulties which they claim to experience when operating within closed procedures. These include:

- (a) the prohibition on direct communication with open representatives;
- (b) the inability effectively to challenge non-disclosure; and
- (c) the lack of any practical ability to call evidence.

They refer also to the difficulties caused by the lack of a searchable database of closed judgments, and to specific difficulties experienced in the employment context.

28. I have discussed these difficulties with Special Advocates and also with counsel regularly instructed by the Government in CMP cases (there being no overlap of personnel between the two bodies, which is unfortunate but probably unavoidable). The grounds are well-travelled: for example, many of the points made by the Special Advocates were the subject of a written response from counsel for the Crown before the House of Lords in *AF No. 3*.¹⁵³

29. The underlying principle is not in doubt: to give individuals in CMPs as many of the normal fair trial rights as can be reconciled with the requirements of national security. Some of the Special Advocates' proposals seem difficult to resist: for example, the need for some sort of searchable database (which could benefit both sides to a case)¹⁵⁴ and their wish to be able to communicate with open advocates for the purposes of agreeing procedural directions over the telephone in advance of a case management conference.¹⁵⁵ Others are more complex, as may be seen for example from GP §§2.29–2.34.

30. The Committee has previously suggested a forum for special advocates to discuss with ministers and representatives of the security and intelligence services the “*difficult issues of principle which the day-to-day operation of the special advocates system has thrown up*”.¹⁵⁶ Such discussions, even if held, seem unlikely to be conclusive. If the judiciary approve, it may be that the time has now come for a working party, chaired by a High Court judge with extensive experience in CMPs and with representation from all sides of the debate, to be tasked with finding solutions to some of these difficult and delicate problems. Such a group should take full account of the international experience to which summary reference is made in GP Appendix J and in the submission of the Special Advocates.

NORWICH PHARMACAL

(5) I support the placing of proportionate limitations on the Norwich Pharmacal principle in the national security context

¹⁵³ [2009] UKHL 28.

¹⁵⁴ See GP Appx F §3.

¹⁵⁵ “*Further analysis*” of this issue is said to be underway: GP §2.35.

¹⁵⁶ *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Ninth Report of Session 2009–10, HL Paper 64 HC 395, §§95–98.

31. The CMP issue is about fairness; but the *Norwich Pharmacal* issue is about national security. The case made in the Green Paper is that the novel application of the *Norwich Pharmacal* principle (as to which, see GP p. 15) to national security cases—initially in the case of *Binyam Mohammed*¹⁵⁷—has adversely affected the flow of intelligence from our most valuable international source, the USA, and may do so to a greater extent in the future. Having questioned people in a number of departments and agencies in several capacities, some of them in direct contact with counterparts in the US, I am in no doubt that this suggestion is correct. It is fairly set out at GP §1.22, which also records that there is no suggestion that key ‘*threat to life*’ information would not be shared.

32. Nobody suggests that the courts in *Binyam Mohammed* were blind to national security concerns, or indeed that they disclosed any information subject to the control principle that was not already in the public domain. The case does however demonstrate that UK law allows information obtained from an international partner and subject to the control principle to be disclosed for the purposes of other proceedings, potentially including open proceedings, notwithstanding the absence of that international partner’s consent. Unlike in the case of PII, where the Government can by abandoning all or part of its case retain ultimate control over whether the information is used in open court, neither the Government nor the international partner has an eject button. Take an action brought against the Government for disclosure of information said to be relevant to a case brought in the US. If disclosure is ordered for the purposes of those US proceedings, then subject to appeal there is nothing that can be done. The *Norwich Pharmacal* procedure would have been used by Americans to circumvent an executive order which prevented them from accessing the intelligence in the US.

33. It is unlikely that matters truly damaging to the security of the USA or other international partners would in practice be disclosed under *Norwich Pharmacal*—even for the purpose of a capital trial in the US such as that of *Binyam Mohammed*. Nervousness on the part of international partners may nevertheless be understood. If UK agencies are unable to give an unqualified assurance that US intelligence supplied under the control principle will not find its way into the public domain, a reduction in the quality and quantity of intelligence-sharing is an entirely foreseeable consequence. In circumstances where, as stated in GP 1.22, “*the fullest possible exchange of sensitive intelligence material between the UK and its foreign partners is critical to the UK’s national security*”, this is a matter of the highest importance.

34. It follows that I am sympathetic to the wish expressed in GP §§2.83–2.97 to restrict the novel application of the *Norwich Pharmacal* doctrine to matters of national security. Any such restriction should however be no more extensive than is necessary for its legitimate purpose. As to the specific suggestions made, and in broad terms only:

¹⁵⁷ See also *Shaker Aamer v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 3316 (Admin).

- (a) Legislation to remove the jurisdiction of the courts to hear Norwich Pharmacal applications against all public bodies, whether or not any question of national security arose (GP §2.90), would appear manifestly disproportionate, as would a blanket exclusion for all material held by or originating from one of the Agencies, regardless of its sensitivity.
- (b) A system of exemption for non-disclosure based on judicially reviewable ministerial certificates (GP §§2.91-2.93) might work, if it could be rendered compliant with Article 6 ECHR. Failing that, a rebuttable legislative presumption might be considered.
- (c) A statutory definition of the Norwich Pharmacal test (GP §2.94) would be unobjectionable, though it is difficult to see how it would meet the intelligence-sharing objective.

Conclusion

35. To summarise my views as expressed in this Memorandum, by reference to its headings:

- (a) **There are likely to be some cases in which secret evidence renders cases untriable under existing procedures.** I can shed little useful light however on whether the problem is as serious as the Green Paper implies.
- (b) **If CMP is to be made available in such cases, it must be on strict conditions.** The potential absence of gisting dictates great caution. The proposed scope (any case involving “sensitive material”) is overbroad, and intercept evidence should be admissible as it is in other CMPs.
- (c) **The decision to trigger a civil CMP must be for the court, not the Government.** An impartial decision-maker is essential for the appearance and the reality of justice.
- (d) **Continuing efforts should be made to improve the operation of CMPs.** A working group chaired by a High Court Judge could be a way forward.
- (e) **I support the placing of proportionate limitations on the Norwich Pharmacal principle in the national security context.** Respect for the control principle is vital to our national security and should not be jeopardised.

26 January 2012

Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice (JS 13)

Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice (JS 13)

Thank you for your letter of 19 January 2012 on your inquiry into the Justice and Security Green Paper. You asked for a response by 24 January 2012 and I am sorry that I have slightly missed that deadline.

I am grateful for the confirmation that the Committee intends to report on its inquiry before Parliament returns from the Easter recess. You seek confirmation that the Government will take the Committee's views into account before bringing forward legislation. When I published the Green Paper for consultation in October 2011 I made clear that the Government intended to press ahead quickly. We do not intend to bring forward legislation before the start of the second session and the Government will endeavour to take into account the Committee's views. In any event, there will be many opportunities to debate these issues during the Parliamentary stages.

You asked for copies of all consultation responses received, and a summary of those responses. I am afraid I am unable to supply these. While some consultation responses have been published by those who submitted them, others have not and may have been sent to the Government in confidence. Before sharing responses with the Committee we would need to check with each consultee individually that they were content for their views to be shared further in this manner and it has not been possible to do this in the time available.

The consultation closed on 6 January 2012 and over a hundred responses have been received to date, including a number of responses submitted after the formal close of the consultation. Some of those late submissions—but not all—were by prior agreement. We are therefore still analysing the consultation responses ourselves and do not have a summary available at this time. The Government will, of course, publish a response to the consultation in due course, in line with the Code of Practice on Consultation. I will ensure that the Committee receives a copy.

The rules of the court for TPIM proceedings in England and Wales and in Northern Ireland were made by two statutory instruments by Jonathan Djanogly MP on 14 December 2011—the same day the TPIM Act received Royal Assent. The Rules came into force on 15 December 2011—the same day the Act came into force—because it was necessary for TPIM proceedings to take place soon after commencement. However, the Act requires subsequent approval of the rules by Parliament within 40 days beginning with the day on which the order is made, subject to extension for periods during which Parliament is dissolved or prorogued or both Houses are adjourned for more than four days. The debates, which are being led by Home Office Ministers took place in Lords Committee on 23 January 2012 and are scheduled for 1 February 2012 in Commons Committee. Rules of court have also been made for Scotland, but these do not require Parliamentary approval. I attach copies of the relevant rules of court and, where applicable, accompanying explanatory memoranda [*not printed*].

Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice (JS 13)

I look forward to giving evidence to the Committee on these issues in due course.

31 January 2012

Written Evidence submitted by Justice (JS 15)

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. In September 2009, JUSTICE published *Secret Evidence*, a major report in which we called for an end to the use of secret evidence in UK proceedings.¹⁵⁸ Secret evidence is, in principle and in practice, unreliable, unfair, undemocratic and damaging both to national security and the integrity of Britain's courts. In 2010, JUSTICE jointly intervened with Inquest and Liberty in the Divisional Court in support of the decision of Lady Justice Hallett that she did not have the power to order to hear evidence in secret as part of the inquests arising from the 7/7 bombings.¹⁵⁹ We made submissions in *A v UK* in Strasbourg and *AF* in the domestic courts.¹⁶⁰

2, JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court.¹⁶¹ The key outcome in these cases—that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority—prompted the introduction of the Justice and Security Green Paper (“the Green Paper”).

3. We submitted our response to the Government consultation on the Justice and Security Green Paper in early January 2012. This submission draws upon our consultation response.¹⁶² We welcome the opportunity to engage with the questions posed by the JCHR inquiry. We respond to those questions where we have experience and expertise. Our decision not to respond to other questions should not be taken as an indication of support for the Government's proposals.

Q1. Does any evidence exist of the scale of the use of secret evidence in the 14 contexts which the Government has identified in which closed material procedures are already provided for in legislation?

Q2. Are there any other contexts in which closed material procedures have been used which have not been included in the Government's list of 14?

158 JUSTICE, *Secret Evidence*, 2009. We have enclosed a hard copy with our submission. Electronic copies are available online: <http://www.justice.org.uk/resources.php/33/secret-evidence>

159 The Divisional Court accepted our submissions. Coroners do not have the inherent jurisdiction to order closed material proceedings. A copy of the judgment and JUSTICE's submissions can be found here: <http://www.justice.org.uk/pages/r-secretary-of-state-for-the-home-department-v-assistant-deputy-coroner-for-inner-west-london.html>

160 Full information on each of these submissions is available online. <http://www.justice.org.uk/pages/past-interventions.html>

161 *Al-Rawi v Security Service* [2011] UKSC 34; *Tariq v Home Office* [2011] UKSC 35. Copies of JUSTICE's submissions can be found online: <http://www.justice.org.uk/pages/al-rawi-.html>

162 http://www.justice.org.uk/data/files/JUSTICE_-_Justice_and_Security_Green_Paper_Response_-_Jan_2012_-_FINAL.pdf

4. It is a basic principle of a fair hearing—both in civil and criminal cases—that a person must know the evidence against him. This principle provides the foundation of the principle of open equal justice incorporated in constitutional guarantees the world over and reflected in international human rights law. The right to be heard includes the opportunity to challenge the evidence before the court.¹⁶³

5. This core principle of justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past decade. Secret evidence is now used in a broad range of cases including deportation hearings, control order proceedings, parole board cases, asset-freezing applications, pre-charge detention hearings in terrorism cases, employment tribunals and even in planning cases. In *Secret Evidence*, we identified that Parliament had legislated 14 times to allow the use of secret evidence:

- The Special Immigration Appeals Commission ('SIAC');¹⁶⁴ 1997
- The Northern Ireland national security certificate review tribunal;¹⁶⁵ 1998
- The Proscribed Organisations Appeals Commission;¹⁶⁶ 2000
- The Investigatory Powers Tribunal;¹⁶⁷ 2000
- Employment tribunals;¹⁶⁸ 2000
- The Pathogens Access Appeals Commission;¹⁶⁹ 2001
- The Northern Ireland Sentences Review Commissioners¹⁷⁰ 2001
- The Northern Ireland Life Sentences Review Commissioners¹⁷¹ 2001
- Planning tribunals;¹⁷² 2004
- The High Court in control order proceedings;¹⁷³ 2005
- Industrial tribunals in Northern Ireland;¹⁷⁴ 2005

163 *Re D (Minors)* [1996] AC 593 at 603-04 (Lord Mustill).

164 The Special Immigration Appeals Commission Act 1997.

165 Section 91 of the Northern Ireland Act 1998.

166 Section 5 of the Terrorism Act 2000.

167 Part 6 of the Counter-Terrorism Act 2008.

168 Section 67A(2) of the Race Relations Act 1976, as amended by section 8 of the Race Relations (Amendment) Act 2000. Now carried over into all discrimination claims, in Section 177, Equality Act 2010.

169 Section 70 of the Anti-Terrorism Crime and Security Act 2001.

170 Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

171 Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

172 See sections 321, 321A, of the Town and Country Planning Act 1990; para 6A of Schedule 3 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and para 6A of the Schedule to the Planning (Hazardous Substances) Act 1990 as amended by sections 80-81 of the Planning and Compulsory Purchase Act 2004.

173 Prevention of Terrorism Act 2005.

Written Evidence submitted by Justice (JS 15)

- County Courts in discrimination cases;¹⁷⁵ 2006
- The First Tier Tribunal and the Upper Tribunal;¹⁷⁶ 2007
- The High Court in asset-freezing proceedings.¹⁷⁷ 2008

Special advocates have also been used in:

- Freedom of Information Act claims before the Information Tribunal;
- Data protection proceedings before the High Court;
- Counter-terrorism proceedings before the High Court; and
- Immigration proceedings before the High Court.

6. This list does not include the circumstances where special advocates have been used after a decision by the court that it had the power to authorise their use without a specific statutory framework.¹⁷⁸ Clearly these uses must now be drawn into question after the decision of the Supreme Court in *Al-Rawi*.

7. The only clear disparity in the Government’s list of occasions when CMP has been made available is in connection with discrimination hearings in county courts, which appear to have been overlooked.¹⁷⁹ We regret however that in the exercise of listing and examining existing practice, the Government does not appear to have engaged seriously with the ever-expanding use of this practice, which presents a significant inroad into the principle of open and natural justice as understood within the UK. In the Ministry of Justice memoranda in response to the Chair’s letter dated 28 November 2011, the Government asserts that “a lot of consideration was given to the current systems in place for protecting sensitive material through closed procedures”. It goes on to explain the Government’s view that “Procedures such as those in SIAC have been shown to deliver procedural fairness and work effectively”. We regret that the Government has not published in greater detail its analysis of the existing use of CMP. We consider that the Government’s assertion that these procedures are fair or effective is unfounded, and in our view, misleading. During our 2009 review of the operation of secret evidence, we concluded:

174 Para 8 of Schedule 2 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SI 2005/150).

175 Section 66B of the Sex Discrimination Act 1975 and section 59A of the Disability Discrimination Act 1995 as amended by the Equality Act 2006.

176 Tribunal Courts and Enforcement Act 2007.

177 Part 6 of the Counter-Terrorism Act 2008.

178 *Roberts v Parole Board* (Parole Board Hearings); *R v H, R v C* [2004] UKHL 3 (Criminal proceedings).

179 Section 117, Equality Act 2010.

Secret evidence is unreliable: Evidence which is considered by a court of rational deduction, but unchallenged is inherently unreliable. This unreliability is compounded by the fact that material produced by the security and intelligence services is not the product of a criminal investigation with the associated safeguards placed on the production of evidence of criminality.¹⁸⁰

It is unfair: Each of the principles that make up the common law right to a fair hearing—the right to be heard, the right to confront one’s accuser and the right to an adversarial hearing and equality of arms—is denied when one party to a claim is denied access to the evidence used against them.¹⁸¹

It is undemocratic: The protection of parliamentary democracy is one of the key foundations of the principle of open justice. Requiring the courts to conduct their work in public ensures through transparency that the public can satisfy themselves that justice is being done. The public’s ability to scrutinise judicial decision making is plainly thwarted when proceedings, evidence and judgements are kept secret.¹⁸²

Secret evidence is damaging to the integrity of our courts and the rule of law: Lack of fairness damages the public good of the justice system itself. It is inevitable that the courts will take hard decisions which may be unpopular with the parties and the public. However the integrity of the courts depends on the perception that our judges have adopted a fair and independent process to reach their conclusions. Despite the importance of open justice, it remains possible to have a fair hearing behind closed doors when the public interest requires, so long as all the parties have had an equal opportunity to make their case.¹⁸³

