Response to the public consultation on Justice and Security

May 2012

HM Government

Government Response to the public consultation on Justice and Security

Presented to Parliament by the
Secretary of State for Justice by
Command of Her Majesty
May 2012

Cm 8364 £16.00

Any enquiries regarding this publication should be sent to us at Justiceandsecurity@cabinet-office.x.gsi.gov.uk.

This publication is available for download at www.official-documents.gov.uk and from http://consultation.cabinetoffice.gov.uk/justiceandsecurity.

ISBN: 9780101836425

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P002493191 05/12

Printed n paper containing 75% recyvled fibre content minimum

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Foreword

It is a fundamental tenet of democratic society that even the most sensitive parts of the state – such as the security and intelligence agencies – need to be properly accountable for what they do. The Government believes that the UK's intelligence services are the finest in the world, and we are hugely grateful for the sacrifices they make in defending public safety. But it is also right that they are properly scrutinised in Parliament and beyond and - where serious allegations are made against the security and intelligence agencies - that they should be heard and resolved in a court of law.

So no-one can be satisfied with the current situation whereby, in a small number of nonetheless important cases, no judgment is passed on very grave allegations. The problem relates to civil claims against the British Government, with claimants typically seeking significant amounts in damages, but where the facts of the case turn on highly sensitive information. In such circumstances, the security and intelligence agencies have had no way of presenting their evidence in court without putting their methods at risk and their agents in danger. The consequence has been that the Government has had to cease to defend itself, leaving state action unscrutinised, citizens with no independent judgment on very serious allegations, and the taxpayer liable for settling cases which may have no merit.

Equally troubling has been the separate matter of the so-called 'Norwich Pharmacal' jurisdiction. Originally concerned only with matters of intellectual property law, Norwich Pharmacal allows someone fighting a court case on the other side of the world to apply to a court in London for intelligence information either belonging to the UK, or provided to us by our allies. No other country in the world has such a jurisdiction. Indeed there is not even a parallel jurisdiction in Scotland. No other country in the world allows this kind of legal tourism to happen – for the good reason that it undermines confidence among other countries that might otherwise share vital intelligence with us. In the UK we are already seeing the consequences, with measures in place from some of our allies to regulate or restrict intelligence exchanges.

It was to sort out these problems that last October I brought forward our Justice and Security Green Paper. It set out proposals to equip our courts system to handle sensitive intelligence material better through the introduction of Closed Material Procedures, to protect our intelligence sharing relationships through the reform of the Norwich Pharmacal jurisdiction, and to improve parliamentary scrutiny of the security and intelligence agencies and wider intelligence community. These are issues of profound significance that go to the heart of the nation's democratic values, and the Government welcomes proper examination of its proposals. I am therefore extremely grateful to all those who responded to the Green Paper.

Many respondents made the point that Closed Material Procedures are a departure from the tried and tested fundamentals of open justice. I entirely agree with them in principle - no Government proposes measures in this area lightly. But CMPs are already available in a number of areas of law, including immigration and employment, for the good reason that where the Courts have recognised that the best option of hearing evidence in open is simply not available, they do provide a fairer outcome than the alternative: no justice at all.

So I have been particularly grateful for a number of important suggestions which have helped us to properly target our proposals to allow the use of Closed Material Procedures in the small number of civil cases where evidence is currently not being presented at all because it is too sensitive to be heard in open court. As a result of these suggestions we have made the following changes to our proposals:

- The final decision that a Closed Material Procedure could be used will be a judicial one. This will ensure that the decision is made free of political influence, and can only be taken where evidence a Closed Material Procedure is needed on national security grounds is found to be persuasive by an independent judge. The Minister must also consider before making an application for a CMP whether to make a claim for PII instead.
- Application to a very narrow range of evidence. Closed Material Procedures will only be made available for national security material. This puts beyond doubt that material relating to crime or other government responsibilities will not be in scope.
- Application to a very narrow range of cases. Closed Material Procedures will not be available in inquests and will only be extended to civil cases in the Court of Appeal and High Court, and the equivalent courts in Scotland and Northern Ireland. Judicial reviews of decisions about citizenship and exclusion from the UK will be remitted to the Special Immigration Appeals Commission, as recommended by the Joint Committee on Human Rights.

The result is a Bill which I believe is focussed and proportionate. It will ensure that civil cases which are currently not heard, will be heard, whilst also ensuring that no evidence currently heard in open court will be heard in secret in future. As a result of the changes the Bill introduces, allegations made against the Government will be fully investigated and scrutinised by the courts, Government will no longer be forced to resort to settling cases which it believes have no merit for significant sums of taxpayers' money and justice will be done for claimants.

Rt Hon Kenneth Clarke QC MP

Executive summary

1. The Government published the Justice and Security Green Paper on 19 October 2011 and sought views on its proposals to:

- enable the courts to consider sensitive material in civil proceedings whilst providing adequate protection to that material
- make the oversight arrangements of the Security and Intelligence Agencies more effective and credible.

