Justice and Security Green Paper (Cm 8194)

Consultation Response

January 2012

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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

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.

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

The rule audi alterem partem ('hear the other side') *is not the formality but the essence of justice: which is therefore figured with both eyes closed but both ears open: because she should hear both sides and respect neither.*

Francis Bacon, *Works*, Vol 5

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

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

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

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

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

Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. In September 2009, JUSTICE published *Secret Evidence*, a major report in which we called for an end to the use of secret evidence in UK proceedings.[1] Secret evidence is, in principle and in practice, unreliable, unfair, undemocratic and damaging both to national security and the integrity of Britain's courts. In 2010, JUSTICE jointly intervened with Inquest and Liberty in the Divisional Court in support of the decision of Lady Justice Hallett that she did not have the power to order to hear evidence in secret as part of the inquests arising from the 7/7 bombings.[2] We made submissions in *A v UK* in Strasbourg and *AF* in the domestic courts.[3]

2. JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court.[4] The key outcome in these cases – that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority – prompted the introduction of the Justice and Security Green Paper ("the Green Paper").

Secret evidence, open justice and the right of confrontation

3. This submission focuses principally on the proposal to extend the use of closed material procedures (CMP) to civil proceedings. The Government clearly has a duty to protect the vital and important work of the security and intelligence services. We recognise that the work of the security agencies saves lives and is vital to our national security. Nothing in this response should be taken as diminishing our recognition of the important work that they do. However, increasing allegations and evidence of involvement in human rights violations illustrate the need for the work of the agencies to be accountable and compliant with international standards in order to ensure public confidence in the conduct of the work they undertake in our name.

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

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

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

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

4. Unfortunately, the proposals in the Green Paper have been designed with an overly cautious approach to the protection of information; are based on a number of false assertions about the operation of existing CMP measures and fail to give adequate consideration to the significance of the proposed change for the common law principles of open justice, the right to be heard and the right to confrontation. These principles are precious and form both the backbone of our system of adversarial justice and the foundation for international human rights standards.

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.[5]

6. This core principle of justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past decade. Secret evidence is now used in a range of cases including deportation hearings, control order proceedings, parole board cases, asset-freezing applications, pre-charge detention hearings in terrorism cases, employment tribunals and even in planning cases. Defendants in some criminal cases are now being convicted on the basis of evidence never made public. Criminal courts have issued judgments with redactions to conceal evidence relied upon. Evidence from anonymous witnesses has been used in hundreds of criminal trials. In *Secret Evidence,* we 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 security and intelligence services is not the product of a criminal investigation with the associated safeguards placed on the production of evidence of criminality. While our agencies are expert in intelligence and security and in the disruption of activity which endangers national security, intelligence material comes from a variety of sources including

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

second or third hand hearsay, information from unidentified informants, information received from intelligence sharing partners, data-mining and intercepted communications and hypotheses and conjecture of intelligence agencies themselves. That this material would not ordinarily be admissible in court is not a criticism of the intelligence services, but a criticism of the use of any intelligence material as evidence. It compounds the risk of material deemed sensitive being considered in CMP without opportunity for effective challenge.[6]

- **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.[7]

- **It is undemocratic:** In a democracy, the public are not only bound by the law but entitled to know that the law when applied, is applied properly. 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.[8]

- **Secret evidence is damaging to the integrity of our courts and the rule of law:** Lack of fairness damages the public good of the justice system itself. It is inevitable that the courts will take hard decisions which may be unpopular with the parties and the public. However the integrity of the courts depends on the perception that our judges have adopted a fair and independent process to reach their conclusions. Despite the importance of open justice, it remains possible to have a fair hearing behind closed doors when the public interest requires, so long as all the parties have had an equal opportunity to make their case.[9]

- **It weakens security:** Although counter-intuitive, the use of unchallenged intelligence to affect the outcome of cases can lead to inaccurate conclusions which endanger security. First, the impression that people are being unfairly treated by the courts breeds resentment and can undermine sources of intelligence within communities where threats may arise. Secondly, inaccurate conclusions in cases which allege

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

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

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

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

serious wrongdoing allow unlawful and perhaps dangerous behaviour to go unchecked. In the case of investigations involving allegations of terrorism, this may mean offenders go unpunished. In the case of civil claims involving allegations against Government agencies, this may allow the cover-up of serious wrong-doing and misconduct by officials and agents. This approach breeds complacency and could encourage a drop in professional standards, which in turn could reduce the trust of the public in the security and intelligence services and their long-term effectiveness.[10]

- **The use of secret evidence is unnecessary:** Finally, there is evidence that the use of secret evidence is not necessary. Firstly, existing cases have shown that the Government may take an overly cautious approach to claiming secrecy, including for information already in the public domain. Secondly, in our view, there are generally better means of protecting the important public interest in maintaining national security which provide greater respect for the right to open justice and a fair hearing.[11]

7. 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:

- In *Al-Rawi v Security Service*, the Supreme Court was asked to consider whether it had the inherent jurisdiction to order that part or all of the damages claims made by former Guantanamo detainees could be considered under CMP.[12] Ultimately, the Supreme Court determined that it did not have the jurisdiction to extend the use of CMP beyond those circumstances which Parliament had deemed their use appropriate. Citing the "fundamental" nature of the shift which the Government sought,[13] the court put at the heart of its consideration the right to open justice and concluded that only Parliament could instigate such a change after full democratic consideration.[14] 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

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

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

[12] [2011] UKSC 34

[13] *Al-Rawi,* para 69.

[14] Ibid

all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.[15] (Emphasis added)

- In his introduction to the Green Paper, the Secretary of State relies on the work of the the Detainee Inquiry led by Sir Peter Gibson as part of the package of measures the Government hopes will restore confidence in the security and intelligence agencies and improve their accountability. The publication of the terms of reference and protocol on disclosure by the Gibson Inquiry confirms the traditionally cautious approach of Government to transparency in the oversight of the work of the security and intelligence services. The Inquiry will not have powers to order disclosure and the final say in any disagreement over disclosure lies with the Government. JUSTICE together with other NGOs and many of the detainees who allege mistreatment and torture have decided not to participate in the inquiry.[16]

8. Against this background, it is extraordinary that the Government propose to extend the use of secret evidence to all ordinary civil proceedings in the UK. The core proposal in the Green Paper would allow the Secretary of State the discretion to certify that any civil proceedings involving sensitive material must be conducted under closed material procedures. This approach grossly underestimates and undermines the common law principles of open and adversarial justice and ignores centuries' old guarantees for fairness in civil proceedings in favour of a broad based Government power to control the boundaries of litigation in which it may be involved.

9. We welcome the acceptance by the Secretary of State that the twin duties of public protection and the safeguarding of civil liberties are "mutually reinforcing".[17] Unfortunately, the Green Paper proposals could easily be seen as a clumsy attempt to control the circumstances in which the State can be challenged and to control information which may be considered embarrassing, or worse yet, evidence of wrong-doing or criminality either by public officials or the State.[18]

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

[16] For more information on JUSTICE's objections to the terms of reference for the Inquiry, see JUSTICE, *Press Release,* 6 January 2012. http://www.justice.org.uk/news.php/60/justice-calls-on-the-prime-minister-to-show-moral-leadership-on-torture-inquiry

[17] *Green Paper,* Foreword, page vii

[18] This risk is more worrying in light of recent claims for secrecy for information which appears simply embarrassing to Government, as opposed to damaging to legitimate national security interests. For example, there are a number of examples of the Government seeking to prevent disclosure of information already in the public domain (e.g. in the context of the *Al-Sweady* litigation).

