Justice and Security Bill

House of Lords Committee Stage Briefing

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Introduction

1. 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 the British section of the International Commission of Jurists. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.[1] We have a long history of litigating in cases where closed material procedures have been in issue.[2]

2. This Bill would ensure closed material procedures (CMP) – where a party to proceedings and his lawyers (together with the public and the press) are excluded while his opposition speaks to the judge in private - become an ordinary part of the civil "toolkit" for our judges (Clauses 6 – 10, Part 2). JUSTICE considers that that the operation of CMP is inherently unfair and that normalising the use of these controversial and previously exceptional hearings risks undermining the credibility of our judges and public confidence in the civil justice system.

3. Clauses 13 and 14 of the Bill would oust the jurisdiction of our courts to consider ordering the disclosure of information in the public interest where an individual seeks redress in an arguable case in which the UK is shown to be mixed up in wrongdoing, however innocently. This ouster would provide no exception for individuals seeking redress in cases involving evidence of UK complicity in torture or other serious human rights violations.

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[1] JUSTICE, *Secret Evidence,* 2009. Electronic copies are available online: http://www.justice.org.uk/resources.php/33/secret-evidence

[2] 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 (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) We made submissions in *A v UK* in Strasbourg and *AF (No 3)* in the domestic courts (Full information on each of these submissions is available online. http://www.justice.org.uk/pages/past-interventions.html**)**. JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court (*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). 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 Bill.

4. Part 1 of the Bill makes a number of changes to the system for oversight of the security services by Parliament. JUSTICE agrees that reform is sorely needed to increase the effectiveness and transparency of independent oversight mechanisms for the intelligence services. The increasing number of allegations of complicity in human rights violations illustrates the need for permanent and effective oversight in immediate and human terms. We regret that the proposals in the Bill will make little practical difference and appear to have been included as a poor trade-off for the unacceptable limits on access to judicial oversight proposed by the rest of the Bill.

5. This briefing can be read together with our briefing for Second Reading.[3] We propose amendments in this briefing which highlight some of our key concerns about Part 2 of the Bill. These amendments should not be taken as support or endorsement of the Bill. Absence of comment should not be taken as assent. We highlight a number of distinct concerns:

   - **That the proposals for the extension of CMP impact significantly on the principles of open, adversarial and equal justice. The Government has not provided evidence to justify such fundamental reform and Clauses 6 – 11 should stand part from the Bill.**
   - **In the alternative, if the need for reform is accepted, the current proposals in Clauses 6 and 7 are clearly disproportionate to the risk identified by the Government. We agree with the JCHR that the starting point (and the only truly justifiable action) should be the clarification of the existing law of public interest immunity (PII). If CMP are an option, they must only be considered after a full PII exercise which looks at alternative means to protect material from damaging disclosure (such as through redaction, confidentiality undertakings or anonymity orders) is completed.**
   - **As the Bill stands, it creates a significant litigation advantage for one party (in most cases, the Government) subject to very limited judicial oversight. We propose a number of amendments to highlight significant deficiencies in the current proposals.**

[3] http://www.justice.org.uk/resources.php/325/justice-and-security-bill

- **The proposals on *Norwich Pharmacal* jurisdiction – the power of the court to order disclosure of information held by someone mixed up in wrong doing in the public interest – provide for a disproportionate and unjustified ouster of the court's discretion. In our view, without further evidence of harm, Clauses 13 -14 should stand part from the Bill.**
- **We propose a number of amendments to highlight significant deficiencies in Clauses 13 and 14, including removing the provision for absolute immunity for all activities of the intelligence services (even those unconnected to national security) and reducing the scope of the proposed ministerial discretion to protect information not harmful to national security but with implications for diplomacy.**
- **Information on the use and operation of existing CMP is extremely limited. In light of the constitutional significance of these measures, JUSTICE considers that Parliament should require statistical information to be gathered and reported to Parliament and that the provisions of this Bill, if enacted, should be subject to regular statutory review by an independent person.**
- **Finally, the proposals on the reform of the Intelligence and Security Committee are limited and will continue to allow Ministers to control the membership of the Committee, disclosure of material to it, the scope of its inquiries and the content of its publications.**

Background: Secret evidence, open justice and the right of confrontation

6. It is a basic principle of a fair hearing – both in civil and criminal cases - that a person must know the evidence against them. This provides the foundation of the open, equal justice guarantees incorporated in constitutions 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. As our domestic courts have long recognised, it is the "first principle of fairness" that:

> Each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not

know the substance of the material of what is said against him (or her), for what he does not know, he cannot answer.[4]

7. JUSTICE has long argued against the expansion of closed material procedures (CMP). The Government's repeated assertion that CMP are commonplace, fair or effective is unfounded, and in our view, misleading. Currently CMP are limited to a number of specific circumstances and accompanied by rules and safeguards approved by Parliament. In each of the cases where they have previously been considered, Parliament has had an opportunity to consider individual proposals and the Government has been required to produce evidence of the necessity for CMP in connection with each of those cases. Largely, existing CMP cover exceptional proceedings outside the ordinary civil or criminal justice process which Governments have acknowledged as distinct (e.g. SIAC immigration proceedings, TPIMs or hearings related to security vetting). The Government is asking Parliament to approve the use of CMP in all civil proceedings. The normalisation of this previously exceptional process calls for close scrutiny, consultation and consideration.

