Justice and Security Bill

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Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.

JUSTICE, *Secret Evidence*, 2009

Evidence which has been insulated from challenge may positively mislead.

Lord Kerr, *Al-Rawi v Ministry of Defence,* [2011] UKSC 34, 93.

[Justice is] ***figured with both eyes closed but both ears open: because she should hear both sides and respect neither.***

Francis Bacon, *Works*, Vol 5

The Justice and Security Bill contains a series of proposals which JUSTICE is concerned could undermine public confidence in the administration of civil justice and damage the credibility of our judiciary.

JUSTICE considers that the Bill's proposal to introduce closed material procedures (CMP) into all civil proceedings is unfair, unnecessary and unjustified. That one party will present his case unchallenged to the judge in the absence of the other party and his lawyers is inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal.

Secret evidence of this kind is:

- **Unfair:** There is nothing in the Bill which can redress the unfairness of CMP. The Bill will allow the Government to more effectively control the handling of information in cases against them involving national security. This will skew litigation in the Government's favour in a way which is inimical to centuries' old common law principles of justice and fair process. Special Advocates – security cleared lawyers – who are at the heart of CMP have said they are *"inherently unfair;…do not work effectively, nor do they deliver real procedural fairness"*.

- **Unnecessary:** The current judicial process for the protection of national security sensitive information – public interest immunity (PII) – works. PII allows the judge to carefully weigh competing public interests in open justice, transparency and accountability against the protection of national security, considering alternatives such as redaction, confidentiality rings and anonymity. If the proposals in the Bill are passed, this discretion will be abandoned.

- **Unjustified:** The Government has produced no evidence to support the case for this fundamental reform. These measures are not justified on the grounds of national security. The Government accepts that PII has not damaged the public interest. Instead, the Government argues that it will have to settle fewer claims under these new procedures. The Joint Committee on Human Rights (JCHR) concluded that the Government's case had devolved to "vague predictions" and "spurious assertions". We share their concerns.

The Government's Justice and Security Green Paper was widely criticised by the Joint Committee on Human Rights, by Special Advocates, by civil society and the media. The publicised changes in the Justice and Security Bill do not meet these concerns.

Introducing CMP into the ordinary civil justice "toolkit" of our judiciary could undermine their credibility irreparably and damage public confidence in the civil justice system. The Bill also proposes to oust courts' jurisdiction to order disclosure - in *Norwich Pharmacal* claims - of information held by intelligence agencies in cases where the UK is shown to be mixed up in wrongdoing.

Taken together, these proposals represent a knee-jerk and disproportionate reaction to a limited number of cases involving UK security and intelligence services in allegations of 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". Limited changes to the measures for parliamentary oversight of the intelligence services are disappointing and must not be seen as a trade-off for the proposed limits on access to effective judicial remedies.

The Supreme Court in *Al-Rawi* refused to expand CMP, concluding that such a fundamental change would require "compelling evidence". JUSTICE considers that Parliamentarians should ask for no less.

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 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] 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 justice "toolkit" in cases involving "national security" (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 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: 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 Green Paper and this 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

Secret evidence, open justice and the right of confrontation

5. 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. 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.[3]

6. JUSTICE has long argued against the expansion of closed material procedures (CMP). The Government's 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.[4] In our view, the use of CMP is generally unfair. However, in each of the cases where they have previously been considered,

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

[4] A full list of circumstances when CMP are available is provided in JUSTICE's response to the consultation on the Green Paper: http://www.justice.org.uk/resources.php/314/secret-evidence-in-civil-proceedings-unnecessary-unfair-and-unjustified-justice-responds-to-governme

Parliament has had an opportunity to consider individual proposals and the Government has been required to produce evidence of the propriety and appropriateness of CMP in connection with each of those cases. Largely they cover exceptional proceedings outside the ordinary civil or criminal justice process which Governments have acknowledged as distinct. Under the proposals in the Bill, the Government asks 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.

7. 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 the evidence used against them.[6]

- **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.

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

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

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

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] The current law of public interest immunity (PII) places the decision on whether material should be fairly disclosed in the public interest with squarely with a judge. Under PII, although the Secretary of State is required to issue a certificate on public interest immunity, detailing the Government's view that the material or information in question attracts PII (accompanied by any supporting evidence), it is for the court to determine ultimately whether any information should be protected or disclosed. The court must first consider whether there is anything in the claim for immunity. If there is, then the court must conduct a balancing exercise.[11] Known as the *Wiley* balance, this requires the court to weigh the competing public interest in protection against the harm that would be caused by disclosure and the public interest in the administration of justice.[12] The court will consider whether alternative mechanisms can be used to protect the public interest, for example, in preserving national security, while providing as much disclosure as possible (these include redaction, anonymity orders, confidentiality rings

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

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

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

[11] *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, para 135.