10. The consultation questions formulated by the Government proceed on the basis of a number of inaccurate assumptions and assertions, particularly in relation to the necessity for and effectiveness of CMP. At a minimum, they neglect to ask whether the Government proposals are needed at all. An open consideration of the need for change must be at the heart of any genuine process of consultation.

11. The remainder of this paper is divided into three parts: a) Secret evidence in civil proceedings; b) *Norwich Pharmacal* and national security; and c) Reforming mechanisms for the oversight of security and intelligence agencies. In each of these parts we raise our specific concerns about the content of the Green Paper and the Government's proposals. Where we have not commented on a specific section or question, this should not be taken as approval or assent. We include an Annex with summary answers to the questions set out in the Green Paper, where we express a view in our principal submissions.

a) Secret Evidence and Civil Proceedings

The proposal and its implications

What is being proposed?

12. The primary proposal in the Green Paper is to answer the judgment of the Supreme Court in *Al-Rawi* by introducing a new statutory discretion for the Secretary of State to certify that civil proceedings should be subject to closed material procedures (CMP):

    (a) The Secretary of State will determine that certain "sensitive material" would cause "damage to the public interest" if disclosed.

    (b) This decision would trigger the start of the CMP process, excluding the claimant and his legal team from the proceedings in so far as CMP applies.

    (c) When CMP is in place, the judge in the case will hear argument from the Government and a Special Advocate on what material should be considered in open proceedings, and what material should be considered only under CMP. The judge's determination of this division will be final, subject to ordinary rights of appeal.

    (d) However, the decision of the Secretary of State that CMP should be in place cannot be challenged by the judge. It may only be challenged by way of judicial review, and on ordinary judicial review grounds.[19]

13. CMP would extend to all civil proceedings "wherever necessary" under the Government's proposals. In light of this approach, we caution that consideration of the Green Paper should not be coloured by the very few cases related to counter-terrorism and alleged torture which provide the Government's motivation for reform. This change would allow the Secretary of State to issue CMP certification in any number of cases, involving both the State and third parties. The Government argues that this approach is necessary in order to be sufficiently "flexible" to allow accommodation for sensitive material to be considered in any context or circumstance in which they "may be required in the future", but provides no specific evidence of risk likely to arise in particular categories or types of civil litigation.[20]

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[19] *Green Paper,* paras 2.6 – 2.7.

[20] *Green Paper,* para 10. In their submission, the Bingham Centre for the Rule of Law provide a list of concerns about distinct types of proceedings, including private proceedings and the implications caused by the extension of CMP. We do not repeat this list here, see para 44.

14. The type of information which will trigger certification is not limited to matters which cause serious harm to the national security of the United Kingdom or to any particular class, type or categorisation of information. The Annex to the Green Paper defines sensitive material to which CMP might apply broadly:

> Any material/information which if publicly disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily sensitive, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive.[21]

15. CMP could apply in a far broader set of circumstances than PII is currently available. The legitimate public interests valid for PII claims include national security, international relations and the prevention and detection of crime. This categories are not exhaustive, but the court has been clear that there must be compelling evidence to justify the creation of new categories of public interest.[22]

16. The Green Paper proposes a considerable breadth of discretion be granted to the Secretary of State in considering whether to trigger CMP. Although the decision of the Secretary of State to trigger CMP is subject to judicial review, this offers only an extremely limited safeguard. Under existing procedures for public interest immunity the deference afforded by the courts to the assessment of the Secretary of State on issues of public interest, particularly in relation to national security and international relations is significant.[23] In this exercise, the court is taking a merits decision on where the public interest lies. Judicial review of decisions of the Secretary of State involving the assessment of public interest will be extremely light touch. We doubt in practice whether any court will be equipped to overturn the assessment of the Secretary of State on CMP, particularly given that the review proceedings are themselves likely to take place in secret with little realistic opportunity for the submissions of the Minister to be challenged.

What will this mean in practice?

17. Where CMP is in place, this could mean that, in order to avoid any disclosure of material the Secretary of State considers "likely to harm the public interest", the immediate consequences for a party to a claim may be that he or she is:

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[21] *Green Paper,* Glossary, page 71

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

[23] See for example, *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, para 129 – 134.

(a) denied the right to attend the trial of his own case;
(b) denied knowledge of another party's statement of case;
(c) denied knowledge of, and the opportunity to challenge evidence on which another party will rely;
(d) denied the opportunity to make submissions on another party's case;
(e) denied the knowledge of material or evidence that may support his case or harm the case of another party;
(f) denied the right to receive a statement of the court's reasons for its decision in his case; and
(g) denied an effective right to appeal the decision of the court (if adverse to him) based on the court's reasons (since these may not be fully disclosed).[24]

18. The introduction of CMP to civil litigation may have more wide-ranging and earlier implications for 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 are 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 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?[25] These and numerous other questions remain unanswered.

19. The immediate legal implications of this change would be that the CMP process is likely to routinely replace the application for public interest immunity (PII). Under PII, although the Secretary of State is required to issue a certificate on public interest immunity, detailing the

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[24] A fuller explanation of the practical implications of the operation of CMP in civil proceedings is outlined in JUSTICE and Liberty's joint submissions to the Supreme Court in the cases of *Al-Rawi* and *Tariq*. See for example, Joint Submissions (Al-Rawi), paras 3 – 5.

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

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 process the court will follow was helpfully summarised by the Court of Appeal in *Binyam Mohammed:*

> Where a minister has concluded that the public interest justifies [non-disclosure] ...the court must first consider whether there is anything in this suggestion, and, if there is, then, unless the inclusion of the passage would have a grave effect on the public interest (in which case that would be the end of the matter), the court must conduct a balancing exercise.[26]

20. This balancing exercise is known as the *Wiley* balance and 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.[27]

21. Although the Green Paper describes the CMP process as a measure of last resort, it is clear that the Government intends that it should replace rather than supplement PII. The Green Paper acknowledges that if these proposals were accepted they would have a significant impact on the operation of the existing common law principle of public interest immunity (PII). In our view, the introduction of a CMP triggered by the exercise of Ministerial discretion, as a replacement for PII would:

    - shift primary control over the disclosure of information from the court to the Secretary of State; and

    - skew the public interest permanently in favour of secrecy, by removing the need for the court to assess the *Wiley* balance in every case where the Government seeks to keep material or information out of the public domain.

22. In effect, if these proceedings are introduced, we predict the speedy demise of PII. It is very difficult to imagine a category of information which the Government could not seek to use CMP but instead would be required to make an application for a PII certificate. Under the CMP process the critical assessment lies with the Secretary of State, subject only to limited judicial review (as explained above). Under PII the judge is required to undertake a delicate balancing of competing public interests. Under CMP there are no competing interests to consider and no balance to be struck. The Secretary of State simply must identify a likely

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

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

harm to the public interest in disclosure of sensitive material. Thus, the balance is once and for all swung disproportionately in favour of secrecy to the detriment of open justice.

Is it necessary and appropriate to extend CMP to civil proceedings?

23. The extension of CMP to civil proceedings is unnecessary, unfair and unjustifiable:

- **The legal and practical justification offered for the proposed extension of CMP is flawed and inadequate;**

- **While we reject the need for any reform, the Government has failed entirely to seriously consider alternative measures to meet any concerns they may have; and**

- **The scope and breadth of these proposals would undermine the ability of Parliament to adequately scutinise their impact on the administration of civil justice.**

Are the proposals justified?