2. The public consultation closed on 6 January 2012. 90 submissions were received in response to it from a range of organisations and individuals across the United Kingdom. A full list of respondents is at Appendix A, but they can be broken down in general terms as follows:

- 4 University academics
- 7 Non-Governmental Organisations (NGOs)
- 2 national human rights organisations
- 14 legal organisations
- 3 Parliamentarians
- 2 Parliamentary Committees
- 1 representative of the devolved administrations
- 4 public oversight bodies
- 4 independent judicial bodies
- 11 police or law enforcement bodies
- 2 media organisations
- 33 members of the general public
- 3 private companies

In line with the Government's Code of Practice on Public Consultations, we aimed to publish all of these responses, subject only to requests for confidentiality. At present 84 submissions are available on the Government's Consultation website[1]. Of the remaining six submissions, the Justice and Security team have contacted all of the respective authors seeking permission to publish their responses. Only one respondent, a private company, has at this stage expressly refused permission for publication. The others have not responded.

3. This document summarises the range of views expressed and the views expressed at a public consultation event on the proposals held by Chatham House[2].

4. 53 responses from non-governmental organisations, legal practitioners, academic professionals and the general public expressed strong concerns about the proposals to expand the use of closed material procedures (CMPs) to all civil proceedings. Many of these respondents felt that the right of an individual to know the case against them was a fundamental element of a fair trial. While some respondents accepted that CMPs are capable of being compliant with Article 6 of the European Convention on Human Rights

[1] http://consultation.cabinetoffice.gov.uk/justiceandsecurity

[2] On 9 December 2011 as part of the consultation process the Government, in conjunction with the International Security Programme at Chatham House, held a high-level roundtable event, attended by senior academics, civil liberties groups, legal practitioners and parliamentarians. Participants discussed the contents of the Green Paper and the wider debate and topics which surround it. The rapporteur report can be found at http://consultation.cabinetoffice.gov.uk/justiceandsecurity.

(ECHR), they argued that CMPs do not meet the common law duty of fairness and ran counter to the principles of open and natural justice. A number of those opposed in principle accepted that CMPs could potentially be justified in a limited number of contexts and as a last resort.

5. Nine respondents were particularly worried about the proposed 'trigger' for CMPs. Their concerns crystallised around two issues: the respective roles of the Executive and the judiciary in the way in which CMPs would be initiated; and the test that would be applied before closed procedures could be initiated. These respondents thought that if CMPs were to be made available then it should be for the courts to decide whether or not they were necessary. There was also concern that if too broad a definition of 'the public interest' was taken, CMPs could be applied in an extremely wide range of cases, leading to an unacceptably broad use of closed procedures. There was a perception that, without appropriate safeguards, CMPs could be used to cover up things that were embarrassing to the Government rather than matters that would genuinely jeopardise the public interest.

6. In contrast, most law enforcement organisations and the former Home Secretary the Rt Hon David Blunkett MP, recognised the delicate balance of issues involved and expressed their support for the extension of CMPs in limited circumstances. However, the Intelligence and Security Committee (ISC) argued that the proposals were insufficient to guarantee adequate protection for certain categories of sensitive material and felt that the Government should, in addition, legislate for a statutory rebuttable presumption against disclosure of foreign intelligence.

7. While many of the 30 respondents who commented on the oversight proposals welcomed the Government's intention to reform the ISC, seven respondents felt the proposals lacked substance. They argued that oversight of the Security and Intelligence Agencies (Secret Intelligence Service, Security Service and Government Communications Head Quarters, collectively the "Agencies") must be clearly owned by Parliament and that the ISC should have access to any and all information necessary to conduct thorough investigations. Only six respondents expressed any support for the proposal to replace existing external oversight arrangements with an Inspector General.

8. Initial draft Impact Assessments and a draft Equality Impact Assessment were published alongside the proposals in the Green Paper. Revised impact assessments have been published alongside the Justice and Security Bill, taking account of comments expressed by respondents to the Green Paper.

9. Further details on the responses to the Green Paper proposals are set out in this document.

Chapter 1

Background – the Justice and Security Green Paper

1.1. The Justice and Security Green Paper, published on 19 October 2011, formed part of a package of measures on detainee-related issues, announced by the Prime Minister on 6 July 2010. This package also included:

- Publication of the guidance issued to intelligence officers and service personnel on engaging with detainees held overseas by third parties.
- Establishment of the Detainee Inquiry to investigate whether, or the extent to which, the UK was involved in (or was aware of) the improper treatment of detainees held by other countries.
- A commitment to mediation with those who had brought civil claims arising from detention at Guantanamo Bay and to offer compensation, where appropriate. Settlement was achieved in November 2010.

1.2. The Green Paper was the forward looking element of this package of measures, and aimed to respond to the challenge, which has grown more acute in recent years, of appropriate handling of sensitive material in our civil justice system. The Paper also considered options for strengthening non-judicial oversight of the Agencies.

1.3. In addition, the Green Paper sought to address the additional challenge of UK court-ordered disclosure of UK Government-held sensitive material for use by individuals in legal proceedings overseas. In these cases the material being sought had very often been shared by foreign parties with the UK Government on a confidential basis.

1.4 The public consultation closed on 6 January 2012.

Chapter 2

Sensitive material in civil proceedings

2.1. The Green Paper contained a series of proposals aimed at maximising the amount of relevant material that may be considered by the courts while at the same time ensuring that, where the material is sensitive, it is protected from potentially harmful disclosure.