8. In *Secret Evidence* (2009), we conducted a major review of the operation of CMP and concluded:

   - **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 intelligence services is not the product of a criminal investigation with the associated safeguards placed on the production of evidence.[5]

   - **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 – and the opportunity to challenge - the evidence used against them.[6]

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

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

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

- **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.[7]

- **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. The integrity of the courts depends on the perception that our judges have adopted a fair and independent process to reach their conclusions.[8]

- **It weakens security:** 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 confidence of the public in the security and intelligence services.[9]

- **The use of secret evidence is unnecessary:** Existing cases have shown that the Government may take an overly cautious approach to claiming secrecy, including for information already in the public domain. 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.[10]

9. 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.

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

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

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

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

- In *Al-Rawi v Security Service*, the Supreme Court determined that it did not have the jurisdiction to extend the use of CMP [11] In the lead judgment Lord Dyson stressed:

> The common law principles…are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.[12] (Emphasis added)

- Responding to the Justice and Security Green Paper, existing Special Advocates (SAs) – security cleared advocates who currently represent people excluded from CMP but who cannot communicate with them - said:

> 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.[13]

A: Clauses 6 to 11 - Expanding closed material procedures

10. Clause 6 of the Bill enables the Secretary of State to apply to the relevant court for the proceedings to be declared eligible for CMP. The Court must make the declaration if presented with any disclosure which would be "damaging to the interests of national security" (Clause 6(2)). Taking this decision, the Court must ignore whether the trial could be heard fairly without CMP. It cannot take into account the availability of PII or the fact that the material may not be relied upon (Clause 6(3)).

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[11] [2011] UKSC 34, para 69

[12] *Al-Rawi,* para 48.

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

11. Although the Secretary of State must consider whether to make an application for PII (Clause 6(5)), he is not required to exhaust PII before CMP will be available. These are presented by the Bill as alternative options entirely at the election of the Secretary of State alone.

12. Once the Court has made a declaration that CMP is available, Clause 7 provides that Rules of Court will allow a relevant person to make applications for particular material (including individual documents, witness evidence or classes of material, for example) to be "closed" (i.e. heard without the presence of the other side or their legal representatives, but with the attendance of a special advocate). These applications will always take place in the absence of the other side and his representatives (Clause 7(1)(c)). The Bill provides that the Court can never order disclosure when it considers that any material would be damaging to national security (Clause 7(1)(c)). The Court is permitted to provide a summary – but not required to provide one – only where a summary would not be damaging to the interests of national security (Clause 7(1)(e)).

13. Where the Court refuses to order that material be dealt with as closed or the Court directs that a summary must be provided, the Secretary of State is not compelled by the Bill to disclose that material (Clause 7(2)). Instead, the party holding the material can opt not to disclose, but the Court is empowered to direct them either not to rely on the material or to "make such concessions or take such other steps as the Court may specify" (Clause 7(3)).

Suggested Amendments

14. JUSTICE considers that the proposals in Clauses 6 – 10 to extend CMP to ordinary civil proceedings are ultimately unfair, unnecessary and unjustified. Giving evidence to the Joint Committee on Human Rights (JCHR) last month the Special Advocates once again voiced their concern that there was no evidence to justify the proposal to expand closed material procedures to ordinary civil proceedings.[14] We share their view and would support a motion that **Clauses 6 – 11 stand part**.

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[14] Special Advocates, Memorandum to the JCHR, June 2012, paras 1 – 3. http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2012-13/justice-and-security-bill/

Briefing

15. There are no national security reasons for change. There is no evidence that the operation of public interest immunity has led to disclosures which have endangered national security. The JCHR stressed, "the current system of PII does not jeopardise national security".[15] That PII will continue to operate in the context of inquests where the Government does not have an option to withdraw or concede underlines that the existing law poses no risk to national security.

16. The Government has failed to provide any other justification for reform. We consider the Government's arguments below:

- **"CMP is in the interests of justice":** The Government argues that, in the interests of fairness, the extension of CMP is needed in order to maximise the information before the Court and to increase the likelihood that justice will be done.[16] 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.[17]

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.

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[15] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 8.

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

[17] *Al-Rawi,* para 93

The Government argues that "no evidence currently heard in open court will be heard in secret in future".[18] This ignores that CMP changes the nature of the judicial exercise entirely, introducing a significant litigation advantage for one side in the case (usually the Government) and potentially undermining the credibility of the judges in the case. It also neglects that the Bill would require the Court on considering CMP to ignore PII. In our view, this will rule out the many existing practical measures which may be taken to strike a more effective balance between open justice and security. Existing practice on redaction, confidentiality rings, undertakings and anonymity will fall by the wayside if the proposals in the Bill become law and it is possible that information that might previously have been heard utilising those techniques will be confined to CMP.