24. As recognised by Lord Dyson in *Al-Rawi*, there must be compelling reasons to depart from the ordinary principles of open justice, including the right to be heard and the right of confrontation. The Green Paper pays little attention to the principles of open justice which the Supreme Court held dear. It devotes only five paragraphs to the underlying legal framework and "evolution" of the principle of "fairness" in our justice system. It argues briefly that:

    - The principles of procedural fairness have "evolved" over centuries;
    - Although these principles include the right to know the opposing case, the scope of this right is variable "depending on the circumstances";
    - The principle of open justice is not absolute and allow exceptions, including the hearing of cases in camera;
    - It may be compatible with the right to a fair and public hearing, as guaranteed by Article 6 ECHR for hearings to be held in private or for information to be withheld from the parties, as long as "there are sufficient procedural safeguards".
    - Under Article 6 ECHR, although relevant evidence should "generally" be disclosed to the parties to civil proceedings, this right is not absolute and limitations may be justified in the interests of national security or to protect the public from harm.[28]

[28] *Green Paper*, paras 1.7 – 1.12.

25. In light of the analysis of the Supreme Court in *Al-Rawi,* this broad-brush approach does not stand up to close scrutiny. Together with Liberty, we addressed the Government's arguments that CMP are consistent with the common law right to open justice and Article 6 ECHR in our submissions to the Supreme Court.[29] In summary:

- Although the principle of open justice, as protected by the common law and Article 6 ECHR allows for exceptions, these are narrowly defined and strictly limited to circumstances where there is compelling evidence that the exception is necessary in the public interest in the specific circumstances of an individual case. A cursory examination of the decision of the Supreme Court in *Al-Rawi* illustrates that this fundamental principle cannot – and should not - be abrogated without weighty reasons.
- The Government's analysis of the Article 6 EHCR case-law is overly simplistic and misleading. The right to a fair hearing is absolute. Although a fair trial may be secured when disclosure is limited by reference to legitimate public interest aims, the circumstances when Article 6 ECHR will be satisfied must at a minimum allow the claimant to understand the case. The claimant has other rights under Article 6 ECHR, including the right to a public hearing and the right to a judgment. A fair hearing presupposes the right to adversarial proceedings and equality of arms. Any limitation to any of these elements of the right to a fair hearing may only be justified in so far as it does not impair the very essence of a fair hearing. The appointment of a special advocate cannot automatically render CMP fair.
- The analysis incorporated in the Green Paper neglects the analysis of the European Court of Justice in *Kadi* and the application of Charter of Fundamental Rights of the European Union. Emerging case-law on Article 47 of the Charter has been clear. As the Court found in *Kadi (No 2),* the provision of "unsubstantiated, vague and unparticularised allegations" as the foundation of a case cannot comply with basic fairness under EU law.[30] The exclusion of the consideration of this case law on the application of the Charter is disingenuous. These issues continue to be litigated in domestic courts and in Luxembourg with the implication that the application of the Charter will be key to the protection of the principle of open justice in any area where EU law is engaged.[31]

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[29] See paras 82 – 120 (*Al-Rawi)* and 14 – 77 (*Tariq).*

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

[31] See JUSTICE's intervention in *SS v Secretary of State for the Home Department,* T2/2010/2142 and also *ZZ v Secretary of State for the Home Department,* C-300/11, currently pending decision by the European Court of Justice. The approach of the Court was confirmed by Advocate General Sharpston in her opinion in *POMI,* C-27/09P, handed down on 14 July 2011, when she described the "gist" considered in *A v UK,* as a "irreducible minimum requirement" in cases involving a freezing order (see paras 244 – 245).

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

- Increasing civil litigation involving the security and intelligence agencies has placed a disproportionate demand on their time and resources and this has endangered national security;

- CMP are necessary to reduce the risk that sensitive material damaging to national security may be disclosed;

- Unlike PII, CMP will allow the court to consider all of the relevant material, regardless of security classification. A judgment on the full facts is more likely to secure justice than a judgment based only on a proportion of the relevant material;

- CMP will benefit both the defendant Government agencies and the claimant. The Government will be able to defend its case fully and the court may be able to consider information beneficial to the claimant's case which it otherwise would not see.

- The court retains the residual jurisdiction to stay or strike-out claims which are not in the public interest. CMP will reduce the likelihood that claims where PII is denied, the underlying claim will be struck out;

- CMP "have proved that they are capable of delivering procedural fairness".

27. None of these arguments stand up to scrutiny and there is no compelling case for reform:

- **"Increasing litigation against the security and intelligence services":** The Green Paper emphasises the burden and weight associated with a "significant" increase in civil litigation involving the security and intelligence agencies. The figures given by the Government cite 14 cases over the past decade, seven of which the Government consider have strained international relationships or created an identifiable risk that sources or techniques would be compromised. This is compared to the first 90 years of the agencies' operation when no case impacted on their operational effectiveness.[32] It is important to emphasise that this number of cases is indeed very small, when compared to litigation against, for example, police forces operating in the UK or other Government agencies. The increase in judicial scrutiny is part of the healthy growth of domestic administrative law, where increasingly the activities of all public authorities are subject to the scrutiny of the courts to ensure our public servants

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

act within the bounds of the law. That there have been so few cases is tantamount to recognition of the special and vital nature of the work of the security and intelligence services. Of the 14 cases cited in the Green Paper, a significant number, if not all, arise from the fall out of the post-September 11 activities of the UK and the US. This litigation has been focused on activities subject to widely publicised public criticism, incorporating allegations of complicity in torture, inhuman and degrading treatment and other human rights violations. **We are not persuaded that the increase in litigation involving the security and intelligence services provides any justification for reform.**

- **"Risk to national security posed by disclosure":** The Green Paper is clear that there is no evidence that national security has been endangered by any specific deficit in existing law and practice. It talks of the need to maximise the intelligence material available by reassuring our international partners that information shared will be subject to absolute confidentiality ('the control principle').[33] The primary case cited in support of change is the case of *Binyam Mohammed,* where the Court of Appeal ordered the publication of seven paragraphs of a judgment of the Divisional Court which the Government argued must be secret in order to protect the diplomatic relationship between the UK and the US.[34] This case was exceptional:

    (a) 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.

    (b) The final discussion on PII was extremely limited, and focused simply on a few paragraphs of the original judgment and the need for redaction. It was accepted that nothing in those paragraphs included secret information or information that was likely to endanger the lives of individuals or the immediate national security of either the UK or the US. The public interest in question was the risk that the flow of intelligence information from the US would be reviewed if the Court were to order disclosure (endangering the diplomatic understanding of the "control" principle where confidentiality attaches to intelligence information provided by third States, subject to their waiver).

    (c) 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

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

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

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.[35] Importantly, the Court of Appeal attached significant weight to the fact that the paragraphs in question related to UK involvement and knowledge about the torture and inhuman treatment which the US court had accepted had occurred. The public interest in open justice in such a significant case outweighed the extremely limited risk to the US-UK relationship in the highly unusual circumstances of this case.

- The *Binyam Mohammed* case was truly an extraordinary case, involving horrific evidence of State involvement in rendition, torture and inhumane treatment. The factual circumstances for the court's order on disclosure in the *Binyam Mohammed* case were exceptional, with the claimant arguing only for disclosure to security vetted counsel in the US litigation, no more. The court was clear that, but for prior disclosure in the US, the Government's claim for public interest immunity would have been successful. Each of the judges in this case emphasised the significant weight to be granted to the Secretary of State's judgment on the implications for national security of sensitive material. The Court of Appeal highlighted the nature of this case, and how very rare it would be for the court to overturn the Secretary of State's assessment of the balance between the public interest in disclosure and any particular risk to national security. While the weight to be given to the Secretary of State's view must be significant, the Court of Appeal explained that the final decision on the balance between national security issues and the public interest in the administration of justice must remain with the judiciary. While the Secretary of State may be better equipped to assess national security issues, the court is best placed to understand the impact of non-disclosure on the administration of justice, and so, while showing respect to the Secretary of State's national security assessment, best placed to consider the balance of the two important and competing public interests.[36]

- That this case might be used to justify a wholesale shift in control from the judiciary over disclosure of information to the discretion of the Secretary of State is extremely worrying.