The Challenge - justification for reform

2.2. Eight respondents acknowledged the challenges facing the Government in balancing the interests of justice and the public interest in safeguarding national security. 30 responses shared the Bingham Centre for the Rule of Law's analysis that the Green Paper overstated the scale of the problem. They argued the Government's omission of any evidence to support claims that court-ordered disclosure had damaged national security, suggested "*from the point of view of protecting sensitive material, our long-established rules and practices of public interest immunity*[3] *("PII") work well."*[4] The Special Advocates[5] response stated "*the prospect of cases being struck out because of the lack of a CMP is in our view exaggerated".*[6] The Bingham Centre and the Equality and Human Rights Commission (EHRC) both commented that the growth of judicial reviews – referred to in §1.15 of the Green Paper – was an expected consequence of the growth of Executive powers that successive governments had introduced since 2001. The Bingham Centre, the EHRC, Amnesty International, Liberty and Reprieve all suggested that the increase in civil litigation involving elements of national security demonstrated failings in the UK's foreign and counter terrorism policy since then, resulting in alleged government involvement in wrong doing, and that the right solution would be more effective oversight and accountability arrangements to prevent wrongdoing, rather than changes to the legal system. Liberty said:

> *"While the UK has no written consolidated constitution, a cardinal principle of our constitutional arrangements is that no-one – including the Government – is above the law. It is no exaggeration to say that the proposals contained in the Justice and Security Green Paper will change that for all time, sweeping away centuries of fair trial protections. If the central proposals in this paper are passed, the Government will (1) be handed a permanent advantage to control litigation to which it is a party and (2) effectively oust the jurisdiction of the courts to hear applications seeking to uncover wrongdoing by other States that may also uncover unlawful actions by the UK authorities."*[7]

[3] In a PII process a Minister must consider if there is a real risk that disclosure of the information at issue would cause harm to an important public interest. If, taking account of possible steps that could be taken in mitigation (*e.g.*'gisting'), the Minister is satisfied that disclosure would give rise to a real risk of damage, then (s)he is entitled to claim PII, by issuing a PII certificate. The decision to claim PII can be reviewed by the Court, but only on grounds of bad faith or irrationality. The Court accords considerable deference to the Minister's views on the harm that disclosure would cause. Once a PII claim has been made, the Court will apply the *Wiley* balance in order to decide whether or not PII should be granted. This refers to a judicial exercise, developed through case law in, and following, *R v Chief Constable of West Midlands, ex parte Wiley* [1995] 1 AC 274, where the Court balances the public interests for and against disclosure. In essence, the Court weighs up the public interest against disclosure which is the basis for the PII claim on the one hand against the public or private interests at issue in the proceedings in which the claim has been made, and the centrality of the information to those proceedings, on the other. Only if the *Wiley* balance falls against disclosure will the Court uphold the PII claim and allow the Minister to withhold the material.

2.3. Amnesty and the Bingham Centre argued that the '*understandable desire'* to have access to all available intelligence from foreign partners did not justify the proposed '*blanket secrecy'.* The Bingham Centre commented:

"We are concerned about whether this really justifies a change in the law, given that it would lead to evidence of serious wrongdoing in the hands of the British Government, in which they may well be mixed-up, being covered-up in order to maintain intelligence-sharing. The UN Security Council Resolutions requiring intelligence-sharing should not be understood as trumping the accountability of intelligence agencies."[8]

Professor Clive Walker of Leeds University said the Green Paper had failed to adduce any evidence to prove the flow of intelligence from foreign governments had been affected, but did accept that *"the Government might find it difficult to adduce evidence of harm without further breaching inter-state confidences".*[9]

2.4. The ISC response recognised the challenge faced by Government through the lack of an appropriate legal framework to deploy sensitive material in defence of claims being brought through the civil courts:

"We recognise that the Agencies are not always able to defend themselves, and the fact that cases have had to be settled – often at considerable cost to the UK purse – in order not to jeopardise the UK's national security, and that questions have been left unanswered, is deeply unsatisfactory. It is essential that our courts are able to handle intelligence material, and that that material is properly protected."[10]

The ISC suggested that the Government's response to the challenge may need to go further in some areas than that outlined in the Green Paper. They referred to the possibilities of a rebuttable presumption against disclosure of intelligence material and an '*executive veto'* along the lines of the United States' State Secrets Privilege:

"The Committee strongly believes that one of these two options should be adopted in addition to CMPs, in respect of foreign intelligence material. Only then do we consider that our allies can feel confident sharing their information with the UK in the future."[11]

2.5. The Investigatory Powers Tribunal (IPT) commented that "*there has been a significant increase in the number of civil claims where Government has to withdraw, often at significant cost {..} In these situations cases cannot be fairly contested on both sides".*[12] Lord Carlile of Berriew CBE QC, the former Independent Reviewer of Terrorism Legislation, argued that justice was not being served when the Government was unable to defend itself against civil claims, due to a lack of adequate court procedures to protect national security sensitive material central to the Government's defence.