- **"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.[19] 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.

  The Government refers to the cost associated with settling the claims made by the Guantanamo detainees. The Green Paper asserted that the Government was compelled to settle these claims and the Government continues to argue that it would be fairer if the Government were able to rely on material currently declared inadmissible during PII albeit within a CMP.[20] The JCHR rejected this argument wholesale.[21] We note that settlement in the Guantanamo cases preceded the final decision of the Supreme Court that

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[18] Government Response to consultation on Justice and Security Green Paper, Executive Summary.

[19] *Green Paper,* Executive Summary, xi

[20] *Ibid,* para 1.18

[21] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 72 – 80.

CMP was not an option. The application of PII was never tested by the Government in practice.

- **"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 theoretically 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 (relying on the precedent of *Carnduff v Rock*.[22]) The Government argues that CMP would be preferable to a claim being struck out and the claimant denied any possible redress. The case of *Carnduff v Rock* was exceptional and we are unaware of any other case where the risk of strike out has arisen. We consider it dubious authority on which to proceed.[23] In recent evidence to the JCHR, David Anderson QC referred to a number of cases where domestic courts have been asked to consider CMP and indicated that strike out could be possible without a closed procedure.[24]

  In our view, the likelihood of a stay or a strike out remains exceptional. However, taking on board this theoretical risk, 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.[25] It does not appear that the Government has explored any possibility that a response to the slim risk of strike out might be anything other than a classic CMP.

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[22] *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 may 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.

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

[24] HC 370-i. Uncorrected Transcript of Evidence, *The Justice and Security Bill,* 19 June 2012, QQ 4-5.

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

Clause 6 - Public Interest Immunity

17. In its report on the Green Paper preceding the Bill, the JCHR also concluded that the evidence had not been produced to support the extension of CMP to all civil proceedings. They recommended instead that there should be statutory clarification of the law on Public Interest Immunity (PII) as it applies in national security cases.[26] **We share the concern of the JCHR that the starting point for any reform must be the existing law of PII.**[27]

Clause 6 - CMP as a measure of last resort

Page 4, line 22, leave out "must" and insert "may"

Page 4, line 28, insert the following new subsections –

(3) that material has been determined to be inadmissible in the relevant civil proceedings following the consideration of a certificate of public interest immunity issued by the Secretary of State; and

(4) it would otherwise be contrary to the interests of justice for the relevant civil proceedings to proceed.

Page 4, line 28, leave out subsections (3) – (5)[28]

Briefing

18. Notwithstanding our view that clauses 6 – 11 should stand part, should they remain, these amendments would limit CMP to cases where a PII exercise had been concluded and the material in question deemed inadmissible. The court

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[26] JCHR Report, para 122.

[27] Since drafting, an amendment has been tabled by members of the JCHR together with members of the Constitution Committee to give effect to the JCHR recommendation (Amendment 39).

[28] We are grateful to the Bingham Centre for the Rule of Law for sharing with us a draft of their briefing, which includes similar proposals for amendments. Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts and others, including members of the JCHR together with members of the Constitution Committee which are of similar effect (Amendments 40, 43-44, 47). JUSTICE supports these amendments.

would have the discretion to consider whether it is in the public interest that the proceedings go ahead under CMP (including whether the interests of justice require that CMP be used, whether a fair hearing can be secured without the disclosure of the material, and whether the interests of justice require that the hearing should proceed under this exceptional procedure).[29]

19. The Secretary of State considers that the proposals in the Bill are targeted at "the small number of civil cases where evidence is currently not being presented at all because it is too sensitive to be heard in open court".[30] This "last resort" criterion is not reflected in the proposals in the Bill. Under the proposals in the Bill, the court is bound to disregard whether under the existing law of PII, alternative mechanisms such as redaction, confidentiality rights or anonymity orders could be used to protect national security (Clause 6(3)(a)). It is for the Minister alone to "consider" PII. On application, the judge must instigate CMP on production of any evidence on damage to the interests of national security. The judge has no discretion to consider whether a trial could proceed fairly without any closed procedure.

20. This creates a distinct advantage for the Secretary of State, who may choose the option which better suits his case. The litigation advantage to the Secretary of State inherent in the unfair CMP process is generally far greater than under PII. However, there may yet be some cases where the Secretary of State might not wish even a judge to see material which may be extremely damaging to his case, and which may create embarrassment or provide evidence of serious wrongdoing. In these circumstances, a Minister might opt not to claim CMP, but instead pursue PII. If the court grants PII, the material is excluded entirely. If the court refuses to grant PII, or proposes disclosure with redactions or other accommodations, the Minister could argue that without PII, conceding the claim was in the public interest. As the JCHR explained in their report on the Green Paper, these measures must remain exceptional "Unless the [PII] exercise is gone through first, it will not be possible to tell whether a closed material

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[29] The amendments would lift the requirement that the court ignore the potential for material to be withheld on PII grounds and since PII will be a prerequisite to an application, removes the requirement for the Secretary of State to consider it.