There is no evidence that the operation of public interest immunity has led to disclosures which have endangered national security. The Government refers to the reaction of international partners to the approach of the Court in *Binyam*

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

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

Mohammed **to the control principle, but we are not persuaded that this risk can justify the proposals in the Green Paper.**

- **"CMP is in the interests of justice":** The Green Paper consistently emphasises that, in the interests of fairness, the promotion of CMP is needed in order to maximise the information before the Court and to increase the likelihood that justice will be done.[37] 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.[38]

The admission of unchallenged evidence under CMP undermines the right to open, adversarial justice. It is more likely to lead to an unjust result and undermines the credibility of the court and the administration of justice.

- **"CMP is fairer to both the claimant and the defendant":** The Government argues that the use of CMP will allow the court to consider evidence which may be beneficial to the claimant's case. We find it difficult to follow how this is likely to be tested in practice. The material considered in CMP will be produced by the Government. The ability of the Special Advocate to determine how this material (or additional material which might be requested if the claimant were fully informed) might benefit the claimant's case is limited by the inability to take instructions from the claimant after the content of the material is disclosed.

  On the other hand, the Green Paper refers to the cost associated with settling the claims made by the Guantanamo detainees when it became clear that it was unlikely that the court would operate CMP. The Green Paper asserts that the Government was compelled to settle these claims. On this, we note that settlement preceded the final decision of the Supreme Court. The application of PII was never tested by the Government in practice. The Green Paper explains the Government's view that the operation of PII to the volume of sensitive material relevant to these cases would be

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

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

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 real shift will be in moving the discussion entirely behind closed doors, preventing the claimant from making submissions on the interests of justice in his or her case and creating a *de facto* benefit to the Government argument in favour of secrecy.

- **"CMP will allow claims to proceed which might otherwise be struck out":** In *Al-Rawi*, the Supreme Court accepted that where sensitive material was not protected by PII, it would be open to the Court to stay or strike-out the claim because it would not be in the public interest for it to proceed. The Court referred to the case of *Carnduff v Rock*.[40] 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.[41] 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.[42]

  However, the *Carnduff* risk articulated in the Green Paper arises only after a full consideration by the Court of the balance of the public interest not only on the PII application, but on the application for stay or strike-out.[43] The Green Paper

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[39] *Green Paper,* para 1.54

[40] *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.

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

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

[43] 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

does not propose that CMP should be an option only after all other mechanisms for protection have been pursued and as an alternative to a decision to strike out a claim which could not be heard without harm to the public interest. Instead, it proposes to remove the traditional *Wiley* balancing exercise altogether, in favour of CMP triggered by administrative assessment. **In our view, the risk of a *Carnduff* strike-out arising is minimal. This cannot justify the introduction of a change of the magnitude proposed in the Green Paper.**[44]

- **"Existing CMP are fair, tried and tested":** In our view, this assertion is inaccurate and misleading. We dissected the operation of existing CMP procedures in *Secret Evidence* and do not repeat our findings here. By way of summary, we support the submission of the Special Advocates on the operation of existing CMP:

> CMP represent a departure from the foundational principle of natural justice...The way in which CMPs work in practice is familiar to only a very small group of practitioners...The use of Special Advocates may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.[45]

We return to the role of the Special Advocate and the minimum requirements for disclosure governed by *AF (No 3)*, below.

28. If there is evidence for any reform, which we do not accept, it cannot justify the breadth and scope of the proposals in the Green Paper. Currently CMP are limited to specific circumstances and accompanied by particular rules and safeguards approved by Parliament. In our view, the use of CMP is wrong in principle. However, in each of the cases where they have previously been considered, Parliament has had an opportunity to consider the specific context of individual proposals and the Government has been required to produce evidence of the propriety and appropriateness of CMP in connection with those cases. Under the proposals in the Green Paper, the Government proposes to ask Parliament to approve the use of CMP in <u>all</u> civil proceedings without evidence to show a compelling need for any reform.

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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.

[44] 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.

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

29. Although the Court in *Al-Rawi* concluded that CMP could only be introduced by Parliament, the significance of exceptions to the common law principles of open justice, the right to a hearing and the right to confrontation are such that they must be justified by weighty reasons and limited to the least restrictive measures necessary. While it is clearly open to Parliament to legislate as it sees fit, in our view, any legislative proposals which clearly engage Convention and common law rights must be narrowly drawn in order to allow for effective Parliamentary scrutiny. The need for "flexibility" to meet some as yet undefined potential risk seems far from a compelling justification for such a broad-based inroad into existing civil procedure. The proposals in the Green Paper are not only unjustified and unnecessary but, if put before Parliament in their current form, designed to frustrate the very democratic legitimacy that the Supreme Court considered a necessary precursor to such fundamental change.

Specific issues: Secret evidence in civil proceedings

30. The Government has asked for submissions on a number of specific questions: a) secret evidence and inquests; b) the role of Special Advocates; c) disclosure of information necessary to satisfy the right to a fair hearing (often referred to as "gisting") ; and d) alternatives to CMP.

a) Secret evidence and inquests

31. We welcome the Government's recognition that the use of secret evidence in the context of inquests poses particular difficulties. We have seen and support the submissions made in the Inquest and Inquest Lawyer's Group response to the Green Paper consultation.[46]

32. The Government has already made two unsuccessful attempts to persuade parliament to authorise administrative procedures for the use secret evidence in inquests.[47] **In our view, any inquest which was intended to meet our obligations under Article 2 ECHR to conduct an effective investigation into a death, if conducted under a CMP would risk violation of the right to life as guaranteed by the Convention.**

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[46] JUSTICE intervened jointly with Inquest and Liberty to support Lady Justice Hallett's conclusion that she had no jurisdiction to hold any part of the 7/7 inquests under CMP. See footnote 2, above.

[47] See for example, Joint Briefing by JUSTICE, Inquest and Liberty on Report Stage (House of Lords), Coroners and Justice Bill: http://www.justice.org.uk/data/files/resources/142/Coroners_and_Justice_Bill_HLreportstage_JUSTICE_INQUEST_LIBERTY_briefing_and_amendments_oct09.pdf. A fuller assessment of the requirement for openness and transparency in the coroners courts is provided in the second reading briefing prepared for the House of Lords; http://www.justice.org.uk/data/files/resources/142/Coroners_and_Justice_Bill_HCreportstage_JUSTICE_briefing_and_amendments_mar09.pdf

33. The Government's justification for extending CMP to inquests relates to a "very small" number of cases where sensitive information is relevant but where the coroner considers that he or she cannot proceed with an effective investigation without access to the material.[48] **We consider that there is little or no justification to support extension of CMP to inquests:**

- The "very small" number of cases which have caused difficulties can, in fact be reduced to one: the case of Azelle Rodney. The death of Azelle Rodney is currently being investigated by a public inquiry established under the Inquiries Act 2005.

- All of the other cases where issues have arisen – including in the context of the De Menezes inquest and the 7/7 inquest – have been successfully managed through the use of PII and other procedural measures designed to maintain confidence in the proceedings and protect the confidentiality of material as necessary. Inquest have produced a detailed Annex of case studies which illustrate the effectiveness of this approach. These are not easily dismissed '*ad-hoc*' procedures as described by the Green Paper, but effective and practical procedural measures taken by coroners to manage proceedings in the public interest while adequately protecting the information identified by the Secretary of State or other Government agencies. Such good practice for coroners handling sensitive information should be disseminated by the Chief Coroner on his or her appointment.