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

and other techniques). If after this balancing exercise is concluded the public interest favours non-disclosure, the relevant material is excluded from the case and neither party can rely upon it. If the public interest is in favour of disclosure, ordinary rules of disclosure apply.

8. We consider that each of these criticisms hold firm. Since the publication of *Secret Evidence* a number of developments have underlined our concerns. The use of CMP is a practice which should not be extended, but rolled back:

- In *Al-Rawi v Security Service*, the Supreme Court the Supreme Court determined that it did not have the jurisdiction to extend the use of CMP [13] 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.[14] (Emphasis added)

  Lord Kerr ruled out the suggestion that CMP would be fairer than PII as the court would consider material which might otherwise be excluded:

  > To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[15]

- 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 – confirmed:

  > 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

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[13] [2011] UKSC 34, para 69

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

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

attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.[16]

Expanding closed material procedures (Clauses 6-10)

9. The Bill institutes a two-stage process for the use of CMP. Clause 6 of the Bill enables the Secretary of State alone 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)).

10. 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.

11. Once the Court has made a declaration that CMP is available, the Bill 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)).

12. 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

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

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)).

Are the proposals in the Bill fair?

13. A number of widely publicised changes to the Green Paper proposals do not render these proposals fair:

    - **"The judge decides":** The Secretary of State claims that CMP will only be available "where evidence a CMP is needed on national security grounds is found to be persuasive by an independent judge".[17] This significantly misrepresents the role of the judge as envisaged by the Bill.

      In practice, the decisions allocated to the judge are very limited ones. In order to trigger CMP, the court will consider evidence from the Secretary of State that disclosure of certain material would damage national security. If there is any evidence that there will be harm, the judge must order CMP. The deference afforded by the judiciary to the executive on questions of national security is well documented.[18] It is highly unlikely that the court would challenge the evidence of the Secretary of State on the degree of risk.

      This decision making exercise is in stark contrast to the current discretion of the judge under PII. It removes any obligation to weigh the public interest in protecting against risks to national security against the public interest in open, adversarial and equal justice. The *Wiley* balance is abandoned. The judge is barred under the Bill from considering whether the trial could proceed under PII – including whether using initiative to

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

[18] See for example, the "Belmarsh" decision, *A v Secretary of State for the Home Department* [2005] 1 AC 68, para 29, 112, 154. See also *Rehman v Secretary of State for the Home Department* [2002] 1 All ER 122. In particular, Lord Hoffman stresses that "decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive". In examining these type of assessments, the court should "respect the decisions of the crown". In *Binyam Mohammed*, while the Court determined that it should order disclosure in the exceptional circumstances of that case, the judges of the Court of Appeal were clear that the decision of the Secretary of State on the risks posed to national security was to be subject to extreme deference (see 129 – 203; at 132 for example).

redact, anonymise or otherwise protect material could adequately protect national security without CMP or non-disclosure. The judge has no discretion to determine that the hearing can fairly proceed without reference to the material, as the Bill prevents him from considering whether it might never be relied upon.

- **"PII" is preserved:** Some critics of the Green Paper proposals pointed out that if CMP were to be extended it should be as a matter of "last resort", only after material had been subject to PII and ruled otherwise inadmissible.

  The Bill creates a duty for the Secretary of State to "consider" PII before applying for CMP. However, the Secretary of State is not required to exhaust PII, but instead is invited to treat the two options as alternatives. 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.

  In our view, it is most likely that CMP will become the default in cases involving national security claims. 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.

14. The Bill adopts and compounds many of the core failings of existing CMP:

- **"The Special Advocate cannot render this process fair":** 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.[19] 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.[20]

  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.[21] 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, but provides that new Rules may deal with their functions.

  We share the Special Advocates view that any changes proposed are unlikely to impact significantly on their ability to offer protection for the individual right to a fair hearing and the principle of open and adversarial justice.

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

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

[21] 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.