It weakens security: Although counter-intuitive, the use of unchallenged intelligence to affect the outcome of cases can lead to inaccurate conclusions which endanger security. In the case of civil claims involving allegations against Government agencies, this may allow the cover-up of serious wrong-doing and misconduct by officials and agents. This approach breeds complacency and could encourage a drop in professional standards, which in turn could reduce the trust of the public in the security and intelligence services and their long-term effectiveness.¹⁸⁴

The use of secret evidence is unnecessary: Finally, there is evidence that the use of secret evidence is not necessary. Firstly, existing cases have shown that the Government may take an overly cautious approach to claiming secrecy, including for information already in the public domain. Secondly, in our view, there are generally better means of protecting

180 *Secret Evidence*, paras 410–415

181 *Secret Evidence*, paras 416–422

182 *Secret Evidence*, paras 423–425

183 *Secret Evidence*, paras, 426–429

184 *Secret Evidence*, paras 430–431

the important public interest in maintaining national security which provide greater respect for the right to open justice and a fair hearing.¹⁸⁵

8. We consider that each of these criticisms hold firm. Since the publication of Secret Evidence a number of developments have underlined our concern that the use of secret evidence is a practice which should not be extended, but rolled back. We consider that it is extraordinary that the Government propose to extend the use of secret evidence to all ordinary civil proceedings in the UK. The core proposal in the Green Paper would allow the Secretary of State the discretion to certify that any civil proceedings involving sensitive material must be conducted under closed material procedures. This approach underestimates and undermines the common law principles of open and adversarial justice and ignores centuries' old guarantees for fairness in civil proceedings in favour of a broad based Government power to control the boundaries of litigation in which it may be involved.

Q3. Has the Government demonstrated the necessity of legislating to make closed material procedures available in all civil proceedings?

9. The Government has failed to establish the necessity for the broad proposals in the Green Paper, or for the extension of CMP at all. As recognised by Lord Dyson in *Al-Rawi*, there must be **compelling** reasons to depart from the ordinary principles of open justice, including the right to be heard and the right of confrontation. The Green Paper pays little attention to these principles which the Supreme Court placed at the heart of its analysis. It argues briefly that:

- The principles of procedural fairness have “evolved” over centuries;
- Although these principles include the right to know the opposing case, the scope of this right is variable “depending on the circumstances”;
- The principle of open justice is not absolute and allow exceptions, including the hearing of cases in camera;
- It may be compatible with the right to a fair and public hearing, as guaranteed by Article 6 ECHR for hearings to be held in private or for information to be withheld from the parties, as long as “there are sufficient procedural safeguards”.
- Under Article 6 ECHR, although relevant evidence should “generally” be disclosed to the parties to civil proceedings, this right is not absolute and limitations may be justified in the interests of national security or to protect the public from harm.¹⁸⁶

10. In light of the analysis of the Supreme Court in *Al-Rawi*, this broad-brush approach does not stand up to close scrutiny.¹⁸⁷ In summary:

¹⁸⁵ *Secret Evidence*, paras 432–437

¹⁸⁶ *Green Paper*, paras 1.7–1.12.

- Although the principle of open justice, as protected by the common law and Article 6 ECHR allows for exceptions, these are narrowly defined and strictly limited to circumstances where there is compelling evidence that the exception is necessary in the public interest in the specific circumstances of an individual case.
- Although a fair trial may be secured when disclosure is limited by reference to legitimate public interest aims, the circumstances when Article 6 ECHR will be satisfied must at a minimum allow the claimant to understand the case. The claimant has other rights under Article 6 ECHR, including the right to a public hearing and the right to a judgment. A fair hearing presupposes the right to adversarial proceedings and equality of arms. Any limitation to any of these elements of the right to a fair hearing may only be justified in so far as it does not impair the very essence of a fair hearing. The appointment of a special advocate cannot automatically render CMP fair.
- The analysis incorporated in the Green Paper neglects the analysis of the European Court of Justice in *Kadi* and the application of Charter of Fundamental Rights of the European Union. Emerging case-law on Article 47 of the Charter has been clear. As the Court found in *Kadi (No 2)*, the provision of “unsubstantiated, vague and unparticularised allegations” as the foundation of a case cannot comply with basic fairness under EU law.¹⁸⁸ The exclusion of the consideration of this case law on the application of the Charter is disingenuous. These issues continue to be litigated in domestic courts and in Luxembourg with the implication that the application of the Charter will be key to the protection of the principle of open justice in any area where EU law is engaged.¹⁸⁹

11. The Government argues that the extension of CMP to civil litigation are necessary and appropriate because:

- Increasing civil litigation involving the security and intelligence agencies has placed a disproportionate demand on their time and resources and this has endangered national security;
- CMP are necessary to reduce the risk that sensitive material damaging to national security may be disclosed;
- Unlike PII, CMP will allow the court to consider all of the relevant material, regardless of security classification. A judgment on the full facts is more likely to secure justice than a judgment based only on a proportion of the relevant material;
- CMP will benefit both the defendant Government agencies and the claimant. The Government will be able to defend its case fully and the court may be able to consider information beneficial to the claimant’s case which it otherwise would not see.

187 Together with Liberty, we addressed the Government’s arguments that CMP are consistent with the common law right to open justice and Article 6 ECHR in our submissions to the Supreme Court. See paras 82–120 (*Al-Rawi*) and 14–77 (*Tariq*).

188 *Kadi No 2*, [2011] 1 CMLR 697 at 157.

189 See JUSTICE’s intervention in *SS v Secretary of State for the Home Department*, T2/2010/2142 and also *ZZ v Secretary of State for the Home Department*, C-300/11, currently pending decision by the European Court of Justice. The approach of the Court was confirmed by Advocate General Sharpston in her opinion in *POMI*, C-27/09P, handed down on 14 July 2011, when she described the “gist” considered in *A v UK*, as a “irreducible minimum requirement” in cases involving a freezing order (see paras 244–245).

- The court retains the residual jurisdiction to stay or strike-out claims which are not in the public interest. CMP will reduce the likelihood that claims where PII is denied, the underlying claim will be struck out;
- CMP “have proved that they are capable of delivering procedural fairness”.

12. In our view, none of these arguments stand up to scrutiny and there is no compelling case for reform:

- **“Increasing litigation against the security and intelligence services”**: The Green Paper emphasises the burden and weight associated with a “significant” increase in civil litigation involving the security and intelligence agencies. The figures given by the Government cite 14 cases over the past decade, seven of which the Government consider have strained international relationships or created an identifiable risk that sources or techniques would be compromised.¹⁹⁰ It is important to emphasise that this number of cases is indeed very small, when compared to litigation against, for example, police forces operating in the UK or other Government agencies. The increase in judicial scrutiny is part of the healthy growth of domestic administrative law, where increasingly the activities of all public authorities are subject to the scrutiny of the courts to ensure our public servants act within the bounds of the law. That there have been so few cases is tantamount to recognition of the special and vital nature of the work of the security and intelligence services. Of the 14 cases cited in the Green Paper, a significant number, if not all, arise from the fall out of the post-September 11 activities of the UK and the US. This litigation has been focused on activities subject to widely publicised public criticism, incorporating allegations of complicity in torture, inhuman and degrading treatment and other human rights violations. **We are not persuaded that the increase in litigation involving the security and intelligence services provides any justification for reform.**
- **“Risk to national security posed by disclosure”**: The Green Paper is clear that there is no evidence that national security has been endangered by any specific deficit in existing law and practice. It talks of the need to maximise the intelligence material available by reassuring our international partners that information shared will be subject to absolute confidentiality (‘the control principle’).¹⁹¹ The primary case cited in support of change is the case of *Binyam Mohammed*, where the Court of Appeal ordered the publication of seven paragraphs of a judgment of the Divisional Court which the Government argued must be secret in order to protect the diplomatic relationship between the UK and the US.¹⁹² This case was exceptional:
 - By the time of the final judgment in this case, all of the documents sought by the claimant had been disclosed by the US authorities directly to his counsel in the US.
 - The final discussion on PII was extremely limited, and focused simply on a few paragraphs of the original judgment and the need for redaction. It was accepted that nothing in those paragraphs included secret information or information that was likely to endanger the lives of individuals or the immediate national security

¹⁹⁰ *Green Paper*, paras 1.17 – 1.18.