- The *Azelle Rodney* case does not concern material likely to endanger national security. The "sensitive" issue in this case revolves around the exclusion of intercept evidence from use in any proceedings, including inquests, in Section 17 Regulation of Investigatory Powers Act 2000. The introduction of CMP would not assist in this case, since the relevant information would be barred from consideration by the court. The Green Paper is clear that it is not within the scope of this consultation to consider the removal of the bar on intercept as evidence. Unfortunately, in relation to inquests, this is the only issue which could justify any kind of reform. The statutory bar on intercept as evidence is archaic, unnecessary and counterproductive. Lifting of the bar is long overdue.[49]

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[48] *Green Paper*, paras 2.10 – 2.23

[49] In our recent report, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* we highlight the absurd problems created by the exclusion of intercept material from evidence (a practice not replicated in other commonwealth or European countries). See paragraphs 129 -

b) The role of the Special Advocates

34. The principal procedural safeguard which the Government relies upon to render the use of CMP acceptable is the role of the Special Advocate. We have had the benefit of seeing the Special Advocates' critical joint response to the Green Paper, which we welcome and support.[50] We consider that policy on CMP which is developed without recognition of the direct experience of those Special Advocates who are operating at the heart of the existing mechanisms for CMP can only make bad law. **It remains our strongly held view, as expressed in *Secret Evidence* that appointment of a Special Advocate cannot compensate for the unfairness of being excluded from the consideration of your case. This holds true in ordinary civil proceedings.**

35. The role of the Special Advocate has been subject to criticism from its adoption, both in terms of their inherent inability to redress the unfairness of secret evidence and in connection with limitations placed on their role. The Special Advocates' own submission identifies eight significant practical problems which limit their effectiveness. These range from the bar on communication through limitations on their practical ability to call reliable evidence, to the lack of formal rules of evidence in CMP and the prejudicial impact of late disclosure by Government agencies. These problems are not new and have previously been identified by commentators and by Special Advocates themselves, not least in their compelling evidence to the Joint Committee on Human Rights and in decisions of individual counsel to resign their appointment for ethical reasons.[51] **The Green Paper proposes only peripheral changes to the existing system of Special Advocates, focusing on addressing the absolute bar on communication and the need for additional training. We share the Special Advocates view that this approach is unlikely to impact significantly on the effectiveness of their role or its ability to add adequate safeguards to the CMP procedure to offer protection for the individual right to a fair hearing and the principle of open and adversarial justice.**

c) *Disclosure of information necessary for a fair hearing*

36. The Green Paper explains that the Government intends to litigate to specify circumstances when Article 6 ECHR requires individuals to have enhanced disclosure within CMP in order to ensure their right to a fair hearing. It is the Government's case that the decision of the House of Lords in *AF (No3)* lacks clarity. The Green Paper refers to the judgment of the Court in

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

[51] See for example, JCHR, Seventeenth Report of Session 2009-2010, *Counter-terrorism policy and human rights: Bringing Human Rights Back In,* HL 86/HC 111, paras 54 – 62; Twentieth Report of Session 2010-2012, *Legislative Scrutiny: TPIMs (Second Report),* 1.18 – 1.23.

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.

37. The Grand Chamber of the ECHR held in the context of control order proceedings that sufficient information must be provided about the substantive case a party has to meet in order to challenge it in order to satisfy the right to a fair hearing. In *Kadi (No 2),* the European Court of Justice rightly held that fundamental rights to due process guaranteed by the Charter of Fundamental Rights also require such disclosure before a person is deprived of the use of his property. The Court makes clear that not only must the details of the substantive case be required, but also the detail of the evidence supporting them. In *AF (No 3),* Lord Hope described the fundamental principle "that everyone is entitled to the disclosure of sufficient material to enable him to answer the case that is made against him".

38. While the Supreme Court in *Tariq* concluded that the right to a fair trial in employment proceedings under CMP could be satisfied without "A-type" disclosure, we have serious misgivings about the outcome of the analysis in that case, which appears inconsistent with the approach of the ECJ in *Kadi* (albeit that Article 47 of the Charter may go further than Article 6 ECHR). The majority in the Court relied heavily on the analysis of the chamber decision in *Kennedy v UK,* a case which concluded that the procedural arrangements of the Investigatory Powers Tribunal were compatible with Article 6 ECHR despite a lack of transparency (it operates a completely closed procedure without even the appointment of a special advocate). In his dissent, Lord Kerr skilfully sets out the defects of the approach to Article 6 ECHR in *Kennedy,* which he dismisses as an anomaly.[52] This is clearly a rapidly evolving area of the law, where the Government seeks to uphold secrecy over open justice in so far as possible.

39. **That the Government adopts a narrow application of the analysis of the courts on the need for disclosure of a case in order to satisfy the fundamental right to a fair hearing is consistent with its view that the analysis of this court on these issues have been problematic for the Government's claims, specifically in connection with control orders. In our view, it underlines the Government's failure to acknowledge and respect the public interest in the proper administration of justice through respect for the rights to open and adversarial justice recognised both by the common law and by Article 6 ECHR.**

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[52] *Tariq,* paras 117 – 137, in particular, see 124 – 129. For further analysis of our interpretation of the decisions in *Tariq* and *Kennedy*, see *Freedom from Suspicion,* Chapter 9, paras 380 – 386.

40. **While it would be possible for Parliament to legislate to specify types of civil cases in which *AF (No3)* jurisdiction would apply, the Government must have cogent evidence to support its justification for a restrictive an approach to the scope of the right to a fair hearing. This evidence does not exist and the Government's argument in favour of clarity is disingenuous.** It is highly likely that the purpose of any legislative exercise will be to seek to narrowly confine the implications of the decision for disclosure in CMP. Any limitation adopted – against the background of the contentious case-law identified above, and the likely implications for any individual case – is likely to be subject to immediate and lengthy challenge before domestic and international courts. The court will continue to apply Article 6 ECHR standards and will be bound to interpret subsequent legislation compatibly by Section 6 HRA 1998. If the statutory definitions are defined too narrowly, individuals will be required to go to Strasbourg to secure the effective protection of their basic right to a fair hearing, traditionally a right considered a central pillar of the common law right to justice.

d) Alternatives to CMP

41. **Alternative, less draconian measures do not been appear to have been considered seriously by the Government,** who appear to have, in light of their defeat in *Al-Rawi,* approached these proposals as an exercise in overturning the decision of the Supreme Court and ensuring that CMP are available in all future civil cases where they might be sought by the security services.