[30] Government Response to the Consultation on the Green Paper, Executive Summary.

procedure is the only possible way of ensuring that the issues in the case are judicially determined".[31]

Clause 6 - Triggering CMP: Who makes an application?

Page 4, line 18, leave out "The Secretary of State" and insert "Any party"[32]

Briefing

21. The Bill currently provides for CMP to be triggered by the Secretary of State alone. It is inconsistent with the principle of the equality of arms that this exceptional mechanism should be at the gift of one party to proceedings. The Government's argument that these proposals will allow claims which otherwise might be struck out – as unlikely as this theoretical risk may be - is undermined if only the Secretary of State is capable of triggering CMP.

22. This amendment would allow any party to trigger consideration of CMP (taken together with our first series of amendments, this would follow a full PII exercise and would be subject to the Court's discretion to consider whether CMP would be in the public interest).

Clause 6 - "National Security"

Page 5, line 18, at end insert –

"national security" does not include matters which may solely prejudice international relations, the prevention and detection of crime (including through the activities of police or other law enforcement agencies) and the economic relations of the UK. For the purposes of this Part, it is limited only to threats to national security connected with the operations of the intelligence and security agencies.

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[31] JCHR Report, para 111.

[32] Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts and others, including members of the JCHR together with members of the Constitution Committee which are of similar effect. JUSTICE supports these amendments (Amendments 40 - 42).

Briefing

23. This amendment would limit CMP to cases involving national security risks associated with the operations of the intelligence and security services. This would bring the Bill into line with statements of the Secretary of State for Justice, which refer to our "spies" as the descendants of James Bond and the need to preserve their work. The amendment would expressly exclude CMP to protect information which may prejudice the broader interests of the UK, but which are not necessarily national security threats.

24. The Green Paper would have applied CMP to all "sensitive material" where non-disclosure was in the "public interest". The Bill applies only where "national security" is involved. However, "national security" is undefined. The Secretary of State explains that "this points beyond doubt that material relating to crime or other government responsibilities will not be in scope".[33] This is far from certain.

25. In light of the likely deferential approach of the judiciary to decisions on national security, without definition of the type of risks involved, there is a potential for this definition to be applied in a more "elastic" manner than suggested. The current national security strategy outlines risks to our national security and includes vulnerability of UK technology to cyber attack, risks posed by flooding and other natural disasters such as flu or other pandemics, threats from organised crime, disruption to oil and gas supply and risks posed by other major infrastructure sensitivities such as nuclear and radioactive power and disruption of the domestic food chain.[34] Would the Secretary of State seek CMP, for example, where a negligence claim is brought in connection with an accident at a nuclear power station and the private operator argued that in order to hear the claim the court would have to consider material sensitive to national security?

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[33] Government Response to Consultation on the Justice and Security Green Paper, Executive Summary.

[34] *A strong Britain in an age of uncertainty: National Security Strategy,* page 28.

Clause 7 - In CMP: the role of the judge

Page 5, line 33, after "national security," insert "and it would be in the public interest not to allow such material to be disclosed". [35]

Page 5, line 41, insert–

(-) that any party to the proceedings or the special advocate has an opportunity to make an application to set aside or vary any determination under this section that material should not be disclosed or that a summary should not be provided.

Briefing

26. The Bill provides that once CMP is triggered, the court must provide for material not to be disclosed – or any summary provided - if disclosure would lead to any damage to the interests of national security. The court is not permitted to consider whether the evidence of damage justifies non-disclosure in the public interest. The first of these amendments would reintroduce a degree of "*Wiley"* balance into the determination of (a) whether material is considered in open session or closed and (b) the degree to which a summary of material considered in closed may be required.

27. The second of these amendments makes clear that – as in existing CMP – it is open to any party or the special advocate to make an application that material previously determined to be closed or incapable of summarising is revisited and either placed in open or a fuller summary given. In the course of existing CMP it has become clear that material has been placed in closed without justification can be challenged by special advocates when circumstances change or as new facts come to light (for example, that the material is already publicly available). As situations and cases evolve, it may become clear that material is anodyne or publicly available and at present, the Bill provides no clear route for determinations on national security grounds to be challenged.

[35] Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts and others including members of the JCHR and the Constitution Committee which are of similar effect (Amendments 58 – 59), . JUSTICE supports these amendments.

Clause 7 - In CMP: Summaries and the role of the Court

Page 5, line 38, leave out subsection (e)[36]

Briefing

28. The Bill places no duty on the court to provide a claimant excluded under CMP with a summary of the material which is "closed." The court is required to "consider" making a summary available, but is under no direct requirement to do so. Rather, Clause 7(1)(e) starts from the premise that the court is prevented from making any disclosure or providing any summary which damages national security. This is perhaps surprising given that both domestic courts and the European Court of Human Rights have struck down decisions made under existing CMP as incompatible with the right to a fair hearing guaranteed by Article 6 ECHR where the person has not been given enough information for them to understand the case against them. The starting point in this case-law is that a person must be given as much disclosure – whether through the provision of documents, evidence or a summary – as is needed to secure a fair trial.[37]