[4] Para 8 of the Bingham Centre for the Rule of Law response dated 6 January 2012
[5] Government appointed counsel who represent the interests of the applicant in Closed Material Proceedings
[6] Para 2.8 of the Special Advocate response dated 16 December 2011
[7] Para 1 of the Liberty response dated January 2012
[8] Para 9 of the Bingham Centre for the Rule of Law response dated 6 January 2012

Proposal to expand CMPs to all civil judicial proceedings

2.6. 68 of the responses commented on the proposal to make CMPs available in all civil proceedings. 53 of them expressed reservations about it, with many believing that CMPs were a departure from the principles of natural and open justice. Both Amnesty International and the Special Advocates, for example, said that CMPs were fundamentally unfair given that the individual claimant and their open representatives were excluded from important parts of the proceedings, which they believed gave rise to judgments based on inadequately challenged evidence. The Constitutional and Administrative Law Bar Association (ALBA) response quoted Lord Denning's statement in *Kanda v Government of Malaya* [1962] AC 322:

> "*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."* (p337)

The Haldane Society of Socialist Lawyers commented that although the operation of CMPs was capable of satisfying Article 6 (the right to a fair trial) of the ECHR, in practice *"this does not mean that it can be considered 'fair' by any traditional common law standard".*[13]

ALBA said that the "*right to be heard, as part of the fundamental principles of procedural fairness, must be zealously guarded despite the competing claims of the state".*[14]

2.7 The 15 respondents in favour of the expansion of CMPs, including Lord Carlile, in the main agreed that justice was best served by empowering the courts to reach judgments based on all the evidence, including in cases where sensitive material was of central relevance. In his response, the Rt Hon David Blunkett MP expressed his support for the proposals commenting that: *"Admissibility and disclosure have been at the heart of the Dilemma since 2001".*[15] Several respondents shared the view that CMPs should be an option of last resort and in an absolute minority of cases.

2.8. The Bingham Centre were opposed in principle to CMPs, believing it "*very unlikely that a case that has progressed through the full PII process {..} cannot be tried on the ground that it would be fundamentally unfair to one party",*[16] but were willing to accept that it was conceivable this situation could arise in a very small number of cases. They considered that closed procedures could potentially be justified in the following scenarios:

- A claim which, after a PII exercise had been completed, would be so fundamentally unfair to the defendant for the case to be determined on the available evidence that the case would have to be struck out.

[9] Para 4 of Professor Clive Walker of University of Lincoln's response dated 29 December 2011
[10] Para 2 of The Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011
[11] Para 8 of The Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011
[12] Page 34 of the Investigatory Powers Tribunal report 2010
[13] Para 6 of the Haldane Society of Socialist Lawyers response dated October 2011
[14] Para 5 of the Constitutional and Administrative Law Bar Association response dated 1 January 2012
[15] Page 1 of the Rt. Hon. David Blunket MP response dated 4 November 2011
[16] Para 25 of the Bingham Centre for the Rule of Law response dated 6 January 2012

- A claim in which, after a PII exercise had been completed, material of fundamental importance to a claimant is withheld such that the claim cannot succeed.
- Where both parties consent to a closed element to proceedings and the court approved such a course as being in the interests of justice.

They went on to say that in using closed procedures in such circumstances it would be vital to adhere strictly to four constraining principles:

- Strictly defined circumstances: CMP could properly be available only where, without it, a case would be so unfair or incomplete that the court would have no option but to strike it out
- greatest possible disclosure including Wiley balance
- decision should be made by a judge
- a CMP must be kept under review as the proceedings progress.[17]

2.9. Several law enforcement respondents raised particular concerns about the potential impact of the proposals on litigation involving the police.
The Association of Police Lawyers said that:

"It is not just the Government which holds sensitive information and has to make decisions whether to pursue a defence which may compromise sensitive material or whether to pay damages and costs to conclude an action. Indeed, it is more likely that actions involving the police will form a far larger group of actions in which these issues will arise, albeit often with less serious political or diplomatic significance."[18]

They were also concerned that these proposals could give rise to "*far reaching consequences in terms of costs, resources and the security of confidential information*".[20] Several other law enforcement respondents suggested that the proposals could have unintended consequences in terms of the recruitment, management and protection of Covert Human Intelligence Sources. The Serious and Organised Crime Agency (SOCA), however, said that CMPs should cover cases related to organised crime in order to protect the sensitive capabilities, sources and international liaisons vital to combating the threat posed by organised crime.

2.10 The Police Action Lawyers Group (PALG) noted that some actions taken against law enforcement agencies – including actions for the torts of false imprisonment and malicious prosecution - attract the right to trial by jury. In their view:

"*Wherever possible, the statutory right to jury trial should be preserved. Where all the evidence is before the court then this is more easily achieved. If a CMP was adopted in any case that could otherwise be heard with a jury, that right would be lost as, in many cases, the closed material would need to be withheld from the jury as well*".[21]

PALG also noted that in some circumstances civil proceedings would be the way in which the State discharged its duty of investigation under Article 3 of the ECHR (the prohibition against torture). To satisfy the investigative duty into allegations of a breach of Article 3 in those cases, there needed to be an effective and official investigation. This had to include the appropriate involvement of the person making the allegation, and an appropriate degree of public scrutiny.

[17] Para 31 of the Bingham Centre for the Rule of Law response dated 6 January 2012
[18] Para 3 of the Association of Police Lawyers response dated January 2012
[19] Para 4 of the Association of Police Lawyers response dated January 2012
[20] Para 30 of the Police Action Lawyers Group

Scope of the proposals

2.11. 21 respondents commented unfavourably on the scope and breadth of the proposed reforms. JUSTICE and Liberty argued that the Green Paper's broad definition of what material should be considered to be injurious to the public interest if disclosed would enable the Government to deploy CMPs in a range of contexts other than where national security or diplomatic relations were concerned. Amnesty were particularly concerned about *"a de-facto claim to secrecy for the Security and Intelligence Services by allowing all material originated or handled by them to be automatically defined as "sensitive" and so presumably placed into a closed session".*[21] They commented that such blanket exemptions represented *"a very real impediment to securing genuine accountability for human rights violations".*[22] Liberty said:

> *"Even if there exist hypothetical cases that would not be able to be heard because too much relevant material is PII protected, the risk and potential fallout is not sufficiently great to justify the general introduction of CMP across the full spectrum of civil proceedings."*[23]

2.12. The Bingham Centre and Public Interest Lawyers (PIL) said that, should the proposals to expand the use of CMPs in the civil courts be taken forward, a narrow definition of sensitive material would be required to prevent the misuse of CMPs and the demise of the well understood and effective common law principle of PII. It was argued that since the proposed CMP trigger required the very same assessment of harm to the public interest made by the Secretary of State as was made in a PII application, Ministers and public bodies would naturally resort to the protections offered by a CMP whenever an argument could be made that disclosure would harm the public interest. Rather than relying on PII to exclude relevant material, this would result in the overuse of CMPs. SOCA felt that while the availability of CMPs would be invaluable to the protection of sensitive material in the context of organised crime, they would *"continue to see Public Interest Immunity (PII) as the ordinary mechanism for protecting sensitive material from disclosure. It is only in exceptional cases where a fair trial would be impossible if a party were unable to rely on the sensitive material to defend a claim against it that the resource intensive process of a CMP would come into its own".* [24]

The 'trigger' mechanism

2.13. Nine of the 12 respondents who commented on the proposed mechanism to initiate a CMP were opposed to the idea that it should be based upon the Secretary of State's judgment that open disclosure of sensitive material would cause damage to the public interest. JUSTICE, Liberty, and Reprieve, in addition to legal practitioners such as PIL and academics such as Professor Clive Walker of Leeds University argued that it should be for the judge to decide whether a CMP was necessary, rather than the executive. The Bingham Centre noted that under the Green Paper's proposal courts would be unable to order a CMP to aid claimants where there was evidence of wrong doing; this they argued was *"fundamentally unfair, one-sided and, in our view, unworkable*".[25]

[21] Page 6 of the Amnesty International UK response dated January 2012
[22] Page 6 of the Amnesty International UK response dated January 2012
[23] Para 16 of the Liberty response dated January 2012
[24] Para 2 of the SOCA response dated 6 January 2012
[25] Para 41.3 of the Bingham Centre for the Rule of Law response dated 6 January 2012

They also argued that *"the courts must continue to be able to weigh the potential harm in disclosing material against the importance of disclosing that material"*[26] rather than Government applying class-based exemptions for state held material.

2.14. The Senators of the College of Justice argued in favour of the proposal and said that: *"The trigger mechanism proposed appears, on the face of it, to strike the right balance whereby the relevant minister identifies the material which it has been decided ought to be considered in a CMP and the judge determines any challenge to that decision".*[27]

2.15. Separately, the Bingham Centre questioned the value of allowing the decision to initiate a CMP to be reviewable under judicial review principles, as they believed it would be "*impossible in practice to effectively challenge the decision".*[28] JUSTICE echoed this view:

"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."[29]

Alternatives to CMPs

2.16. Five respondents - the Special Advocates (SAs), the Haldane Society of Socialist Lawyers, the Bingham Centre, Amnesty and JUSTICE - argued that the Government should give serious consideration to alternatives to CMPs. They cited confidentiality rings and *in camera* hearings as two possible alternative mechanisms to hear cases involving sensitive material worth further consideration. Liberty, JUSTICE, the EHRC and Reprieve believed that the Government should continue to rely on PII to protect relevant information, although Amnesty International noted that "*the existing PII framework itself is not free from human rights concerns".*[30]

Inquests involving sensitive material

2.17. The Green Paper included possible ways to ensure that, where necessary, inquests into a death could take account of all relevant sensitive information, whilst supporting the involvement of a jury, family members and other properly interested persons. 15 of the 21 responses which addressed this issue were opposed to the proposal to allow CMPs in an inquest. The Newspaper Society described the proposals as *'wholly unecessary'* and added that the Green Paper had failed to adduce sufficient evidence to justify the proposed measures. INQUEST cited a number of examples of how a coroner could conduct an effective inquest involving sensitive material without the use of a CMP, including the inquests which followed the 7 July 2005 bombings and the accidental death of Terence Jupp (a MOD scientist) in 2002. Furthermore, these respondents failed to see how the exclusion of family members could be conducive to the principles of openness and transparency in such investigations, since they would leave the families, if excluded from elements of the inquest, without a sufficient understanding of the facts surrounding the loss of their family member.

[26] Para 35 of the Bingham Centre for the Rule of Law response dated 6 January 2012
[27] Page 1 of the Senators of the College of Justice response
[28] Para 41.3 of the Bingham Centre for the Rule of Law response dated 6 January 2012
[29] Para 16 of the JUSTICE response dated January 2012
[30] Footnote 35 in the Amnesty International response dated January 2012

2.18. The Association of Chief Police Officers (ACPO), along with other law enforcement respondents, supported the inquest proposals in principle, but noted the significant practical difficulties that the Government would need to overcome in order to introduce CMPs to the coronial system. ACPO said:

"The suggested alternatives, of Jurors undergoing security clearance or light touch vetting, have the potential to be massively bureaucratic and create significant time delays to the process of inquests. These concerns would also apply if considering security vetting of family members and furthermore, this could be viewed as being intrusive, especially at times of bereavement."[26]

2.19. The Association of Police Lawyers argued that *"Vetting individuals either in detail or on a light touch basis will be expensive and inevitably will not guarantee that a person will not disclose material acquired as a matter of principle".*[27] The Association of Police Lawyers and other law enforcement respondents in favour of the proposals noted that a coroner already had extensive control over the treatment of evidence, more so than a judge in civil or criminal litigation. The Metropolitan Police for example, highlighted a coroner's ability to exclude members of the public (though not properly interested persons) from parts of the inquest where sensitive matters were being considered. They felt, however, that the introduction of CMPs would ensure that sensitive material, including details of sensitive sources, would only be disclosed to the coroner and properly vetted individuals.