42. **We do not consider that the alternatives listed in the Green Paper– such as a new specialist security court for the UK or a significant departure from the adversarial system in favour of inquisitorial style case management – are realistic suggestions being considered by the Government and do not comment on them here in any detail.**

43. **However, we would strongly object to the extension of the jurisdiction of the Investigatory Powers Tribunal.** In our recent report, *Freedom from Suspicion: Surveillance Reform for a Digital Age,* we conduct a detailed analysis of the operation of the IPT since its inception and conclude that it is ineffective and lacking in transparency and its procedures are incompatible with common law principles of fairness. Despite the finding of the European Court of Human Rights in *Kennedy v UK*, the compatibility of the procedures of the IPT with both Articles 6 and 8 ECHR remain very much in doubt.[53] We consider that *Kennedy* was wrongly decided and regret the influence that the reasoning in that case has had on the development of domestic case law in *Tariq*. **The IPT is not the answer to applications for excessive secrecy.** The body is itself an unhappy compromise: a body vested with the

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

investigative functions of an ombudsman and the judicial functions of a court, but tasked at the same time with keeping secret the activities of the body it investigates. We make concrete proposals for the wholesale reform for the IPT under its existing jurisdiction,

44. The Green Paper dismisses extensive and practical processes designed to protect national security and the public interest in the protection of sensitive material where necessary. We have had the benefit of seeing the response of the Bingham Centre on the Rule of Law to the Green Paper, which considers in some detail alternative measures, including confidentiality rings and *in camera* hearings to supplement the use of the existing PII process. We do not repeat this information here, but share the concern that these practical measures (which the Green Paper accepts operate in criminal cases) which are less inimical to the principal of open justice have been dismissed with such alacrity by the Government in the Green Paper's analysis. The effectiveness of these already available processes (both at home and abroad), must be taken into consideration when looking at the propriety of the Government's proposals. If the Government neglects to do so, it will mislead Parliament by presenting the threat it perceives as a far greater problem than justified by experience.

45. In *Secret Evidence,* we suggested that PII might be supplemented by the use of not Special Advocates, but a form of public interest advocate designed to assist the court in PII applications by arguing in favour of disclosure when an application is made *ex parte*. We still see benefit in the appointment of such counsel to benefit the court in making a fully considered assessment of the *Wiley* balance.[54] While we recognise that the Green Paper looks to increase the likelihood that information is protected from disclosure, as opposed to increasing the effective and appropriate operation of the consideration of the competing public interests, we consider that this proposal continues to have merit. This is an example of only one way in which the PII process might be improved. Unfortunately the Government proposes instead to marginalise it to the point of extinction and remove the nuanced balancing of competing public interests entirely.

[54] *Secret evidence,* paras 439 – 445.

b) *Norwich Pharmacal* Orders and national security

The proposal and its implications

46. In addition to the proposal to introduce CMP, the Government argues that additional measures are necessary to limit the use of *Norwich Pharmacal* jurisdiction by claimants seeking disclosure of sensitive information for the purposes of a third-party claim. The Green Paper refers to the high profile case of *Binyam Mohammed* where the claimant, a Guantanamo detainee, sought disclosure of material held by the UK Government to assist in his defence against charges which could lead to capital punishment. He sought material to support the case that evidence against him had been produced as a result of unlawful ill-treatment and torture.[55]

47. 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. Thus, in order for *Binyam Mohammed* to seek a *Norwich Pharmacal* Order, he had to satisfy the court that his underlying claim was arguable.
    - **Involvement of the defendant:** The defendant must be involved in the underlying claim, however innocently. Thus, in *Binyam Mohammed* the court had to be satisfied that there was a link between the UK and the underlying claim.
    - **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. In *Binyam Mohammed,* it had to be established that there was no way of obtaining the information from US or other sources.
    - **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.

48. The Government proposes to legislate to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications in any case where the Secretary of State certifies that the disclosure of the material in question would cause damage to the public interest. This decision would be subject to review only on judicial review grounds. Under the Government's proposals, any

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

judicial review challenge would be subject to CMP. We consider that a judicial review challenge of the Secretary of State's assessment of the need for non-disclosure would be extremely difficult under existing procedures, since the material would not be available to the party seeking judicial review. Under CMP, the potential for the Secretary of State's decision to be seriously questioned would, in our view, be miniscule.

49. As an alternative, the Government proposes that legislation should be introduced to "provide more detail" as to what will in the future be required to satisfy each of the five elements of the *Norwich Pharmacal* test. The Green Paper argues that better definition would lead to greater certainty and could limit resource intensive litigation on these applications.[56]

Is it necessary to limit the circumstances when *Norwich Pharmacal* disclosure can be sought?

50. The Government explains that there is one single justification for the proposal to limit this jurisdiction: assuring foreign intelligence partners (and principally, the United States) that information provided to the UK will never risk disclosure. It explains that even if CMP are introduced to all civil proceedings, including *Norwich Pharmacal* applications, the final decision on disclosure in these cases will still remain with the judge. The Government does not consider that this approach is acceptable, arguing:
    - it will be inadequate to give complete reassurance to our foreign partners that security and intelligence information shared will remain confidential;
    - "speculative" claimants will continue to bring their claims to UK courts; and
    - it will have a "disproportionate" impact on the Government, in light of the diplomatic capital necessary to manage the damage the impact this would have on international relationships.[57]

51. Once again, we must reiterate that the Government accepts that there is no risk of the United States or any of our other international partners withholding intelligence with any "threat to life implications". The justification for change is to assuage concerns expressed in "clear signals" from overseas that the flow of information may reduce if no steps are taken to narrow the law in this area.

52. In any event, we consider that the concerns expressed by our overseas partners are not well-founded or are based on a sensationalised and false impression of the operation of the *Norwich Pharmacal* jurisdiction in the UK:

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[56] *Green Paper,* para 2.83 – 2.97

[57] *Green Paper*, para 2.96

- Prior to the concern expressed in relation to the *Binyam Mohammed* case, we are unaware of any serious or significant objection having been raised to this last-resort jurisdiction;

- The argument presented in the Green Paper is misleading and suggests that disclosure under *Norwich Pharmacal* does not take into account important national security considerations. This neglects two important factors: (a) the significant hurdles which a claimant must cross before disclosure will be ordered and (b) the application of public interest immunity to material that would otherwise be disclosed under a *Norwich Pharmacal* order.

- Thus the Green Paper proposition that while national security exclusions are available in Freedom of Information Act applications, they are not available under *Norwich Pharmacal* is not accurate The comparison itself is inappropriate. The *Norwich Pharmacal* process is a matter of last resort designed to create a judicial discretion, in limited cases, to allow a court to order disclosure where it is in the public interest to protect an individual's right to a remedy and to support access to justice where a defendant has become involved in wrong doing. This discretion is bound by other public interest considerations, including national security. Disclosure is ruled out in cases where public interest immunity is successfully established. By way of contrast, individuals have a statutory right to access public information under the Freedom of Information Act, subject to certain, limited statutory exemptions, including national security. This right is unbounded unless information is shown to qualify for exemption.

- The case of *Binyam Mohammed* has been described by the Court of Appeal as exceptional and very rare, and itself illustrates existing safeguards in the *Norwich Pharmacal* process:

    (a) At the time of the first judgment, *Binyam Mohammed* was facing charges which included capital offences, with the associated risk that he might be subject to the death penalty. He was in custody at Guantanamo bay. The consequences he faced were grave and the public interest in ensuring that information relevant to his defence was in the public domain significant.

    (b) As to whether wrongdoing occurred in this case (and whether the claimant had an arguable case), in the first judgment, the FCO accepted that Mr Mohammed had an arguable case that he had been subject to cruel,

inhuman and degrading treatment.[58] By the time of the final judgment by the Court of Appeal, a US Court had accepted the truth of his allegations.[59]

(c) 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.[60]

(d) The treatment of PII is discussed above.

- The case of *Binyam Mohammed* illustrates plainly that these claims are entirely likely to involve cases where the UK is at least "mixed-up" in allegations of serious human rights obligations and unlawful behaviour. Proposing that the Secretary of State should have the final say on what is placed in the public domain, subject only to a broad-based test of harm is disproportionate and unjustified. In practice, it would be difficult to dispel the impression – however unjustified - that the use of this certification power was associated with cover-up, concealment and collusion designed to hide misconduct and illegality, particularly in cases involving atrocities of the most serious kind.