29. Clause 11(5) stresses the duty of the court under the Human Rights Act 1998, providing that nothing in the Bill is to be read as requiring the court to act incompatibly with Article 6 ECHR. The Government explains that where Article 6 applies, the court should provide such summaries as are necessary.[38] This reassurance is welcome. However, the restrictive approach on the face of the Bill makes non-disclosure the starting point for the court. In our view, this sits uncomfortably with existing case-law (and the common law principles of open

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[36] Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts which are of similar effect (Amendment 61), JUSTICE supports these amendments. We also support Amendment 62 tabled by Lord Lester of Herne Hill QC and Lord Pannick which would redraft the Bill to ensure that the starting point for the Court is to ensure that the person excluded from the CMP has enough information to understand the case against him,

[37] *A v UK* (2009) 29 EHRR 29, the Grand Chamber concluded that where insufficient material had been disclosed to an individual subject to a control order following a CMP, this rendered the hearing unfair and incompatible with the Convention. In *AF (No 3)* [2009] UKHL 28, 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".

[38] Cabinet Office ECHR Memoranda, para 31.

justice) which suggests that the goal should be to secure a fair hearing in so far as is possible. This amendment would remove the requirement in the Bill that the Court should approach any summary with a view to the protection of national security, as opposed to the protection of the right to a fair hearing.

Clause 11 - Extending application of CMP

Page 8, line 1, leave out subsections (2) – (4)[39]

Briefing

30. This amendment would remove the power of the Secretary of State to further extend the application of CMP by secondary legislation. The Government has taken the decision not to include coronial inquests within the scope of this Bill. While this is a welcome concession, it is perhaps unsurprising. The previous Government failed twice to persuade Parliament that bereaved families of servicemen and victims of terrorist atrocities might be excluded under CMP from coroners' inquiries. However, Clause 11(6) provides for the Secretary of State to extend the scope of the Bill by secondary legislation, without the full scrutiny of Parliament. This would include the power to extend the Bill to cover inquests. Although the Bill provides for affirmative resolution, this affords far less opportunity for debate and effective consideration than primary legislation. If this Bill allows CMP to become an ordinary part of our civil justice procedure, Parliament may be asked to expand its use further without the opportunity to revisit the scheme wholesale or to adapt its use to any new fora. The Bill would allow amendments to its structure also to be made by secondary legislation as determined necessary by the Secretary of State. The Lords Constitution Committee has indicated that this Henry the Eighth clause is inappropriate and has suggested that a super-affirmative procedure might be more acceptable.[40]

Clause 7, Schedule 3 - Rules and the role of the Secretary of State

Page 19, line 39, at end insert-

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[39] Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts which are of similar effect (Amendment 70), JUSTICE supports these amendments.

[40] Third Report of Session 2012-12, *The Justice and Security Bill,* HL Paper 18, para 32

(-) in relation to any rules, any such individuals as have been appointed to act as Special Advocates for the purposes of existing closed material procedures.

Page 19, line 40, delete paragraphs (2) and (3)

Briefing

31. The Bill provides for the first set of rules governing CMP to be made by the Lord Chancellor in consultation with the Lord Chief Justices of England and Wales and Northern Ireland and to be approved by both Houses of Parliament. The rules governing CMP will be extremely important in light of the potential impact of these procedures for the administration of justice and the credibility of our civil justice system. The Bill expressly exempts the Secretary of State from conducting any form of wider consultation. The Secretary of State may rely upon consultation that took place with the Lord Chief Justices before the Act takes effect. This means that the Secretary of State could rely on a consultation with the Lord Chiefs before the final text is agreed by Parliament and could exclude from the preparation of the rules any consideration given by professional bodies such as the Law Society and the Bar Council. That the Bill does not expressly provide for consultation with existing Special Advocates is particularly worrying. The principal procedural safeguard which the Government relies upon to render the use of CMP acceptable is the role of the Special Advocate. The Special Advocates have been highly critical of the proposed extension of these "inherently unfair" procedures.[41] Appointment of a Special Advocate cannot compensate for the unfairness of a person being excluded from the consideration of their case. This holds true in ordinary civil proceedings.[42]

32. 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

[41] Response to Green Paper Consultation from Special Advocates, 16 December 2011

[42] Clause 8 makes clear that the role of the Special Advocate reflects existing practice.

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.[43] The Green Paper proposed only peripheral changes to the existing system of Special Advocates, focusing on addressing the absolute bar on communication and the need for additional training. The Bill makes no change to the role of a Special Advocate. The rules could provide an opportunity for improvements to be made.[44]

33. Introducing CMP to the civil process may require significant rule changes to deal with – for example – the making of offers to settle under Part 36 of the Civil Procedure Rules – the transposition of this exceptional procedure may impact on the role of the non-security cleared legal teams and the special advocates alike. Existing Special Advocates will be uniquely placed to assist in their drafting.

34. These amendments would remove the provisions which limit the scope of required consultation and would require the Secretary of State to consult existing Special Advocates.