¹⁹¹ *Green Paper*, para 1.22, 1.43 – 1.44.

¹⁹² *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

of either the UK or the US. The public interest in question was the risk that the flow of intelligence information from the US would be reviewed if the Court were to order disclosure (endangering the diplomatic understanding of the “control” principle where confidentiality attaches to intelligence information provided by third States, subject to their waiver).

- The judgments in the Court of Appeal were clear that the Secretary of State’s view would have prevailed and PII prevented disclosure, but for the prior disclosure of this information in the US undermining any argument that there was a risk that the US Government would act to significantly change the flow of information based on the disclosure of this material alone.¹⁹³ Importantly, the Court of Appeal attached significant weight to the fact that the paragraphs in question related to UK involvement and knowledge about the torture and inhuman treatment which the US court had accepted had occurred. The public interest in open justice in such a significant case outweighed the extremely limited risk to the US-UK relationship in the highly unusual circumstances of this case.
- The *Binyam Mohammed* case was truly an extraordinary case, involving horrific evidence of State involvement in rendition, torture and inhumane treatment. The factual circumstances for the court’s order on disclosure in the *Binyam Mohammed* case were exceptional, with the claimant arguing only for disclosure to security vetted counsel in the US litigation, no more. The court was clear that, but for prior disclosure in the US, the Government’s claim for public interest immunity would have been successful. Each of the judges in this case emphasised the significant weight to be granted to the Secretary of State’s judgment on the implications for national security of sensitive material. The Court of Appeal highlighted the nature of this case, and how very rare it would be for the court to overturn the Secretary of State’s assessment of the balance between the public interest in disclosure and any particular risk to national security. While the weight to be given to the Secretary of State’s view must be significant, the Court of Appeal explained that the final decision on the balance between national security issues and the public interest in the administration of justice must remain with the judiciary. While the Secretary of State may be better equipped to assess national security issues, the court is best placed to understand the impact of non-disclosure on the administration of justice, and so, while showing respect to the Secretary of State’s national security assessment, best placed to consider the balance of the two important and competing public interests.¹⁹⁴

That this case might be used to justify a wholesale shift in control from the judiciary over disclosure of information to the discretion of the Secretary of State is, in our view, extremely worrying. **There is no evidence that the operation of public interest immunity has led to disclosures which have endangered national security. The Government refers to the reaction of international partners to the approach of the Court in *Binyam***

¹⁹³ *Binyam Mohammed* (CA), see for example paras 129 – 203.

¹⁹⁴ *Ibid*, see for example, para 132.

Mohammed to the control principle, but we are not persuaded that this risk can justify the proposals in the Green Paper.

- **“CMP is in the interests of justice”**: The Green Paper consistently emphasises that, in the interests of fairness, the promotion of CMP is needed in order to maximise the information before the Court and to increase the likelihood that justice will be done.¹⁹⁵ This argument was made before the Supreme Court and dismissed, most eloquently by Lord Kerr:

For what [...] could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of that argument, however 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.¹⁹⁶

The admission of unchallenged evidence under CMP undermines the right to open, adversarial justice. It is more likely to lead to an unjust result and undermines the credibility of the court and the administration of justice.

- **“CMP is fairer to both the claimant and the defendant”**: The Government argues that the use of CMP will allow the court to consider evidence which may be beneficial to the claimant’s case. We find it difficult to follow how this is likely to be tested in practice. The material considered in CMP will be produced by the Government. The ability of the Special Advocate to determine how this material (or additional material which might be requested if the claimant were fully informed) might benefit the claimant’s case is limited by the inability to take instructions from the claimant after the content of the material is disclosed.

On the other hand, the Green Paper refers to the cost associated with settling the claims made by the Guantanamo detainees when it became clear that it was unlikely that the court would operate CMP. The Green Paper asserts that the Government was compelled to settle these claims. On this, we note that settlement preceded the final decision of the Supreme Court. The application of PII was never tested by the Government in practice. The Green Paper explains the Government’s view that the operation of PII to the volume of sensitive material relevant to these cases would be timely, costly and disproportionate.¹⁹⁷ It is difficult to see how when argument must be heard by the court on what material should be open or closed under CMP, the time and cost involved in this type of litigation will be reduced under CMP as opposed to PII. The real shift will be in moving the discussion entirely behind closed doors, preventing the claimant from making submissions on the interests of justice in his or her case and creating a de facto benefit to the Government argument in favour of secrecy.

¹⁹⁵ *Green Paper*, for example, para 2.2 – 2.3.

¹⁹⁶ *Al-Rawi*, para 93.

¹⁹⁷ *Green Paper*, para 1.54

- **“CMP will allow claims to proceed which might otherwise be struck out”:** In *Al-Rawi*, the Supreme Court accepted that where sensitive material was not protected by PII, it would be open to the Court to stay or strike-out the claim because it would not be in the public interest for it to proceed. The Court referred to the case of *Carnduff v Rock*.¹⁹⁸ The Green Paper expresses the Government’s view that CMP would be preferable to the alternative which could see a claim struck out and the claimant denied any access to the Court. **We consider that the case of *Carnduff v Rock* is exceptional and are unaware of any other case where the risk of strike out has arisen.** We consider it dubious authority on which to proceed and dealt with the risk of strike out in our submissions to the Supreme Court.¹⁹⁹ The likelihood of a stay or a strike out is exceptional. However, in the cases where this is the last resort, it is arguable that under the existing system, the price of preserving the public interest in the credibility of the courts and the proper administration of justice is that in some circumstances one or other party may exceptionally be disadvantaged in the greater public interest. Thus, in some cases where PII is denied, the Government may choose to drop a prosecution rather than rely on sensitive material or may put forward a defence which is not supported by evidence which it keeps secret in the public interest. On the other hand, in some cases the claimant may have to accept the unlikely risk that his claim may be struck out.²⁰⁰

However, the *Carnduff* risk articulated in the Green Paper arises only after a full consideration by the Court of the balance of the public interest not only on the PII application, but on the application for stay or strike-out.²⁰¹ The Green Paper does not propose that CMP should be an option only after all other mechanisms for protection have been pursued and as an alternative to a decision to strike out a claim which could not be heard without harm to the public interest. Instead, it proposes to remove the traditional Wiley balancing exercise altogether, in favour of CMP triggered by administrative assessment. **In our view, the risk of a *Carnduff* strike-out arising is minimal. This cannot justify the introduction of a change of the magnitude proposed in the Green Paper.**²⁰²

198 *Al-Rawi*, paras 50, 81- 82, 86, 103, 108, 158, 175–181. See also Lord Justice Mance in *Tariq* at 40, Lord Kerr at 110 (where he considers strike-out make be a more palatable outcome than the introduction of CMP in some cases. *Carnduff v Rock* [2001] EWCA Civ 680 was not a national security case. In fact, it was a contractual claim brought by a police informant. The case has itself been subject to criticism and may be wrongly decided.

199 See JUSTICE submission in *Al-Rawi*, paras 103 on.

200 We expand on this argument in our submissions to the Supreme Court in *Al-Rawi*, see paras 1–2.

201 Lord Dyson expressed a similar scepticism about the *Carnduff* precedent in his judgment in *Al-Rawi* (at para 50): “cases such as *Carnduff* are a rarity. They do not pose a problem on a scale which provides any justification (let alone any compelling justification) for making a fundamental change to the way in which litigation is conducted in our jurisdiction with all the attendant uncertainties and difficulties that I have mentioned”. See also Lord Brown at 81–82.

202 We consider that the use of this justification is particularly objectionable in light of the proposal that only the Secretary of State will have the ability to trigger the CMP process. This would create the absurdity that, in order to allow the claimant’s case to go ahead (a case in which a claim might progress at significant financial and reputational cost to the Government or its agencies), the Secretary of State would need to certify that a case should proceed under CMP.

- **“Existing CMP are fair, tried and tested”**: In our view, this assertion is inaccurate and misleading. We dissected the operation of existing CMP procedures in Secret Evidence and do not repeat our findings here. By way of summary, we support the submission of the Special Advocates on the operation of existing CMP:

CMP represent a departure from the foundational principle of natural justice [...]The way in which CMPs work in practice is familiar to only a very small group of practitioners [...]The use of Special Advocates may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.²⁰³

We return to the role of the Special Advocate and the minimum requirements for disclosure governed by *AF (No 3)*, below.