2.20. The Coroners' Society of England and Wales agreed there was a need to maximise the amount of information available in inquest proceedings and supported the proposals:

"Generally speaking, there have been, to date, very few occasions when a coroner's inquest has been required to consider material that is so sensitive that at least some of the issues that are identified in this Green Paper may apply. In the future there will be more cases and the incidence where there are security issues may well be more frequent than heretofore."[28]

In particular, they supported amending Coroners' Rules to make CMPs available, and the security clearance, or at least 'light touch vetting', of inquest juries if required.

2.21. Respondents from Northern Ireland, such as the Northern Ireland Justice Minister and British Irish Rights Watch (BIRW), agreed with the principle of empowering coroners to hear all relevant evidence, but highlighted the need for further consideration to be given to the particular challenges in Northern Ireland, including the treatment of legacy cases there. BIRW said that these proposals should be disapplied to legacy cases given, in their view, the absolute requirement for families affected to know all the facts and that *"the sensitivity of information need not apply to historical inquests where any such argument raised by the state as to national security interests over thirty years ago would be both specious and disingenuous".*[29] The Committee on the Administration of Justice were concerned that the introduction of CMPs into inquests in Northern Ireland might have retrogressive consequences on efforts to ensure

[26] Q2. of the Association of Chief Police Officers response dated 6 January 2012
[27] Para 17 of the Association of Police Lawyers response dated January 2012
[28] Para 3 of the Coroners Society of England and Wales response dated 29 December 2011
[29] Page 3 of the British Irish Rights Watch response dated 9 January 2012

human rights compliance in relation to Northern Ireland inquests. They noted that vetting of jurors could be perceived as a form of political vetting.

2.22. The Senators of the College of Justice in Scotland commented that: *"Since Fatal Accident Inquiries ("FAIs") take place before a sheriff who will become familiar with the adoption of CMPs in civil proceedings, we do not see any reason for exempting FAIs from the general proposal".*[30]

Special Advocates

2.23. A collective response, signed by 57 currently appointed Special Advocates (SAs), focussed primarily on the 'unfairness' of the CMP proposals. 31 other respondents, such as the Bingham Centre and the Haldane Society, agreed with the SAs that the exclusion of individuals and their open representatives from elements of a case ran counter to the principle of open justice and inhibit the thorough challenge of closed evidence. 15 of these respondents cited the prohibition on direct communication between SAs and open representatives after service of closed material as the most prominent example of this alleged unfairness. The SA's argued that *"because the SA appointed on his behalf is unable to take instructions in relation to that case, they may leave the SA with little realistic opportunity of responding effectively to that case".*[31]

2.24. With regards to the restrictions on communication between the SA and the individual whose interests they represented, Lord Carlile said that more communication could be achieved under existing but under-used procedures. However, the SAs argued that to disclose the substance of a communication request to the Secretary of State and their Counsel would be disadvantageous to the defence. At the same time, the SAs accepted that communication in relation to the substance of any closed material was likely to create '*difficulties'* and could often be impossible. The SAs considered that any objection to communication on purely procedural or administrative matters, where there was no question of any sensitive disclosure, was unsustainable. They argued that there should instead be an opportunity to communicate on these matters with permission of the courts without notice to the Secretary of State. The Association of Police Lawyers and the EHRC both suggested that the requirement for communication between the SA and individual could be reduced by undertaking a "*full exposition of the claim and the defence. That means providing full details of the issues, the evidence and the approach being taken by both parties to the litigation; and that detail should extend to case presentation, argument and analysis. In civil cases there cannot be any question of keeping litigation tactics up the sleeve; by the time a case gets to a hearing, full disclosure of witness statements, documents and skeleton arguments will usually have been made".*[32]

2.25. Responding to the Government's proposal in the Green Paper designed to deal with concerns over the prohibition of communication, the SA's stated that the concept of developing a Chinese wall within the current communication framework '*may be worth pursuing, although we suspect that the practical difficulties alluded to in the Green Paper [§2.33 and 2.34] are likely to make this unworkable".*[33]

[30] Page 2 of the Senators of the College of Justice response dated January 2012
[31] Para 13 of the Special Advocate response dated 16 December 2011
[32] Para 16.a of the Association of Police Lawyers response dated January 2012

2.26. As regards to the other improvements put forward in §2.24 of the Green Paper, the Bingham Centre said that *"no improvements can alter the basic unfairness of proceedings from which one of the parties is excluded".*[34] The SAs indicated that the proposal for more training was not unwelcome, but that *"it would be wrong to suggest that such training would enable us to challenge closed material more rigorously".*[35] They would, however, welcome further funding for training to be provided by experienced SAs to new SAs. The IPT felt the Green Paper rightly addressed the need to strength the SA system in terms of numbers and intelligence training. Cambridgeshire Constabulary also believed training was a significant challenge while the Police Federation agreed that specific training in the various areas of law should be provided. SAs stated that further resources would rarely be required.