53. In our view, the Green Paper neglects the role of *Norwich Pharmacal* jurisdiction and its underlying purpose. It recognises only that these are "extremely difficult issues" given that the "cases" in which "issues" have arisen have been in circumstances where individuals have been facing severe consequences for their liberty.[61] This neglects that, in order to persuade a court to exercise *Norwich Pharmacal* jurisdiction, a claimant must show that they have an arguable claim against a third party. The case could, like that of *Binyam Mohammed,* be based upon an arguable claim that a State has been implicated in ill-treatment or torture which violates both domestic law and international human rights standards. It may involve a lesser degree of wrong-doing, for example, a claim of negligence against a public or private body. Regardless, the jurisdiction of the court is ultimately designed to protect the public interest in access to justice. It is a discretionary remedy and the court must be persuaded not only that there is an arguable claim, but that it would be appropriate to order disclosure in all the circumstances of the case. Under existing practice, as we explain above, this can involve serious judicial consideration of the public interest in national security and the vital work of the intelligence and security services and the balance to be struck between the competing public

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

[59] Ibid, paras 120 - 126

[60] Ibid, paras 68-71

[61] Ibid

interests at play in any set of circumstances. As the *Binyam Mohammed* case illustrated, this is not a task which the courts undertake lightly or without deference to the assessments made by the Secretary of State and the security and intelligence agencies.[62]

54. Under the Government's proposal to allow Ministerial certification to operate as an absolute bar, a serious and arguable claim of torture might be defeated without any judicial consideration of whether the public interest in the protection of the information held by the UK Government outweighed the public interest in the underlying claim and the right of the alleged victim to a remedy. **We consider that this would pose an unacceptable and unnecessary inroad into the system of civil justice carefully established by the domestic courts, without any evidence of serious justification.**

55. **Without any compelling evidence of a need for change, we are not persuaded by the case for any reform.** The Government proposes – as an alternative to Ministerial certification and exclusion of sensitive cases – to place *Norwich Pharmacal* cases on a statutory footing, including statutory definitions of the tests which must be satisfied for disclosure. Without any further information about the Government's intended approach, it is difficult to assess and comment on this proposal in any significant detail. We consider that currently *Norwich Pharmacal* jurisdiction operates well subject to judicial discretion and that the tests for disclosure are clearly defined in case-law, as illustrated in the *Binyam Mohammed* case. **While providing a statutory basis for this process would not be inherently objectionable, it is clear that the Government's objective in codifying the common law practice would be to narrow the circumstances in which the judiciary would be capable of ordering disclosure. We do not consider that this is necessary and urge caution**. It is important to remember that significant limitations could have wider unintended consequences for this measure of last resort which has evolved in order to protect individual's right to a remedy.

[62] 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.

c) Reform of the mechanisms for the independent oversight and scrutiny of security and intelligence agencies.

> The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the court) is undiminished by either the possible exercise by the Intelligence and Security Committee of its responsibilities to inquire into possible wrongdoing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice.
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> *Binyam Mohammed v Secretary of State for Foreign and Commonwealth Affairs, para 42 (Lord Chief Justice)*

56. The final part of the Green Paper makes proposals on the reform of non-judicial mechanisms for oversight of the security and intelligence services. While we welcome the Government's recognition that the current arrangements for oversight of the security and intelligence services are ripe for reform, we have two concerns. Firstly, inclusion in this package of proposals should not suggest that the improvement of non-judicial mechanisms for oversight can provide a trade-off for the limitation to the right to open justice represented in the introduction of CMP and the proposed exclusion of sensitive cases from *Norwich Pharmacal* jurisdiction. As recognised in *Binyam Mohammed,* above, these special processes, designed, in principle to improve the accountability of the security and intelligence services serve an entirely different purpose to the right of an individual to seek redress through the ordinary civil justice system. The two should not be conflated.

57. Secondly, we consider that the proposals in the Green Paper are disappointingly unambitious and unlikely to lead to any significant increase in the accountability of the security and intelligence services. We outline our summary concerns below, but regret that the Government does not propose to take a more radical approach. In light of the seriousness of the allegations of wrongdoing by UK agencies over the last decade, a radical approach is necessary to ensure that public confidence in the vital work of our security and intelligence professionals is effective, well respected, lawfully conducted and subject to independent and impartial democratic oversight.

a) The Intelligence and Security Committee

58. The ISC has been routinely criticised as a means of providing effective parliamentary oversight of the operations of the agencies, not least by the parliamentary Joint Committee on

Human Rights. The JCHR has consistently called for reform to strengthen the powers of the ISC and for changes to its composition, remit and staffing to secure its status as a fully credible parliamentary committee reporting to both Houses.[63] 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.[64] This criticism does not feature in the Green Paper.

59. The Green Paper builds on recommendations by the ISC itself and proposes to make minor changes to it remit to formally recognise work it already conducts in relation to the intelligence community and operational matters. This change is a mere formalisation of the status quo. The Government also proposes giving consideration to whether Parliament can be more closely involved in the appointment process. It is proposed that the Committee will report to both Parliament and the Government and the ISC should physically be housed on the Parliamentary estate and staffed by a Parliamentary secretariat.

60. The Government proposes to maintain the ISC as a statutory parliamentary committee as opposed to a fully fledged body of parliament, governed by standing orders controlled by both Houses. It explains this is necessary to maintain a Government veto over the publication of material by the ISC.

61. In our view, these proposals are seriously lacking. The Government will continue to exercise significant control over the ISC, its composition, its publications and ultimately the conduct of its day to day work. Although there are some welcome indications that the Government is open to some limited further consideration – in connection with appointments and the transparency and visibility of the work of the ISC - there are no clear proposals for the involvement of Parliament in a way which makes the ISC truly a parliamentary body with democratic accountability for the effective scrutiny of the agencies as organs of Government.

62. The Green Paper indicates that it is considering possible changes to ISC staffing accommodation and budget to strengthen both the "actual and symbolic" connection to Parliament. We regret this reference to symbolic attachment to Parliament, but unfortunately accept that this is what the Government's proposals would ultimately achieve. **Without greater scope, ambition and commitment to the appointment of an independent Parliamentary committee to scrutinise the security and intelligence services (with full funding for a specialist secretariat with legal and security professionals tasked to**

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[63] 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.

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

assist it) any tweaked version of the ISC will fall foul of the criticism of its existing incarnation. It will be underfunded, underpowered and entirely lacking in independence.

b) The Role of the Intelligence Services Commissioner and the Interception of Communications Commissioner

63. The Green Paper also proposes to extend the remit of the Intelligence Services Commissioner to include a responsibility to oversee the effectiveness of operational policies of the agencies, including a responsibility for monitoring compliance by the agencies with the necessary legal requirements in the exercise of their intrusive powers. It is proposed that the individual areas which the Commissioner would focus on would "need to be agreed, on an ongoing basis, with the appropriate Secretary of State". Thus, the Commissioner would be empowered to look into the legality of the actions of the agencies, but only in so far as the Secretary of State considers appropriate.

64. The Government asserts that "the effectiveness and value of the Commissioners in providing assurance and challenge to Ministers is not in doubt". 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 and the Interception of Communications Commissioner under their existing remits. We conclude that the work of the Commissioners 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 Commissioners is the limited time and resources available for his or her work under their existing remit.[65] 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.

65. Although we agree that the Commissioners' reports have been recently more accessible and provide more valuable information than historically, this would not be difficult. In the past, we have noted that successive annual reports have previously been produced on a "cut and paste" basis from the preceding year.[66]

66. **While we consider that the roles of the Intelligence Services Commissioner and the Interception of Communications Commissioner under the Regulation of Investigatory**

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[65] *Freedom from Suspicion,* see for example, paras 94 – 117; 231 – 239; 270 – 275.