New Clause, Part 2 - Reporting

Page 11, line 36, insert the following new clause –

(-) The Secretary of State shall be required to lay before both Houses of Parliament:

(a) an annual report on the operation of this Part (including on the use of section 6 proceedings, the treatment of sensitive information under section 13 and review under section 14); and

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[43] 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.

[44] Since drafting, we have seen amendments tabled in the name of Lord Hodgson of Astley Abbotts which are designed to clarify the role of the Special Advocate.

(b) quarterly statistics on the use of this Part (including on the use of section 6 proceedings, the treatment of sensitive information under section 13 and review under section 14).

(-) The annual report and the quarterly statistics provided under section (-) shall include:

(a) the number of applications under section 6;

(b) the number of declarations made pursuant to section 6;

(c) the identities of the parties in the relevant civil proceedings in section 6 applications, including the relevant Government departments or agencies;

(d) the frequency of the consideration of "sensitive material" under section 13;

(e) the category and type of "sensitive material" considered under section 13;

(f) the frequency of certification under section 13;

(g) the frequency of the operation of section 6 in connection with review under section 14;

(h) the details of any open judgment given by the court or tribunal in the relevant civil proceedings, including on any application under section 6, 7 or 14;

(i) a list of closed judgments made in the relevant civil proceedings, including on any application under section 6, 7 or 14; and

(j) any other such information as the Secretary of State considers relevant to the operation of this Part.

( ) Such closed judgments as are listed in both the annual report and in quarterly statistics should be provided to the Intelligence and Security Committee when they are handed down.

Briefing

35. This amendment would create a requirement on the Secretary of State to collate and provide to Parliament statistics on the operation of this Part of the Bill (both in relation to CMP and the limitation of *Norwich Pharmacal* jurisdiction). It provides for quarterly statistics to be provided and for an annual report. Closed judgments should be provided to the ISC.

36. In the course of JUSTICE's work on CMP we have found it routinely difficult to access information on the operation of existing CMP. It is clear that members, seeking information during the Green Paper process have had similar difficulties.[45] Ministers have indicated that information has not been stored and that it would now be disproportionately expensive to collate for the purposes of informing Parliament's consideration of the Bill. The Lords Constitution Committee has recommended that the Government should be required to both keep consolidated records on the use of CMP and to provide for independent review.[46] JUSTICE considers that, in light of the exceptional nature of these measures, reporting requirements would not be unduly onerous and will allow Parliament to continue to monitor the impact of the use of CMP in future. While this amendment refers specifically to Part 2 of this Bill, in light of the exceptional nature of these proceedings, JUSTICE considers that there is a good case for maintaining up to date and consolidated statistics on the operation of all existing CMP.

New Clause, Part 2 - Independent Review

( ) The Secretary of State shall have the power to appoint an independent reviewer to consider the application of this Part.

(a) Within 5 years of Royal Assent, the Secretary of State shall appoint the first independent reviewer.

(b) The independent reviewer will be allowed access to section 6 and section 14 proceedings and any closed judgments in the course of his review.

(d) Within 12 months of his appointment, and every 5 years thereafter, the independent reviewer will report on the operation of this Part and the Secretary of State shall lay the report before both Houses of Parliament.

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[45] See for example, HC Deb, 14 May 2012, col 18W.

[46] Third Report of Session 2012-12, *The Justice and Security Bill,* HL Paper 18, paras 34 – 35.

37. This amendment would provide for review by an independent person of the operation of the whole of Part 2 every 5 years. In light of the constitutional significance of these proposals, and the limited justification provided to Parliament in connection with the type of cases that may be covered by this Part, JUSTICE considers that the Bill should be amended to provide for a statutory review by an independent person.

B: Clauses 13 and 14 - Ousting *Norwich Pharmacal* and other similar jurisdictions

38. The *Norwich Pharmacal* jurisdiction is designed to support access to justice and to ensure individuals with a right to a remedy are not excluded from justice by an inability to access documents and other evidence relevant to their case, but held by a party other than the defendant. Claimants asking the court to exercise this exceptional jurisdiction have several significant hurdles to overcome before the court will order disclosure:

- **An arguable case:** The claimant must show that they have an arguable case in the main litigation.
- **Involvement of the defendant:** The defendant must be involved or 'mixed-up' in the underlying claim, however innocently.
- **No other means of obtaining the information:** The *Norwich Pharmacal* jurisdiction is a remedy of last resort. The claimant must show that he has no other way of obtaining the information.
- **No more than necessary:** The court will only order such limited disclosure as shown to be necessary.
- **A discretionary remedy:** The court must ultimately be satisfied, having taken into account each of these factors, that the information should be disclosed in the public interest.[47]

Proposals in the Bill

39. Clause 13 of the Bill will oust the jurisdiction of the courts to hear *Norwich Pharmacal* applications in any case which concerns "sensitive information",

[47] Rule 31.18 Civil Procedure Rules; *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133; *Mitsui v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch).

including in any case where the Secretary of State certifies that the disclosure of the material in question would "be contrary to the public interest". This "sensitive information" provision will effectively stop this power being used in any case relating to or involving the intelligence services. Clause 13(3) defines such information so broadly that it will exclude information which is held by, obtained from, or relating to an intelligence service, or even third party information derived from such a source. The ouster of jurisdiction in connection of this information is absolute and not subject to review.