Any 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. In their response to the Bill, the Special Advocates conclude:

> CMPs are inherently unfair and contrary to the common law tradition; ..the Government would have to show the most compelling reasons to justify their introduction; ...no such reasons have been advanced; and...in our view, none exists.[22]

We call on Parliamentarians to pay close attention to their conclusion that there are fundamental flaws in the Bill which render the proposals disproportionate and unnecessary.[23]

- **"If an individual does not understand the case against him, the hearing is unfair":**

The Bill makes no provision for the court to be required to provide a claimant excluded under CMP with even a summary of the material which is "closed" under CMP. Instead, Clause 7 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.[24]

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[22] Special Advocates Evidence to the JCHR, 14 June 2012, para 3.

[23] Special Advocates Evidence to the JCHR, 14 June 2012.

[24] *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".

In the Green Paper, the Government argued that this case-law was unclear and proposed to limit the cases where "enhanced disclosure" would be required under the new CMP procedure. The ECHR memoranda accompanying the Bill explains the Government's view that while the case law is uncertain, the degree of disclosure required should remain with the judge.[25] This is a welcome, but limited, concession.

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. This sits uncomfortably with the limits placed on disclosure and the provision of summaries in Clause 7. The Government explains that where Article 6 applies, the court should provide such summaries as are necessary.[26] While this reassurance is welcome, 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 justice) which suggests that the goal should be to secure a fair hearing in so far as is possible.

Are the proposals in the Bill necessary?

15. The publicity surrounding the publications of the Bill suggested that it was greatly circumscribed. While we welcome the limited changes accepted by Government, they do not affect our view that the expansion of CMP is unnecessary. Two key issues are highlighted by the Government:

- **"National security cases only":**

  The Green Paper would have applied CMP to all "sensitive material" where non-disclosure was in the "public interest". The Bill applies only

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[25] ECHR Memoranda, paras 29 – 31. The Government relies heavily on the Supreme Court decision 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. The ECHR Memoranda does not acknowledge that *Tariq* is currently subject to litigation, having been referred to the European Court of Human Rights and communicated to the Government in March 2012.

[26] ECHR Memoranda, para 31.

where "national security" is involved. However, "national security" is undefined. While the Secretary of State explains that "this points beyond doubt that material relating to crime or other government responsibilities will not be in scope",[27] this in our view is far from certain. 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 by the Government. For example, the current national security strategy outlines current 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.[28] 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?

- **"No inquests":** 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 a 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 may 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 the peculiarities of any new forum.

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

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

In any event, for many bereaved families, an inquest may not be the end of their involvement with the judicial system. It might appear ironic that many options will be open to a coroner to allow as open an inquest as possible – for example, a wide range of techniques including redaction, anonymity and confidentiality rings were used at the 7/7 inquests – but that those will be denied to any civil court should the families seek compensation.

16. It is important to stress that the extension of CMP is not needed to redress any risk to national security. 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".[29] 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.

17. In the Green Paper, the Government referred to the reaction of international partners to the approach of the Court in *Binyam Mohammed* to the control principle, as justification for change. The Government argued that maximising the exchange of intelligence information was important to national security. The Government continues to argue that the protection of the "control principle" would provide justification for CMP. In *Binyam Mohammed,* 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.[30] 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

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

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

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.[31] 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 involved 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 rare, with the claimant arguing only for disclosure to security vetted counsel in the US litigation, no more. The Court was clear that, but for prior disclosure in the US, the Government's claim for public interest immunity would have been successful. Each of the judges in this case emphasised the significant weight to be granted to the Secretary of State's judgment on the implications for national security of sensitive material. The Court of Appeal highlighted the nature of this case, and how very unusual 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 will be great, the Court of Appeal explained

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

> 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.[32]

18. The *Binyam Mohammed* case cannot be used to justify the wholesale shift in the handling of litigation against the Government that would occur under the proposals in Clauses 6 - 10.

Are the proposals in the Bill justified?

19. There are no national security reasons for change. In our view, the Government has failed to provide any other justification for reform. Without compelling evidence for change, Parliament should reject these proposals. 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.[33] 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

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

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

withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.[34]

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.

The Government argues that "no evidence currently heard in open court will be heard in secret in future".[35] 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.