13. If there is evidence for any reform, it cannot justify the breadth and scope of the proposals in the Green Paper. Currently CMP are limited to specific circumstances and accompanied by particular rules and safeguards approved by Parliament. In our view, the use of CMP is wrong in principle. Under the proposals in the Green Paper, the Government proposes to ask Parliament to approve the use of CMP in all civil proceedings without evidence to show a compelling need for any reform. Although the Court in *Al-Rawi* concluded that CMP could only be introduced by Parliament, the significance of exceptions to the common law principles of open justice, the right to a hearing and the right to confrontation are such that, in our view, any change must be justified by weighty reasons and limited to the least restrictive measures necessary. **The proposals in the Green Paper are not only unjustified and unnecessary but, if put before Parliament in their current form, designed to frustrate the very democratic legitimacy that the Supreme Court considered a necessary precursor to such fundamental change.**

Q4. What evidence exists of the scale of the problems relied on by the Government to justify the proposals in the Green Paper? In particular:

- **Apart from the case of *Carnduff v Rock*, are there any other examples of cases in which civil proceedings against the Government have been struck out because the determination of the claim would have required the disclosure of sensitive information and the case was therefore not triable?**

14. Aside from the case of *Carnduff*, which we consider dubious authority, we are unaware of any similar case being struck out.

- **Apart from the 16 civil claims settled in relation to the Guantanamo civil litigation, are there any other examples of cases in which civil claims have been settled by the defendant because the only way to defend the claim would have been to disclose sensitive information?**

²⁰³ Response to Consultation from Special Advocates, 16 December 2011, para 2.

15. We are unaware of any cases additional to those referred to by the Government in the Green Paper.

Q5. Is the law of Public Interest Immunity ("PII") inadequate to deal with the problem of sensitive information in judicial proceedings, and if so why?

16. We reject the Government's assertion that PII is inadequate to deal with the protection of sensitive information in judicial proceedings. There is no significant evidence, in our view, to show that this system is failing or has led to the disclosure of sensitive material, capable of justifying a radical departure from existing practice as proposed in the Green Paper. As we explain above, we consider that the introduction of the CMP mechanism proposed would lead to the end of PII, at least in civil proceedings.

Q6. What actual examples exist of current procedures resulting in the damaging disclosure of sensitive material?

17. We are unaware of any example of damaging disclosures of sensitive material, as explained above.

Q7. Do you agree with the Government that a hearing in which a judge has seen all the evidence is more likely to secure justice than a hearing where some evidence has been ruled inadmissible?

18. No. We agree with Lord Kerr's assessment in the Supreme Court, that this argument is deceptively attractive, but fails to understand the impact which the introduction of such a system will have on the ability of the Court to have access to material fully tested by the rigours of informed cross-examination.

Q8. Are there any circumstances in which the availability of closed material procedures in civil proceedings is preferable to public interest immunity and positively human rights enhancing?

19. We do not consider that the expansion of CMP is human rights enhancing, although the Government presents the proposals in the Green Paper as designed to enhance fairness. Although the JCHR has questioned the opportunity for the introduction of Special Advocates in the past (for example, in the context of protecting the rights of bereaved families in the face of the Government's proposal in the Coroners and Justice Bill), these proposals have only been seen as inadequate safeguards designed to try to address some of the worst excesses of Government proposals for enhanced secrecy. We understand that the Government continues to argue that CMP is preferable to PII, since this will allow the Government to disclose proactively more material than is presently the case. As we explain above, we do not think that this paints a realistic picture of litigation against the Government.

Q9. Should the availability of a closed material procedure be a decision for the Court, or for the Executive subject only to judicial review?

20. We do not consider that the extension of any form of CMP is justified. However, we consider it extraordinary in the context of these proposals that the Government proposes that the Secretary of State should hold the sole “trigger” for the introduction of secret evidence procedures through CMP, in all civil proceedings, as we explain, above.

Q10. Should there always be balancing by the court of the interests of the administration of justice on the one hand and the interests of national security on the other?

21. Yes. The operation of the Wiley balance by the courts under existing PII principles provides an essential safeguard against abuse of PII by the executive.

Q11. If there is justification for changing the current legal framework, how widely should any new regime apply? Should it be confined to information which may harm national security if disclosed, or should it apply more generally to “sensitive information” the disclosure of which is damaging to “the public interest” more broadly defined?

22. The weakness of the definition proposed in the Green Paper illustrates the lack of justification provided by the Government for its approach. As we explain above, any departure from the ordinary principles of open and confrontational justice must be justified by reference to compelling reasons, we consider that the creation of broad exemptions based on the ill-defined categories in the Green Paper would create a significant risk of injustice without justification.

Q13. Does any jurisdiction provide particularly pertinent comparative lessons?

23. We regret the lack of attention paid in the Government’s response to the relevance of comparative material. Annex J provides few short paragraphs on the Government’s comparative analysis of overseas experience. JUSTICE is currently conducting some supplementary comparative analysis to supplement its submission to the consultation on the Green Paper. When this research is complete, we will provide copies to the JCHR.

Q14. Do you agree with the Government that closed material procedures have proved that they are capable of delivering procedural justice?

24. No. We fundamentally disagree with the Government’s unsupported statement that CMP have been proved to operate fairly and effectively. We share the anxiety expressed by the JCHR in 2010, that the case-law on the operation of CMP has been consistently misrepresented to Parliament by successive Governments:

The law in this area is complex and technical and we regard it as positively misleading to say to parliamentarians, most of whom are not legally trained and do not have ready access to legal advice, that the House of Lords has "confirmed" the way in which the control orders regime operates in a manner fully compliant with the ECHR. That is not, on any view, a fair or accurate characterisation of the effect of the House of Lords judgments.²⁰⁴

Q15. If you have experience of the operation of closed material procedures, did you consider them to be fair? If not, why not?

25. In *Secret Evidence*, we conducted a detailed review of the limitations of the special advocate:

Despite the claims of the Government and others that special advocates are a safeguard against the unfairness caused by the use of secret evidence, special advocates, operate under a number of limitations which make them a paltry substitute for a fair trial in open court [...] [In particular, they operate under] four key limitations [...] (i) the prohibition on their communication with defendants, (ii) the limitations on their access to evidence, including their practicability to call witnesses, absence of disclosure of unused material and their lack of access to expertise; (iii) the absence of any mechanism to ensure their accountability; and (iv) the lack of formal judicial control over their appointment.²⁰⁵

26. These are problems which the JCHR is familiar with, having taken evidence from Special Advocates in the past and concluded:

By seriously hampering special advocates in their performance of the role they are intended to perform, it creates the risk of serious miscarriages of justice.²⁰⁶

27. We share the Committee's concerns about the inability of the special advocate to redress to any significant degree the operation of CMP. We do not think that anything has changed since our assessment in *Secret Evidence* which would change our view. Similarly, there is nothing in our view to suggest that they will operate more effectively in the context of civil proceedings. On the contrary, we consider that there are different and challenging questions about the operation of CMP and the extent of the role of the special advocate which have not yet been addressed. For example, how will a lawyer advise his claimant client on prospects of success in a CMP claim? What implications will this have for, for example, Part 36 offers to settle a claim? It is unclear from the Government's proposals that the implications for civil litigation have been considered fully, or whether the Government has considered the implications for the role of special advocate, if any.

204 *Ninth Report of Session 2009-10, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395, para 85.

205 *Secret Evidence*, para 367. Each of these limitations is explored in detail in paras 368 – 405.

206 *Ninth Report of Session 2009-10, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395, para 65. See also, paras 55-98.

Q16. Can the system of special advocates be made to operate any more fairly and effectively than it currently does?