40. Certification by a Minister may be issued in connection with information where disclosure would be considered contrary to "national security" or "the interests of the international relations of the UK". This definition is potentially very broad, particularly in light of the very limited justification for reform, set out below. The decision of the Secretary of State to certify such information would be subject to review only on only limited judicial review grounds. The Court will only be permitted to examine whether the Minister "ought" to have concluded that disclosure would be contrary to the public interest (Clause 14(2)). Any judicial review challenge would be automatically subject to CMP. Any challenge of the Secretary of State's assessment of the need for non-disclosure would be extremely difficult under ordinary judicial review since neither the relevant material nor the reasons for certification would not be available to the party seeking disclosure. Under CMP, the potential for the Secretary of State's decision to be seriously questioned would, in our view, be miniscule.

Is it necessary to limit Norwich Pharmacal disclosure?

41. 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 (in other words to reinforce the "control principle" which assumes that we will "control" or in so far as possible keep confidential material provided to us by third states):
    - 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 Green Paper suggested that disclosure under *Norwich Pharmacal* does not take into account important national security considerations. This neglects: (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.
- This process is used as a matter of last resort and 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 wrongdoing. 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.

42. The *Binyam Mohammed* case itself illustrates the substantial safeguards in the *Norwich Pharmacal* process:
    - The FCO accepted that Mr Mohammed had an arguable case that he had been subject to cruel, inhuman and degrading treatment.[48] By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.[49]
    - 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.[50] The UK was "mixed-up" in his treatment.
    - He sought only disclosure to his security vetted counsel, already cleared to receive sensitive information in the US.
    - At the time of his application, *Binyam Mohammed* was facing charges which included capital offences. 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.

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

[49] Ibid, paras 120 - 126

[50] Ibid, paras 68-71

43. The material sought by *Binyam Mohammed* under *Norwich Pharmacal* was never ordered by our courts. Before a decision was taken, it was disclosed in the US proceedings. *Binyam Mohammed* illustrates plainly that these claims will involve cases where the UK is at least "mixed-up" in allegations of serious human rights obligations or unlawful behaviour. In practice, it may be difficult to dispel the impression – however unjustified - that the ouster and the use of certification to prevent disclosure would be associated with cover-up, concealment and collusion designed to hide embarrassment, misconduct and illegality, particularly in cases involving atrocities of the most serious kind. Without any compelling evidence of harm, we urge Parliamentarians to exercise caution in considering the case for reform.

44. We share the view of the JCHR that ouster of the kind proposed in the Bill is entirely disproportionate to any justification provided by the Government:

> [The absolute application of the control principle would mean] that our legal framework admits of the possibility of individuals facing the death penalty being unable to obtain disclosure of material which is central to their defence, without any judicial balancing of the gravity of the harm likely to be done to the individual on the one hand and the degree of risk to national security on the other. We do not think our legal framework should countenance that possibility.[51]

45. The proposals in the Bill neglect the safeguards built into the *Norwich Pharmacal* jurisdiction and its underlying purpose. The jurisdiction of the court is ultimately designed to protect the public interest in access to justice. The ouster proposed in the Bill – which in effect would make the control principle absolute – is inappropriate given that disclosure might be sought in cases where an individual faces a threat to his life, in violation of international standards, and where there might be evidence that the UK is mixed-up in the circumstances of his plight.

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[51] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 162

Suggested Amendments

46. JUSTICE considers that clauses 13 and 14 present a disproportionate inroad into the system of civil justice carefully established by the domestic courts to protect public interest disclosure without any evidence of serious justification. We would support a motion that **Clauses 13 and 14 stand part.**[52]

    We suggest alternative amendments, below.

Clause 13 - Ouster

Page 10, line 9, leave out subsections 13(3)(a) – (d)[53]

Briefing

47. This would remove the automatic exemption from the *Norwich Pharmacal* jurisdiction for material held by or related to the intelligence services. JUSTICE considers that the creation of an absolute ouster of this jurisdiction in connection with the status of the services – as opposed to the public interest in non-disclosure – would be a damaging and retrograde step.

Clause 13 - The scope of the certification process

Page 10, line 24, after "cause" insert "serious"

Page 10, line 24, delete from "cause" to end line 26 and insert "involve the disclosure of material provided by a foreign intelligence service on a confidential basis and the Secretary of State is satisfied that disclosure would be damaging to national security"

Page 10, line 26, leave out subsection (b)

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[52] Lord Pannick has tabled motions that both Clauses 13 and 14 stand part. We support these motions

[53] Since drafting a series of amendments have been tabled in the names of members of the JCHR and the Constitution Committee which would also restrict significantly the scope of Clauses 13 and 14 (Amendments 71 – 75, 77 – 79, 81 - 87). JUSTICE supports these amendments.