2.27. The SAs also rejected the Government's assertion that CMPs were familiar to their practitioners. They noted that of the 69 currently appointed to the list of Special Advocate, only around half that number had substantial experience in the role, as a result of "*the practice of allowing appellants to nominate their preferred SAs".*[36] The Association of Police Lawyers drew attention to the fact that drawing SAs from a small pool to act in similar cases posed '*a potentially serious consequence'* given that an SA could have access to information from one case, including the identity of intelligence sources, that may be relevant to other proceedings. In such circumstances, the Association of Police Lawyers believed that "*it should be clearly and unequivocally established that once an advocate has been instructed to act as a special advocate, he should not ever accept instructions to act in any case where his specialist knowledge might be used to the detriment of the party holding the sensitive information".*[37]

2.28. The SAs response highlighted three other issues relating to the statutory regimes which currently provide for CMPs and four practical limitations:

<u>Issues with statutory regimes</u>

- The inability effectively to challenge non-disclosure.
- The lack of any practical ability to call evidence.
- The lack of any formal rules of evidence, so allowing second or third hand hearsay to be admitted, or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings.

<u>Practical limitations</u>

- A systemic problem with prejudicially late disclosure by the Government
- Where *AF (No.3)* applies, the Government's approach of refusing to make such disclosure as is recognised would require to be given until being put to its election, and the practice of, iterative disclosure.
- The increasing practice of serving redacted closed documents on the Special Advocates, and resisting requests by the SAs for production of documents to them (i.e. as closed documents) on the basis of the Government's unilateral view of relevance.
- The lack of a searchable database of closed judgments.

[33] Para 30.iii of the Special Advocate Response dated 16 December 2011
[34] Para 48 of the Bingham Centre for the Rule of Law response dated 6 January 2012
[35] Para 11 of the Special Advocate Response dated 16 December 2011
[36] Para 11 of the Special Advocate Response dated 16 December 2011

2.29. The SAs, Professor Clive Walker of Leeds University and Reprieve all raised the question as to why closer attention was not given in the Green Paper to the system of security cleared lawyers adopted by the US in the *habeas corpus*[38] process there. They argued that the US Government afforded the applicant's own lawyers a greater level of trust once security cleared, enabling them to see all the material being considered by the court. However, Professor Walker noted that US State Secrets Privilege had been increasingly used in the US courts to terminate civil damages claims brought against the US Government.

The 'AF No.3' principle

2.30. The Green Paper consulted on whether it might be possible in legislation to clarify the range of contexts in which it was necessary or not to provide an individual with sufficient information about the allegations against them, however sensitive, to allow them to give effective instruction to their Special Advocate. Aside from the issues of fairness discussed in §1.6 of the Green Paper, 10 respondents shared the Bingham Centre's view that the situations in which the *AF (No.3)* disclosure requirement applied needed to be debated on a case-by-case basis in the courts.

The Bingham Centre added that:

> *"Establishing a statutory presumption as to the circumstances in which the AF (No 3) disclosure requirement applies would not avoid the need for the precise parameters of the principle being worked out in the courts. This issue cannot be resolved by domestic legislation alone but requires careful and detailed reference to ECHR and EU law. The content of UK legislation could not have any appreciable influence on the CJEU or ECtHR."*[39]

2.31. The EHRC and Lord Carlile both argued that in the interests of enhancing procedural fairness, the *AF (No.3)* principle should apply in all proceedings. They also argued that in view of the general duty to disclose all relevant material in civil litigation, the Government should be able to ascertain early on what constituted the irreducible minimum level of information required for an individual's case to be adequately argued in a CMP.

2.32. In contrast, the ISC argued for greater protection of sensitive material in situations where the *AF (No.3)* disclosure requirement might apply, commenting that *"Judgments in cases such as AF (No.3) have extended the scope of information that has to be disclosed in the gist provided to individuals who are subject to Control Orders and, in future, TPIMs. This principle has also been applied in some cases where convicted terrorists have challenged the decision to revoke their licence and return them to prison as a result of intelligence suggesting they have re-engaged in terrorism".*[40]

[37] Para C.ii of the Association of Police Lawyers response dated January 2012
[38] Habeas Corpus – A writ or legal action which requires the release of an individual who has been found to have been held unlawfully.
[39] Para 58 of the Bingham Centre for the Rule of Law response dated 6 January 2012

Specialist Courts and active case management

2.33. The Green Paper asked whether there were any benefits in having i) a specialist court, ii) greater active case management powers for judges or iii) making changes to the IPT. 15 of the 21respondents who commented saw no benefit to the introduction of any additional specialist courts or greater active case management. However, a small number shared the view of the Association of Police Lawyers which said that *"appointing designated judges to hear and determine sensitive cases would be proportionate and effective use of the court's resources and would lead to costs savings for all".*[41]

2.34. The IPT proposed expanding its own role, primarily to provide an investigatory function for the civil courts. The IPT said that given their experience and procedures they could effectively investigate the facts surrounding a civil claim and report their findings to the court without disclosing any sensitive material. The Bingham Centre, SAs and Reprieve did not share this view, however, as they saw the secrecy surrounding the Tribunal's work as not providing an encouraging precedent for improving transparency. They believed instead that where possible government actions should be subject to review by the ordinary courts. The Bingham Centre also argued that if any change was applied to the IPT's remit, it should be limited only to hearing complaints relating to the Regulation of Investigatory Powers Act 2000.