The principal procedural safeguard which the Government relies upon to render the use of CMP acceptable is the role of the Special Advocate. We have had the benefit of seeing the Special Advocates' critical joint response to the Green Paper, which we welcome and support.²⁰⁷ We consider that policy on CMP which is developed without recognition of the direct experience of those Special Advocates who are operating at the heart of the existing mechanisms for CMP can only make bad law. **It remains our strongly held view, as expressed in Secret Evidence that appointment of a Special Advocate cannot compensate for the unfairness of being excluded from the consideration of your case. This holds true in ordinary civil proceedings.** The role of the Special Advocate has been subject to criticism from its adoption, both in terms of their inherent inability to redress the unfairness of secret evidence and in connection with limitations placed on their role. The Special Advocates' own submission identifies eight significant practical problems which limit their effectiveness. These range from the bar on communication through limitations on their practical ability to call reliable evidence, to the lack of formal rules of evidence in CMP and the prejudicial impact of late disclosure by Government agencies. These problems are not new and have previously been identified by commentators and by Special Advocates themselves, not least in their compelling evidence to the Joint Committee on Human Rights and in decisions of individual counsel to resign their appointment for ethical reasons.²⁰⁸ **The Green Paper proposes only peripheral changes to the existing system of Special Advocates, focusing on addressing the absolute bar on communication and the need for additional training. We share the Special Advocates view that this approach is unlikely to impact significantly on the effectiveness of their role or its ability to add adequate safeguards to the CMP procedure to offer protection for the individual right to a fair hearing and the principle of open and adversarial justice.**

Q17. Is it possible to identify specific contexts in which the AF (No. 3) disclosure obligation (sometimes known as “the gisting requirement”) does not apply?

29. We consider that it would be extremely difficult to provide a list of cases where AF (No 3) does not apply. Attempting to do this would not save litigation, but would generate it, as individuals argued that the list selected was inappropriate and too narrowly drawn. The Green Paper explains that the Government intends to litigate to specify circumstances when Article 6 ECHR requires individuals to have enhanced disclosure within CMP in order to ensure their right to a fair hearing. It is the Government's case that the decision of the

207 Response to Consultation from Special Advocates, 16 December 2011

208 See for example, JCHR, Seventeenth Report of Session 2009–2010, *Counter-terrorism policy and human rights: Bringing Human Rights Back In*, HL 86/HC 111, paras 54–62; Twentieth Report of Session 2010–2012, *Legislative Scrutiny: TPIMs (Second Report)*, 1.18–1.23.

House of Lords in *AF (No3)* lacks clarity. The Green Paper refers to the judgment of the Court in *Tariq*, where Lord Dyson stated that in “many cases”, an individual’s case can be prosecuted without disclosure of material which “public interest considerations make it impossible to disclose to him”. It remains the Government position, as argued during *Tariq* and the passage of the Terrorism Prevention Investigation Measures Bill, that the protections in *AF (No 3)* as articulated by the European Court of Human Rights in *A v UK* is limited to only certain types of case, including those where individual liberty is at issue.

30. The Grand Chamber of the ECHR held in the context of control order proceedings that sufficient information must be provided about the substantive case a party has to meet in order to challenge it in order to satisfy the right to a fair hearing. In *Kadi (No 2)*, the European Court of Justice rightly held that fundamental rights to due process guaranteed by the Charter of Fundamental Rights also require such disclosure before a person is deprived of the use of his property. The Court makes clear that not only must the details of the substantive case be required, but also the detail of the evidence supporting them. In *AF (No 3)*, Lord Hope described the fundamental principle “that everyone is entitled to the disclosure of sufficient material to enable him to answer the case that is made against him”. While the Supreme Court in *Tariq* concluded that the right to a fair trial in employment proceedings under CMP could be satisfied without “A-type” disclosure, we have serious misgivings about the outcome of the analysis in that case, which appears inconsistent with the approach of the ECJ in *Kadi* (albeit that Article 47 of the Charter may go further than Article 6 ECHR). The majority in the Court relied heavily on the analysis of the chamber decision in *Kennedy v UK*, a case which concluded that the procedural arrangements of the Investigatory Powers Tribunal were compatible with Article 6 ECHR despite a lack of transparency (it operates a completely closed procedure without even the appointment of a special advocate). In his dissent, Lord Kerr skilfully sets out the defects of the approach to Article 6 ECHR in *Kennedy*, which he dismisses as an anomaly.²⁰⁹ This is clearly a rapidly evolving area of the law, where the Government seeks to uphold secrecy over open justice in so far as possible.

31. That the Government adopts a narrow application of the analysis of the courts on the need for disclosure of a case in order to satisfy the fundamental right to a fair hearing is consistent with its view that the analysis of this court on these issues have been problematic for the Government’s claims, specifically in connection with control orders. In our view, it underlines the Government’s failure to acknowledge and respect the public interest in the proper administration of justice through respect for the rights to open and adversarial justice recognised both by the common law and by Article 6 ECHR. While it would be possible for Parliament to legislate to specify types of civil cases in which *AF (No3)* jurisdiction would apply, the Government must have cogent evidence to support its justification for a restrictive approach to the scope of the right to a fair hearing. This evidence does not exist and the Government’s

²⁰⁹ *Tariq*, paras 117–137, in particular, see 124–129. For further analysis of our interpretation of the decisions in *Tariq* and *Kennedy*, see *Freedom from Suspicion*, Chapter 9, paras 380–386.

argument in favour of clarity is disingenuous. It is highly likely that the purpose of any legislative exercise will be to seek to narrowly confine the implications of the decision for disclosure in CMP. Any limitation adopted—against the background of the contentious case-law identified above, and the likely implications for any individual case—is likely to be subject to immediate and lengthy challenge before domestic and international courts. The court will continue to apply Article 6 ECHR standards and will be bound to interpret subsequent legislation compatibly by Section 6 HRA 1998. If the statutory definitions are defined too narrowly, individuals will be required to go to Strasbourg to secure the effective protection of their basic right to a fair hearing, traditionally a right considered a central pillar of the common law right to justice.

Q19. Does the courts’ power to order disclosure of material to a claimant to assist in other legal proceedings (the so-called *Norwich Pharmacal* jurisdiction) risk the disclosure of material which could damage national security? If so, should that jurisdiction be removed from the courts where disclosure would harm the public interest or could further safeguards be introduced to minimise that risk?

32. The Government explains that there is one single justification for the proposal to limit this jurisdiction: assuring foreign intelligence partners (and principally, the United States) that information provided to the UK will never risk disclosure. It explains that even if CMP are introduced to all civil proceedings, including *Norwich Pharmacal* applications, the final decision on disclosure in these cases will still remain with the judge. The Government does not consider that this approach is acceptable, arguing:

- it will be inadequate to give complete reassurance to our foreign partners that security and intelligence information shared will remain confidential;
- “speculative” claimants will continue to bring their claims to UK courts; and
- it will have a “disproportionate” impact on the Government, in light of the diplomatic capital necessary to manage the damage the impact this would have on international relationships.²¹⁰

33. Once again, we must reiterate that the Government accepts that there is no risk of the United States or any of our other international partners withholding intelligence with any “threat to life implications”. The justification for change is to assuage concerns expressed in “clear signals” from overseas that the flow of information may reduce if no steps are taken to narrow the law in this area:

- Prior to the concern expressed in relation to the *Binyam Mohammed* case, we are unaware of any serious or significant objection having been raised to this last-resort jurisdiction;

210 *Green Paper*, para 2.96

- The argument presented in the Green Paper is misleading and suggests that disclosure under *Norwich Pharmacal* does not take into account important national security considerations. This neglects two important factors: (a) the significant hurdles which a claimant must cross before disclosure will be ordered and (b) the application of public interest immunity to material that would otherwise be disclosed under a *Norwich Pharmacal* order.
- Thus the Green Paper proposition that while national security exclusions are available in Freedom of Information Act applications, they are not available under *Norwich Pharmacal* is not accurate. The comparison itself is inappropriate. The *Norwich Pharmacal* process is a matter of last resort designed to create a judicial discretion, in limited cases, to allow a court to order disclosure where it is in the public interest to protect an individual's right to a remedy and to support access to justice where a defendant has become involved in wrong doing. This discretion is bound by other public interest considerations, including national security. Disclosure is ruled out in cases where public interest immunity is successfully established. By way of contrast, individuals have a statutory right to access public information under the Freedom of Information Act, subject to certain, limited statutory exemptions, including national security. This right is unbounded unless information is shown to qualify for exemption.