Briefing

48. We maintain that the certification process is unnecessary and unjustified. We share the view of the JCHR that if there is any need to address any perceived fear that information which is damaging to national security may be disclosed by our courts, that this should be done within the existing system of PII.[54] However, the breadth of the certification system is such that there could be a danger of its operating as an effective ouster of the jurisdiction of the court based largely on Ministerial discretion.

49. The first two amendments would limit the certification power of the Secretary of State to circumstances either where he is satisfied that disclosure would cause serious damage to national security or where the relevant damage relates to violations of the control principle. It would remove the Secretary of State's power to issue a certificate on the basis of any kind of damage to the UK's international relations without evidence of damage to national security. This latter criterion is extremely broad and could arguably be used to prevent disclosure of material which was simply embarrassing for our diplomatic partners, or material which could undermine our diplomatic relations by disclosing evidence of embarrassing or unhelpful conduct on the part of UK officials.

Clause 14 – Judicial Oversight

Page 11, line 12, leave out from "proceedings," to end of line 13, and insert "the relevant court shall consider whether to confirm that the information covered by the certificate should be withheld in the public interest"

Page 11, line 15, delete subsections 14(2) – (5) and insert –

(2) In determining whether to confirm any certificate issued under section 13, the court shall consider the Secretary of State's assessment of the serious damage to the interests of national security and any competing public interest in the disclosure of the information covered by the certificate.

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[54] JCHR Report, para 192

(3) Any review under this section will be considered relevant civil proceedings for the purposes of section 6.

Briefing

50. Clause 14 currently provides for a limited form of judicial oversight of certification by the Secretary of State, on ordinary judicial review grounds. Any such review would automatically be subject to CMP, even where the Secretary of State issues his certificate for reasons related to international relations, not national security. Thus, in cases involving *Norwich Pharmacal* certification, CMP is to be utilised far more broadly than proposed in the already broad provisions in Clauses 6 – 11.

51. These amendments would ensure that the court will exercise discretion on whether to accept any Ministerial certificate, and will have the power to balance the interests in disclosure against the Secretary of State's certification that disclosure would damage the public interest. This is in contrast to the current provision in the Bill, where review is limited to scrutiny of whether the Minister "ought" to have issued the certificate. In effect this amounts to a review of the rationality of the Ministerial assessment of whether the information in question may damage either national security or international relations. Case law – including *Mohammed* – illustrates that our courts are very deferential to executive assessments of risk on national security and international relations. This amendment would permit the Court to balance competing interests, including in access to justice and whether, for example, the individual concerned is seeking the information to aid in his defence against charges for which the death penalty may be applied or in connection with allegations that the UK has been mixed up in wrongdoing which amounts to a grave violation of our international human rights obligations (including, for example, violations of the UN Convention against Torture).

The second new subsection would permit an application for CMP under Clause 6. It would rule out the automatic imposition of CMP. CMP would only be available in national security cases. Ordinary PII rules would apply in any case involving any issue of international relations if the Bill were to be otherwise unamended.

C: Scrutiny of the intelligence services (Part 1)

52. Part 1 of the Bill makes proposals on the reform of non-judicial mechanisms for oversight of the security and intelligence services. The current arrangements for oversight of the security and intelligence services are ripe for reform. The JCHR has consistently called for reform to strengthen the powers of the Intelligence and Security Committee and for changes to its composition, remit and staffing to secure its status as a fully credible parliamentary committee reporting to both Houses.[55] 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.[56]

53. Inclusion of these measures in the Bill 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 expansion of CMP and the ousting of *Norwich Pharmacal* jurisdiction. These special processes 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:

> The open justice principle…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.[57]

54. Clause 1 of the Bill would change the existing Intelligence and Security Committee (ISC) and would make it a statutory parliamentary committee but not a fully fledged body of Parliament, governed by standing orders controlled by both Houses. Under the current arrangements, ISC members are nominated

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[55] 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.

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

[57] *Binyam Mohammed,* para 42.

from the House and appointed by the Prime Minister. The Bill will reverse this, with candidates nominated by the Prime Minister formally appointed by both Houses (Clauses 1(1)-(5)). Clause 2 of the Bill places the functions of the ISC on a statutory footing. This provision makes clear that it is within the power of the ISC to examine operational matters of the Security Services and any other operational matters agreed by the Government. Clause 3 makes provision for an annual ISC report to Parliament, subject to the Prime Minister agreeing the draft text. The Prime Minister will have an unfettered discretion to redact reports of the ISC to exclude any matter that he considers prejudicial. Schedule 1 of the Bill provides that the ISC will determine its own procedure. However, it also provides detailed provision on access to information and disclosure. Services and Departments are required to provide information to the ISC, but this is subject to Ministerial override. The Minister can veto access to information on broad "national security" grounds; wherever non-disclosure is considered "sensitive" (relevant to operational techniques, information about particular operations or information provided by other countries) or where the information is of a type he wouldn't ordinarily disclose to a Select Committee.

55. 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 the Green Paper mentioned the need to explore greater reform, including possible changes to ISC staffing, accommodation and budget to strengthen both the "actual and symbolic" connection to Parliament, there appears to be little in the Bill to suggest that the changes to the ISC proposed in the Bill will lead to any significant change.