- **"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.[36] 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 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.[37] On this, we note that settlement preceded the final decision of the Supreme Court that CMP was not an option. The application of PII was never tested by the Government in practice. The JCHR rejected this argument wholesale.[38]

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[34] *Al-Rawi,* para 93

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

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

[37] *Ibid,* para 1.18

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

The Green Paper explained 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.[39] 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 introduction of CMP to civil litigation may have more wide-ranging and earlier implications for fairness in litigation in cases where the Government might instigate CMP procedures. In order to get a case off the ground – whether in seeking legal aid, looking to enter a conditional fee agreement or simply in seeking advice on the merits – a claimant will seek advice from his legal team on the prospects of success. Legal advisers in cases where CMP are likely will have an unenviable, if not impossible, task in trying to reliably predict prospects of success in a case where they are unlikely to be permitted to see all of the evidence in the case and where they know the claimant is likely to be precluded from making full submissions on the law as applicable to the closed material. The knock-on effects of the introduction of CMP were not considered at all in the Green Paper. How, for example, is a solicitor expected to advise his client on any Part 36 offer to settle a claim without full access to closed material? How can Special Advocates within the current limits of that role be expected to reliably become involved decisions like these without being able to communicate directly with the claimant? In their response to the Green Paper consultation, Special Advocates note the particular impact on courts and tribunals of the operation of CMP and the delay caused by the need to subject staff to security clearance. How many court reporters, typists, judicial assistants and others might need to be subject to vetting if CMP are rolled out across all civil proceedings?[40] The Bill provides for changes to be made to the Rules to accommodate the operation of CMP. However, these and numerous other questions remain as yet unanswered.

- **"CMP will allow claims to proceed which might otherwise be struck out":** In *Al-Rawi*, the Supreme Court accepted that where sensitive material

[39] *Green Paper,* para 1.54

[40] Response to Consultation from Special Advocates, 16 December 2011, para 19.

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. 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 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 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] Under the proposals in the Bill, CMP is offered as an alternative to PII. It is for the Secretary of State alone to choose. CMP is not envisaged as a last ditch attempt at justice in the very unlikely occasion that a court concludes that a case cannot otherwise be heard. As explained above, it is likely that these proposals will lead to the end

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[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.

[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.

of the PII process, except in cases where potential exclusion of evidence, and the risk of strike-out (unrealistic as we consider that to be) is beneficial to the Secretary of State (for example, in any case where he does not want certain material to be considered by the Court at all and instead wishes to argue that the case cannot be heard).

In our view, the risk of a *Carnduff* strike-out arising is minimal. It cannot justify the introduction of a change of the magnitude proposed.[45]

20. **JUSTICE considers that the proposals in Clauses 6 – 10 to extend CMP to ordinary civil proceedings are ultimately unfair, unnecessary and unjustified.**

Ousting *Norwich Pharmacal* and other similar jurisdictions (Clauses 13 – 14)

21. The *Norwich Pharmacal* jurisdiction of the court is designed to support access to justice and to ensure individuals with a right to a remedy are not denied 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.

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[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.

- **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.[46]

Proposals in the Bill

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

23. In addition, 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. 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.

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[46] 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).

Is it necessary to limit Norwich Pharmacal disclosure?

24. The Government's sole justification for the proposal to limit this jurisdiction is to assure foreign intelligence partners (and principally, the United States) that information provided to the UK will never risk disclosure. It argues 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 wishes to bolster the "control principle" whereby we agree to protect information provided to us by intelligence partners.

25. The principal given source for this anxiety is again the decision in the *Binyam Mohammed* case. We reiterate that the Government accepts that there is no risk of the United States or any of our other international partners withholding intelligence with any "threat to life implications". The justification for change is to assuage concerns expressed in "clear signals" from overseas that the flow of information may reduce if no steps are taken to narrow the law in this area:
    - Prior to the concern expressed in relation to the *Binyam Mohammed* case, we are unaware of any serious or significant objection having been raised to this last-resort jurisdiction;
    - The Green Paper suggests 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.
    - 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.

26. 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.[47] By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.[48]
- 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.[49] 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, 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.

27. In any event, as explained above, disclosure of the material sought by *Binyam Mohammed* under *Norwich Pharmacal* was never ordered by our courts. Before The real issue in that case was not about *Norwich Pharmacal* but about the boundaries of PII. This PII process, as explained above, was exacting and the judges of the Court of Appeal extremely respectful of the Secretary of State's opinion on the impact which disclosure would have on our relationship with the US.[50] The decision to disclose ultimately hinged on the seriousness of the information (disclosing wrongdoing on the part of the UK) and the fact that the information had already been disclosed in the US. The content of the disputed paragraphs could have been discovered by anyone with access to a computer and an interest in US court judgments.

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

[48] Ibid, paras 120 - 126

[49] Ibid, paras 68-71

[50] 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.

28. *Binyam Mohammed* illustrates plainly that these cases will involve circumstances 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 or 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.