34. The case of *Binyam Mohammed* has been described by the Court of Appeal as exceptional and very rare, and itself illustrates existing safeguards in the *Norwich Pharmacal* process:

- At the time of the first judgment, *Binyam Mohammed* was facing charges which included capital offences, with the associated risk that he might be subject to the death penalty. He was in custody at Guantanamo bay. The consequences he faced were grave and the public interest in ensuring that information relevant to his defence was in the public domain significant.
- As to whether wrongdoing occurred in this case (and whether the claimant had an arguable case), in the first judgment, the FCO accepted that Mr Mohammed had an arguable case that he had been subject to cruel, inhuman and degrading treatment.²¹¹ By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.²¹²
- The Divisional Court had little difficulty in concluding that by seeking to interview the claimant and supplying questions for his interviews, the UK had gone far beyond bystander or witness to the then alleged wrongdoing of the US.²¹³
- The treatment of PII is discussed above.

35. The case of *Binyam Mohammed* illustrates plainly that these claims are entirely likely to involve cases where the UK is at least “mixed-up” in allegations of serious human rights obligations and unlawful behaviour. Proposing that the Secretary of State should have the final say on what is placed in the public domain, subject only to a broad-based test of harm is

211 *Binyam Mohammed (CA)*, paras 66–67

212 *Ibid*, paras 120–126

213 *Ibid*, paras 68–71

disproportionate and unjustified. In practice, it would be difficult to dispel the impression – however unjustified - that the use of this certification power was associated with cover-up, concealment and collusion designed to hide misconduct and illegality, particularly in cases involving atrocities of the most serious kind.

36. The Green Paper neglects the role of *Norwich Pharmacal* jurisdiction and its underlying purpose. It recognises only that these are “extremely difficult issues” given that the “cases” in which “issues” have arisen have been in circumstances where individuals have been facing severe consequences for their liberty.²¹⁴ This neglects that, in order to persuade a court to exercise *Norwich Pharmacal* jurisdiction, a claimant must show that they have an arguable claim against a third party. The case could, like that of *Binyam Mohammed*, be based upon an arguable claim that a State has been implicated in ill-treatment or torture which violates both domestic law and international human rights standards. It may involve a lesser degree of wrong-doing, for example, a claim of negligence against a public or private body. Regardless, the jurisdiction of the court is ultimately designed to protect the public interest in access to justice. It is a discretionary remedy and the court must be persuaded not only that there is an arguable claim, but that it would be appropriate to order disclosure in all the circumstances of the case. Under existing practice, as we explain above, this can involve serious judicial consideration of the public interest in national security and the vital work of the intelligence and security services and the balance to be struck between the competing public interests at play in any set of circumstances. As the *Binyam Mohammed* case illustrated, this is not a task which the courts undertake lightly or without deference to the assessments made by the Secretary of State and the security and intelligence agencies.²¹⁵

37, Under the Government’s proposal to allow Ministerial certification to operate as an absolute bar, a serious and arguable claim of torture might be defeated without any judicial consideration of whether the public interest in the protection of the information held by the UK Government outweighed the public interest in the underlying claim and the right of the alleged victim to a remedy. **We consider that this would pose an unacceptable and unnecessary inroad into the system of civil justice carefully established by the domestic courts, without any evidence of serious justification.**

38. Without any compelling evidence of a need for change, we are not persuaded by the case for any reform. The Government proposes—as an alternative to Ministerial certification and exclusion of sensitive cases—to place *Norwich Pharmacal* cases on a statutory footing, including statutory definitions of the tests which must be satisfied for disclosure. Without any further information about the Government’s intended approach, it is difficult to assess and comment on this proposal in any significant detail. We consider that currently *Norwich Pharmacal* jurisdiction operates well subject to judicial discretion and that the tests for disclosure are clearly defined in case-law, as illustrated in the *Binyam*

214 Ibid

215 See analysis of the decision making of the Divisional Court by the Court of Appeal, at, for example, paras 60–72. See also Court of Appeal, paras 154, where Lord Neuberger explains that the court must have an “unusually powerful reason” to override the Secretary of State’s assessment on a public interest immunity certificate.

Mohammed case. **While providing a statutory basis for this process would not be inherently objectionable, it is clear that the Government’s objective in codifying the common law practice would be to narrow the circumstances in which the judiciary would be capable of ordering disclosure. We do not consider that this is necessary and urge caution.** It is important to remember that significant limitations could have wider unintended consequences for this measure of last resort which has evolved in order to protect individual’s right to a remedy.

Q20. If you have experience of the operation of the Investigatory Powers Tribunal, did you consider its proceedings to be fair? If not, why not?

39. In our recent report, *Freedom from Suspicion: Surveillance Reform for a Digital Age*, we conduct a detailed analysis of the operation of the IPT since its inception and conclude that it is ineffective and lacking in transparency and its procedures are incompatible with common law principles of fairness. Despite the finding of the European Court of Human Rights in *Kennedy v UK*, the compatibility of the procedures of the IPT with both Articles 6 and 8 ECHR remain very much in doubt.²¹⁶ We consider that *Kennedy* was wrongly decided and regret the influence that the reasoning in that case has had on the development of domestic case law in *Tariq*. **We would strongly object to the extension of the jurisdiction of the Investigatory Powers Tribunal. The IPT is not the answer to applications for excessive secrecy.** The body is itself an unhappy compromise: a body vested with the investigative functions of an ombudsman and the judicial functions of a court, but tasked at the same time with keeping secret the activities of the body it investigates. We have made concrete proposals for the wholesale reform for the IPT under its existing jurisdiction and do not think that its proceedings are fair. These include:

- Increasing the use of prior judicial authorisation for surveillance decisions, which would free up the Tribunal’s resources to investigate complaints;
- Introduce mandatory notification requirements following the completion of surveillance;
- Increasing the number of routes by which the Tribunal might be notified of a case;
- Increasing the capabilities of the Tribunal to conduct proactive investigations;
- Adopting internal measures to increase the adversarial testing of relevant evidence and
- Relaxing the existing policy of “neither confirm nor deny” sufficiently to allow the tribunal to adopt fairer procedures in practice.²¹⁷

Q22. Do the proposed reforms to the Intelligence and Security Committee enhance the democratic accountability of the intelligence and security services sufficiently to justify increased restrictions on the right to a fair hearing and to open justice?

216 JUSTICE, *Freedom from Suspicion*, November 2011, Chapter 9. See specifically, para 377.

217 JUSTICE, *Freedom from suspicion: Surveillance Reform for a Digital Age*, November 2011, Chapter 9.

The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the court) is undiminished by either the possible exercise by the Intelligence and Security Committee of its responsibilities to inquire into possible wrongdoing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice.

Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs, para 42 (Lord Chief Justice)

40. The final part of the Green Paper makes proposals on the reform of non-judicial mechanisms for oversight of the security and intelligence services. While we welcome the Government's recognition that the current arrangements for oversight of the security and intelligence services are ripe for reform, we have two concerns. Firstly, inclusion in this package of proposals should not suggest that the improvement of non-judicial mechanisms for oversight can provide a trade-off for the limitation to the right to open justice represented in the introduction of CMP and the proposed exclusion of sensitive cases from *Norwich Pharmacal* jurisdiction. As recognised in *Binyam Mohammed*, above, these special processes, designed, in principle to improve the accountability of the security and intelligence services serve an entirely different purpose to the right of an individual to seek redress through the ordinary civil justice system. The two should not be conflated.

41. Secondly, we consider that the proposals in the Green Paper are disappointingly unambitious and unlikely to lead to any significant increase in the accountability of the security and intelligence services. We outline our summary concerns below, but regret that the Government does not propose to take a more radical approach. In light of the seriousness of the allegations of wrongdoing by UK agencies over the last decade, a radical approach is necessary to ensure that public confidence in the vital work of our security and intelligence professionals is effective, well respected, lawfully conducted and subject to independent and impartial democratic oversight.

42. The JCHR has consistently called for reform to strengthen the powers of the ISC and for changes to its composition, remit and staffing to secure its status as a fully credible parliamentary committee reporting to both Houses.²¹⁸ The ISC—on discovery that it had been misled by the security services during its work on the 7/7 bombings—could do no more than express its frustration with the agencies conduct.²¹⁹ This criticism does not feature in the Green Paper.

218 See for example, JCHR, Twenty-fourth Report of Session of 2005-06, paras 159–164; JCHR, Seventeenth Report of Session 2009–2010, *Counter-terrorism policy and human rights: Bringing Human Rights Back In*, HL 86/HC 111, paras 107–122.