[66] Ibid, para 109.

Powers Act 2000 are ripe for reform, this reform must be focused on ensuring accountability in the operation of surveillance, revisiting the propriety of their existing remit rather than expanding it. The proposals in the Green Paper for the expansion of their work should be rejected wholesale.

ANGELA PATRICK
Director of Human Rights Policy
JUSTICE
6 January 2012

Annex: Questions for Consultation JUSTICE Responses

Closed Material Procedures

Q1: How can we best ensure that closed material procedures support and enhance fairness for all parties?

67. We do not consider that there is any CMP mechanism which can "support and enhance fairness for all parties". In our view, the use of CMP will always create unfairness for the party excluded from proceedings. This unfairness cannot be addressed by the work of a Special Advocate.

68. As explained above, we consider that the extension of CMP to civil proceedings (as proposed in the Green Paper) is unfair, unnecessary and unjustified. (See paras 3 - 29, above)

Q2: What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other properly interested persons?

69. We consider that the existing measures adopted by coroners to protect sensitive information have protected the public interest in protecting specified sensitive material while ensuring effective access to the inquiry for bereaved families and other properly interested persons. This has been achieved by the use of PII and effective and practical measures adopted by coroners, such as confidentiality rings and undertakings. We support the submission of Inquest on the detailed operation of these mechanisms in coroners' courts.

70. We consider that the principle reform needed to improve the access of coroners' courts to material otherwise included is removal of the absolute ban on the admissibility of intercept evidence. This is the only area where there is evidence of a need for change, and the introduction of CMP could not alleviate this problem, since under CMP intercept evidence would remain inadmissible by virtue of Section 17 Regulation of Investigatory Powers Act 2000. (See paras 30 - 33)

Q3: Should any proposals for handing sensitive inquests be applied to inquests in Northern Ireland?

71. As above, we do not consider that CMP should be introduced. We consider that the argument against the introduction of secret evidence is all the more compelling in relation to cases in Northern Ireland if those "sensitive inquests" arise in connection with historical inquiries into deaths where there are allegations of State involvement or allegations of negligence in

connection with previous inquiries (the legacy inquests arising from the Troubles). There are a number of historical cases where the UK has been found in violation of its obligations under Article 2 ECHR to conduct a full, transparent and effective investigation. In these legacy cases, the use of a CMP procedure is highly likely, in our view, to lead to further litigation and violations of Article 2 ECHR.

Q4: What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

72. We refer to the submission of the Special Advocates. We do not consider that the proposals in the Green Paper are adequate to address the limitations on the communication between claimants and SAs. (See paras 34 - 35)

Q5: If feasible, the Government sees benefit in introducing legislation to clarify the contexts in which the AF (No 3) 'gisting' requirement does not apply. In what types of legal cases should there be the presumption that the disclosure requirements set out in AF (No 3) does not apply?

73. We are concerned that the Government has read the obligation in *AF (No 3)* too narrowly. The obligation is to ensure that the individual concerned has access to adequate information to understand the case, in order to protect the essence of the right to a fair trial.

74. We do not consider that there are any cases where these minimum disclosure requirements can be entirely ruled out, compatibly with domestic common law requirements and the requirements of Article 6 ECHR. (See paras 36 - 40)

Q6: At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court or active case management that we have not identified?

75. We consider that the alternatives considered by the Government in the context of this consultation have been limited. We consider that the exclusion of enhancements to PII or the development of alternative mechanisms such as those adopted by coroners have been ruled out without proper consideration. For example, in the US, the trial of *Binyam Mohammed* was effectively managed through the use of security cleared counsel. Domestically, criminal trials involving sensitive material are effectively managed without the exclusion of the defendant or his counsel. (See paras 41 - 45)

Q7: The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?

76. We do not consider that transferring civil cases involving sensitive materials to the IPT would be an appropriate or justifiable alternative to the introduction of CMP.

77. We make a number of recommendations for the wider reform of the IPT in *Freedom from Suspicion: Surveillance Reform for a Digital Age.* In our view, the IPT is badly in need of reform as it stands. It is ineffective, opaque and lacking in procedural safeguards. (See para 43)

Q8: In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

78. We consider that the existing mechanism of PII provides an appropriate means of balancing the competing public interests in protection national security (and respecting the State's duty to protect the public from serious harm) and the effective administration of open and adversarial justice and the rule of law.

79. In the past, we have accepted that the use of a form of Special Advocate – acting as a public interest advocate to enhance the operation of the PII mechanism could help secure the public interest in open justice in ex parte PII applications. We consider that replacing the existing system of PII with the introduction of CMP across the spectrum of civil proceedings is disproportionate, unnecessary and likely to significantly undermine the principle of open justice, as recognised by the common law. For the reasons set out above, we do not accept that the Government has produced compelling evidence to support its case for reform. (See paras 1 – 29, 41, 44)

Norwich Pharmacal

Q9: What role should the UK courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?

We consider that the courts should retain the power to determine the balance of the public interest in disclosure of sensitive material, following the traditional PII procedure. We do not consider that the Government has made the case for either the introduction of CMP or the limitation of *Norwich Pharmacal* jurisdiction.

The principal motivation for change in connection with *Norwich Pharmacal* cases appears to be based on the claim of *Binyam Mohammed*. The reading afforded to this case by the Green Paper is alarmist and neglects the exceptional nature of the facts before the court, both at first instance and on appeal. There is little evidence to support the argument that *Norwich Pharmacal* jurisdiction poses a serious risk of disclosure of dangerous and sensitive material or that without prior disclosure by the State from which the information originated, the courts would act to disclose information provided by our overseas partners without their consent. The Court of Appeal in *Binyam Mohammed* make clear that, but for the exceptional circumstances of that case, the PII process would have prevented disclosure of the contentious material subject to argument. That this information was not dangerous or sensitive (being limited to the redacted paragraphs of the original judgment), suggests that the court would exercise extreme caution in connection with any material associated with such risks, and as such disclosure in any case where a certificate of PII is produced by the Secretary of State will be extremely rare. (See paras 46 - 55)

Oversight of the Security and Intelligence Agencies

Q10: What combination of existing or reformed arrangements can best ensure credible effective and flexible oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?

80. We caution against viewing the CMP proposals, reform of Norwich Pharmacal and the reform of non-judicial oversight of the security and intelligence agencies as a package, where limitations in one area can be compensated by reform in another. Access to the civil justice system for victims of wrongdoing – according to the principles of open and adversarial justice – serve a distinct and easily distinguishable purpose to post-hoc oversight and scrutiny of the services for the purposes of enhancing their accountability and effectiveness. (See para 56)

Q11: With the aim of achieving the right balance in the intelligence system overall, what is the right emphasis between reform of parliamentary oversight and other independent oversight?

Q12: What changes to the ISC could best improve the effectiveness and credibility of the Committee in overseeing the Government's intelligence activities?

81. We regret the lack of ambition in the Green Paper and call on the Government establish a Parliamentary Committee which is fully recognisable as such with full powers of oversight of the agencies, with commensurate funding for legal and security expertise. Anything less will attract the criticism targeted at the ISC in its current incarnation: it is ineffective, lacking in transparency and devoid of actual and perceived independence. (See paras 58 – 62)

Q13: What changes to the Commissioners' existing remit can best enhance the valuable role they play in intelligence oversight and ensure that their role will continue to be effective for the future? How can their role be made more public facing?

82. We consider that the work of the Commissioners is ripe for reform in their current guise. We strongly object to the proposal to expand their remit and direct the Government to JUSTICE's recent report *Freedom from suspicion: Surveillance Reform for a Digital Age* (November 2011). (See paras 63 – 66)