29. 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 proposals in the Bill neglect the safeguards built into *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 in individual faces a threat to his life, in violation of international standards, and where there might be evidence that the UK were mixed-up in the circumstances of his plight. We agree with the conclusion of the JCHR:

> [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]

30. Latterly, the Government has suggested that these reforms are necessary to stop some kind of "forum shopping" by speculative international litigants seeking access to intelligence material. The concept of litigation "tourism" has gained

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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

some traction in the light of evidence that the law of defamation and the threat of suit in London is utilised to chill freedom of expression.[52]

31. The Government is yet to provide any evidence of any alleged rash of international national security court-hopping by speculative claimants. As the JCHR explained in their report, those cases in the UK where *Norwich Pharmacal* disclosure has been sought, domestic courts have granted permission for judicial review to proceed here, suggesting that there is at least an arguable case that in these cases the UK has itself been mixed-up (however innocently) in wrongdoing of some kind.[53]

32. **JUSTICE considers that clauses 13 and 14 present an unacceptable and 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.**

Scrutiny of the intelligence services (Part 1)

> 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.
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> *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs, para 42 (Lord Chief Justice)*

33. 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

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[52] Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper,* HL Paper 286/HC 1777, para 159. Government Response to the Consultation on the Justice and Security Green Paper, Executive Summary.

[53] Ibid, para 160. *Omar v Secretary of State for the Foreign and Commonwealth Office* [2011] EWCA Civ 1587; *Habib v Secretary of State for the Foreign and Commonwealth Office* [2012] EWHC 681.

secure its status as a fully credible parliamentary committee reporting to both Houses.[54] 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.[55]

34. 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. As recognised in *Binyam Mohammed,* above, 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.

35. Clause 1 of the Bill would change the existing Intelligence and Security Committee (ISC) and would make it a statutory parliamentary committee as opposed to a fully fledged body of Parliament, governed by standing orders controlled by both Houses. Under the current arrangements, ISC members are nominated 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)).

36. 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-

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[54] 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.

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

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.

37. 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 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.

38. Clause 5 expands the powers of the Intelligence Services Commissioner to allow the Prime Minister to direct him to keep under review the functions of the intelligence services, the head of any of the services or the Armed Forces when conducting intelligence services. The ISC will conduct these reviews on direction from the Prime Minister, who will in effect control the exercise of these functions. Although the ISC can request that the Prime Minister issue a direction for any review, the Prime Minister is not compelled to issue any direction. The Prime Minister has already indicated that he intends to direct the ISC to monitor compliance with the *Consolidated Guidance on Detention and Interviewing of Detainees by Intelligence Officers and Personnel* in relation to detainees held overseas.[56] The Green Paper asserts that "the effectiveness and value of the Commissioners in providing assurance and challenge to Ministers is not in doubt".[57] We strongly challenge the accuracy of this analysis. In our recent report *Freedom from Suspicion*, we conduct a detailed analysis of the effectiveness of the work of both the Intelligence Services Commissioner under its existing remit. We conclude that the work of the Commissioner is lacking in transparency, ineffective in ensuring the legality of the activities of those whose work they monitor and unable to provide public confidence in the accountability of the services taking important decisions about surveillance which may significantly interfere with the individual right to privacy. One major limitation of the work of the Commissioner is the limited time and resources available to meet his existing

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[56] EN, para 43.

[57] Green Paper, 3.44

remit.[58] It is impossible to see how the existing model could be credibly expanded to include effective scrutiny of the legality of the work of the agencies across the breadth of their operational practices.

39. The proposals in the Bill are disappointingly unambitious and unlikely to lead to any significant increase in the accountability of the security and intelligence services. We 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.

[58] JUSTICE, *Freedom from Suspicion*, November 2011. See for example, paras 231 – 239; 270 – 275. *"Generally woeful"* levels of transparency criticised at para 234 and reports "disclosed little and appeared to rely heavily on the same language being reused year after year" at para 237. We are concerned to read that the Secretary of State proposes to refer monitoring of compliance with the guidance on the treatment of detainees to the Intelligence Services Commissioner. This scrutiny cannot in our view meet the standards of compliance necessary to meet the procedural requirements for a full investigation into any allegation of ill-treatment by UK Armed Forces or intelligence services which violates Article 2 and 3 of the European Convention on Human Rights (ECHR) or the terms of the UN Convention against Torture. In light of the long running controversy over the treatment of detainees prior to the promulgation of the current guidance, and the abandoned *Gibson* inquiry, we reiterate our concern that review by the Commissioner would not be a substitute for a public inquiry which provides for the full participation of the alleged victims and their families.