219 ISC, Annual Report (2010–11) Cm 8114, page 72

43. The Green Paper builds on recommendations by the ISC itself and proposes to make minor changes to it remit to formally recognise work it already conducts in relation to the intelligence community and operational matters. This change is a mere formalisation of the status quo. The Government also proposes giving consideration to whether Parliament can be more closely involved in the appointment process. It is proposed that the Committee will report to both Parliament and the Government and the ISC should physically be housed on the Parliamentary estate and staffed by a Parliamentary secretariat.

44. The Government proposes to maintain the ISC as a statutory parliamentary committee as opposed to a fully fledged body of parliament, governed by standing orders controlled by both Houses. It explains this is necessary to maintain a Government veto over the publication of material by the ISC. In our view, these proposals are seriously lacking. The Government will continue to exercise significant control over the ISC, its composition, its publications and ultimately the conduct of its day to day work. Although there are some welcome indications that the Government is open to some limited further consideration—in connection with appointments and the transparency and visibility of the work of the ISC—there are no clear proposals for the involvement of Parliament in a way which makes the ISC truly a parliamentary body with democratic accountability for the effective scrutiny of the agencies as organs of Government.

45. The Green Paper indicates that it is considering possible changes to ISC staffing accommodation and budget to strengthen both the “actual and symbolic” connection to Parliament. We regret this reference to symbolic attachment to Parliament, but unfortunately accept that this is what the Government’s proposals would ultimately achieve. **Without greater scope, ambition and commitment to the appointment of an independent Parliamentary committee to scrutinise the security and intelligence services (with full funding for a specialist secretariat with legal and security professionals tasked to assist it) any tweaked version of the ISC will fall foul of the criticism of its existing incarnation. It will be underfunded, underpowered and entirely lacking in independence.**

January 2012

Written Evidence submitted by Index on Censorship (JS 16)

At *Index on Censorship* we believe that far too little information is in the public domain, rather than too much. In the prelude to the invasion of Iraq, the government's allusion to secret documentation as evidence to send British troops into combat with little public proof, was indicative of how a culture of secrecy can be especially corrosive.

Index on Censorship believes that the Green Paper lays the groundwork for the UK government to withhold information from open scrutiny that would demonstrate the complicity of the UK security services with human rights violations including torture; cruel, inhuman or degrading treatments or violations to the fundamental right to freedom of expression. By preventing the victim of such violations from seeking remedy through civil proceedings in an open court (through the withholding of key evidence), it will in turn reduce the ability of the media to hold to account the government for violations of human rights.

We should not be complacent. It has taken centuries for the right to a fair trial and the right to open justice to be established in English law. The number of civil cases where genuinely sensitive intelligence material is relied upon is tiny and can already be catered for through public interest immunity, which will continue to apply in all criminal cases. Where sensitive national security issues are involved, the courts already have ample powers to hear evidence in private. A hearing in which the parties cannot challenge the evidence against them and which precludes all possibility of public scrutiny is not one which any civilised country should adopt. The case for this radical departure from the most fundamental principles of English law has simply not been made.

It is also important that your committee views the Green Paper in its broader international context. The publication of US State Department cables by Wikileaks has demonstrated how the urge to over-classify documents is present even in established democracies. The breadth of the term 'sensitive material' could easily set a precedent in other areas such as access to information through the Freedom of Information Act (and note that post-legislative scrutiny of the Act is in progress now).

We see no need for the government's approach as outlined in the Justice and Security Green Paper. The case has simply not been made for such powers – and there is considerably opposition to closed material procedures (CMPs) from your committee in previous reports as well as the UN Human Rights Committee, *Amnesty International*, the *BBC*, *Human Rights Watch*, the *Guardian*, *Justice*, *Liberty*, *Reprieve* and *The Times*. The 7/7 inquests show that in complex scenarios involving both time-sensitive intelligence and national security issues, the judiciary (or coroners) have the power to investigate without putting at risk public safety. We also believe there is much still to expose, intelligence personnel from

the UK conducted or witnessed over 2,000 interviews in Afghanistan, Guantanamo Bay and Iraq. The circumstances of these interviews are not well known.²²⁰

Index has a number of specific concerns which we hope your Committee will investigate:

The excessive power to suppress public interest information by the Security Services

According to the approach outlined in the Green Paper, the Home Secretary will use a public interest test based on evidence provided by the Security Service that may preclude evidence of malpractice by the Security Services being shown to the defendant in a trial. It is not only our contention that this gives the Security Services an incentive to opt for a closed material procedures where they have breached the law; but without proper scrutiny from the accused this lack of scrutiny may suppress evidence being heard leading to Ministers being misled.

As the government's lawyer Jonathan Sumption QC wrote in his letter to the court of appeal on criticism of MI5 in the draft copy of the Binyam Mohamed judgement:²²¹

The statements of ministers in this area, although embodying their own judgements, are often necessarily based on the information and advice of the Security Service.

The principles of open and natural justice are long-established in English common law, and civil proceedings meet or exceed international fair trial standards. Yet, as we know the Security Services often use intelligence based on foreign sources where human rights are violated. According to the report of the UN Special Rapporteur on counter-terrorism and human rights (2009):

*The Special Rapporteur is gravely concerned about situations, for instance in Morocco, Jordan and Pakistan, where the detention and interrogation powers of the intelligence services in counter-terrorism operations and investigations have no clear statutory basis.*²²²

We know from the Binyam Mohamed case that our Security Services have worked closely with the above-mentioned countries, and it is not unreasonable to suspect that evidence from these intelligence services may be used as the basis to apply for a closed material procedure.

220 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.pdf> [65]

221 <http://www.guardian.co.uk/world/2010/feb/10/binyam-mohamed-torture-annotated-letter>

222 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.pdf> [40]

The media's watchdog function will be undermined

The proposals in the Green Paper are overly broad. It is not justifiable for the Home Secretary to trigger the use of secret evidence in *any* civil proceeding. The Green Paper establishes the term 'sensitive material' as follows:²²³

Any material/information which if publically disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily 'sensitive', but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive.

Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.

The justification for such a broad definition is not given, nor is any evidence base given to suggest why this is necessary. We are concerned that such a definition may creep into other areas of law namely the Official Secrets Act. The broadness of this approach could lead to a significant reduction in the publication of records in the public interest, with a subsequent chilling effect on open discussion. That the Green Paper frames the disclosure of such material around 'risk' and not the public's right to know underlines this concern:

CMPs reduce the risk of damaging disclosure of sensitive material.

In contrast to withholding information, the current PII (Public-interest immunity) process incentivises the government to disclose more rather than less in order to defend against the claim in Court. Lord Kerr notes in *Al Rawi v Security Service* [2011]:

At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make.

Special Advocates believe they will not be in a position to challenge the government's argument on CMPs. The current arrangement, the "Wiley balance", is a proper balance between the public interest in withholding evidence, and the proper administration of justice. The broadness of the term 'sensitive materials' and the inadequate replacement of the "Wiley balance" will lead to a diminishment in the open administration of justice.

Index would like to emphasise to the committee the importance of the media in holding power to account through an open court system, demonstrating to the public that the open administration of justice is upheld. As Lord Neuberger pointed out in his lecture last year

223 <http://www.official-documents.gov.uk/document/cm81/8194/8194.pdf>, p. 21

“Open Justice Unbound”,²²⁴ as fewer members of the public sit through court cases the importance of the media reporting such cases has increased.

There is no doubt that pressure from the British media (and organisations like *Index on Censorship* who sought publication) helped ensure that the deleted paragraph from the final judgement in the *Binyan Mohamed* case on Security Service participation in torture was made public.

The judgment of the Court of Appeal in *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* contains extremely powerful statements which recognise the fundamental importance of the media in an open judicial system. Lord Judge CJ in the judgements of the Court of Appeal in *Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs* recognises the significant importance of the role of the media, and the strong interrelationship between open justice and freedom of expression:

In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished [...]

In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself [...] Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with Article 10 of the European Convention of Human Rights.”[38–40]

Without open justice, the fundamental right to freedom of expression to challenge authority will in turn be curtailed.

Index on Censorship hopes the Joint Committee on Human Rights will recognise the serious impact on the article 10 right to freedom of expression the proposals contained within the Green Paper would have if implemented. We will be writing to the Home Secretary with a copy of this letter separately.

If you would like oral evidence to the committee we would be very pleased to oblige.

2 February 2012

224 <http://www.scribd.com/doc/50968052/Lord-Neuberger-on-Open-Justice-Unbound>