Joint Committee on Human Rights: Justice and Security Green Paper Inquiry

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Summary

JUSTICE is deeply concerned that the language used in the Green Paper obscures a series of proposals which would lead to a fundamental shift in the administration of civil justice in this country.

We welcome the Government's acknowledgement that the distinct duties of the Government to preserve national security and protect us from serious harm and to protect the rights and liberties which are at the heart of free, democratic society are "mutually reinforcing".

The Government has a duty – grounded in human rights law – to protect the public from the harm connected with serious risks associated with threats to national security, such as terrorism. Unfortunately, we consider that the core proposals in the Green Paper – to give discretion to the Secretary of State to trigger the use of secret evidence in any civil proceedings – pose a serious, unnecessary and unjustified interference with the common law principle of open justice.

This proposal - together with the plan to restrict access to "*Norwich Pharmacal*" jurisdiction in cases involving sensitive information - represents a knee-jerk and disproportionate reaction to a limited number of cases involving the security and intelligence services in the United Kingdom, incorporating allegations of UK complicity in some of the most serious allegations of human rights abuse, through torture, inhuman and degrading treatment in the context of the so-called "war on terror".

We welcome the Government's recognition that reform is needed to increase the effectiveness and transparency of independent oversight mechanisms for the intelligence services. The increasingly public allegations of complicity in human rights violations and the limited remit granted by the Government to ad-hoc scrutiny mechanisms such as the *Gibson* inquiry, illustrate the need for permanent and effective oversight to ensure that what is done in our name is lawful and compatible with the principles that we hold dear. We regret that the inclusion of limited proposals for reform in this Green Paper appears to present improved systems of non-judicial oversight as a trade-off for the limitation of access to judicial remedies which forms the heart of this package of proposals.

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.[1] 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.[2] We made submissions in *A v UK* in Strasbourg and *AF* in the domestic courts.[3]

2. JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court.[4] 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.[5] 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?

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[1] 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

[2] 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

[3] Full information on each of these submissions is available online. http://www.justice.org.uk/pages/past-interventions.html

[4] *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

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

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?

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.[6]

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');[7] 1997
- The Northern Ireland national security certificate review tribunal;[8] 1998
- The Proscribed Organisations Appeals Commission;[9] 2000
- The Investigatory Powers Tribunal;[10] 2000
- Employment tribunals;[11] 2000
- The Pathogens Access Appeals Commission;[12] 2001
- The Northern Ireland Sentences Review Commissioners[13] 2001
- The Northern Ireland Life Sentences Review Commissioners[14] 2001
- Planning tribunals;[15] 2004
- The High Court in control order proceedings;[16] 2005

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

[7] The Special Immigration Appeals Commission Act 1997.

[8] Section 91 of the Northern Ireland Act 1998.

[9] Section 5 of the Terrorism Act 2000.

[10] Part 6 of the Counter-Terrorism Act 2008.

[11] 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.

[12] Section 70 of the Anti-Terrorism Crime and Security Act 2001.

[13] Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

[14] Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564).

[15] 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.

[16] Prevention of Terrorism Act 2005.

- Industrial tribunals in Northern Ireland;[17] 2005
- County Courts in discrimination cases;[18] 2006
- The First Tier Tribunal and the Upper Tribunal;[19] 2007
- The High Court in asset-freezing proceedings.[20] 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.[21] 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.[22] 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:

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

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

[19] Tribunal Courts and Enforcement Act 2007.

[20] Part 6 of the Counter-Terrorism Act 2008.

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

[22] 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.[23]

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.[24]

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.[25]

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.[26]

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.[27]

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[23] *Secret Evidence,* paras 410 – 415

[24] *Secret Evidence,* paras 416 - 422

[25] *Secret Evidence,* paras 423 - 425

[26] *Secret Evidence,* paras, 426 - 429

[27] *Secret Evidence*, paras 430 - 431

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 the important public interest in maintaining national security which provide greater respect for the right to open justice and a fair hearing.[28]

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.[29]

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[28] *Secret Evidence,* paras 432 - 437

[29] *Green Paper*, paras 1.7 – 1.12.

10. In light of the analysis of the Supreme Court in *Al-Rawi,* this broad-brush approach does not stand up to close scrutiny.[30] In summary:

- 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.[31] 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.[32]

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;

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[30] 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).*

[31] *Kadi No 2,* [2011] 1 CMLR 697 at 157.

[32] 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).

- 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.
- 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.[33] 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

[33] *Green Paper,* paras 1.17 – 1.18.

absolute confidentiality ('the control principle').[34] 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.[35] 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 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.[36] 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

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[34] *Green Paper,* para 1.22, 1.43 – 1.44.

[35] *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

[36] *Binyam Mohammed* (CA), see for example paras 129 – 203.

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.[37]

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 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.[38] 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.[39]

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[37] Ibid, see for example, para 132.

[38] *Green Paper,* for example, para 2.2 – 2.3.

[39] *Al-Rawi,* para 93.

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.[40] 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.

- **"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*.[41] 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

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[40] *Green Paper,* para 1.54

[41] *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.

authority on which to proceed and dealt with the risk of strike out in our submissions to the Supreme Court.[42] 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.[43]

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.[44] 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.**[45]

- **"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

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[42] See JUSTICE submission in *Al-Rawi,* paras 103 on.

[43] We expand on this argument in our submissions to the Supreme Court in *Al-Rawi,* see paras 1-2.

[44] 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.

[45] 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.

procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.[46]

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?

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?

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[46] Response to Consultation from Special Advocates, 16 December 2011, para 2.

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.[47]

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.[48]

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.[49]

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.

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[47] *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.

[48] *Secret Evidence,* para 367. Each of these limitations is explored in detail in paras 368 – 405.

[49] *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?

28. 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.[50] 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.[51] **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

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[50] Response to Consultation from Special Advocates, 16 December 2011

[51] 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.

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 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.[52] 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**

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[52] *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.

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 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.[53]

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:

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[53] *Green Paper*, para 2.96

- 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;
- 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.[54] By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.[55]

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[54] *Binyam Mohammed (CA),* paras 66-67

[55] Ibid, paras 120 - 126

- 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.[56]
- 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 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.[57] 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.[58]

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

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[56] Ibid, paras 68-71

[57] Ibid

[58] 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.

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 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.[59] 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:

[59] JUSTICE, *Freedom from Suspicion,* November 2011, Chapter 9. See specifically, para 377.

- 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.[60]

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?

> 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

[60] JUSTICE, *Freedom from suspicion: Surveillance Reform for a Digital Age,* November 2011, Chapter 9.

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.[61] 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.[62] This criticism does not feature in the Green Paper.

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**

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[61] 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.

[62] ISC, Annual Report (2010-11) Cm 8114, page 72

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.

ANGELA PATRICK
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JUSTICE
January 2012