Norwich Pharmacal

2.35. The Green Paper considered the challenge of court ordered disclosure of sensitive material, including into foreign legal proceedings, and set out several proposals for reform of the Norwich Pharmacal jurisdiction. Of the 40 responses which addressed this topic, 33 rejected the proposals to introduce a combination of absolute and certificated exemptions for sensitive material held by or originating from different government departments; or to strengthen the five elements of the Norwich Pharmacal test. Reprieve viewed these proposals as an attempt to prevent future cases similar to *Binyam Mohamed*[42] from causing the Government embarrassment. The SAs said that, by definition, cases such as *Binyam Mohamed* arose because government was in some way 'mixed up' in the alleged wrong doing. Amnesty said:

> *"It is a requirement of a Norwich Pharmacal action that the defendant, who holds the information sought, must have been mixed up in the wrong-doing concerned. It is, therefore, only because the Court found that the UK was sufficiently involved in Binyam Mohamed's mistreatment that his case could be brought."*[43]

2.36. The Bingham Centre, JUSTICE, Reprieve and Liberty all argued that these proposals were disproportionate given that the Norwich Pharmacal principle was a necessary legal remedy for those affected by arguable wrongdoing and who potentially faced the gravest of consequences. In addition, they argued the Government was only involved in a relatively small number of claims, none of which had ever resulted in a

[40] Page 3 of the Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011
[41] Para 29 of the Association of Police Lawyers response dated January 2012
[42] *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65
[43] Page 15 of Amnesty international UK's response dated January 2012

court-ordered disclosure, and that the courts had always sought ways of limiting the scope of any potential disclosure. Reprieve remarked that "*nor did the Norwich Pharmacal proceedings in Binyam Mohamed risk any harm to national security. Mr Mohamed sought disclosure only to his security cleared US lawyers. That was what the Court ordered, and what occurred. None of the documents he sought have ever been made public, or even seen by Mr Mohamed".*[43]

2.37. On the issue of the proposed exemption of sensitive material by way of judicially reviewable Ministerial certificates, the SAs said "*judicial review alone is an inadequate remedy when the specific circumstances of the cases they have dealt with are considered. To succeed in a judicial review a claimant would need to show that a Minister had irrationally concluded that national security would be harmed".*[44] The SAs also argued that:

"The proposed change would see the Minister in charge of the relevant department make the decision based on advice from those who work for him. The fact that the courts have been willing to overrule such decisions in the past given the specific circumstances of a very small number of cases should provide ample evidence as to why such a proposed change is misguided and dangerous."[45]

2.38. Lord Carlile and the ISC[46] both commented that the disclosure of another state's sensitive material was injurious to the UK's national security and the ISC cited firsthand experience of hearing the concerns raised by the US intelligence community over the disclosure of US material in the *Binyam Mohamed* case. In its response, the ISC quoted the statement released by the US Office of the Director of National Intelligence following the outcome of *the Binyam Mohamed* case:

"The protection of confidential information is essential to strong, effective security and intelligence co-operation among allies. The decision by a United Kingdom court to release classified information provided by the United States is not helpful, and we deeply regret it."[47]

The ISC response went on to state:

"This is a message that cannot be ignored. This Committee has heard such concerns first-hand. We have been struck by the force with which certain interlocutors within the US intelligence community have told us their concerns about the actions of the UK courts. We must ensure that we are able to protect foreign intelligence material from disclosure if we are to be able to protect UK citizens."[48]

2.39. The ISC observed that the established intelligence sharing relationship with the US was "*critical to providing the depth and breadth of intelligence coverage required to counter the threat to the UK posed by global terrorism. These relationships have saved lives and must continue".*[49]

[44] Q9. of Reprieve's response dated 20 December 2011
[45] Para 8 of the Special Advocates response - Court-ordered disclosure where the Government is not a primary party dated 5 January 2012
[46] Para10 of the Special Advocates response - Court-ordered disclosure where the Government is not a primary party dated 5 January 2012
[47] Intelligence and Security Committee annual report [2010]
[48] Page 2 of the Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011
[49] Page 2 of the Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011

Their response also stated:

"It is a fundamental principle of intelligence sharing that such exchanges are kept confidential. Publication of other countries' intelligence material, whether sensitive or otherwise, undermines the key principle of confidentiality on which relations with foreign intelligence services are based and has the potential to cause serious harm to future intelligence cooperation and thereby undermine the national security of the UK. The release in a UK court of a summary of US intelligence material in the Binyam Mohamed case was therefore of serious concern."[50]

2.40. Each of the six respondents, including Amnesty and JUSTICE, who commented specifically on the proposal to strengthen the five elements of the Norwich Pharmacal test expressed some concern about it. The SA's argued that:

"The five stage test for Norwich Pharmacal proceedings is well known and has been considered on a number of occasions recently, any case will involve dispute over the facts and their application. Such a position cannot be avoided and will not be assisted by an attempt to set the tests out in greater detail either through the courts or legislation. Experience suggests, moreover, that the more detailed the tests the more complicated the litigation."[51]

[50] Page 2 of the Rt. Hon. Sir Malcolm Rifkind MP response dated 7 December 2011

[51] Para 17 of the Special Advocates response - Court-ordered disclosure where the Government is not a primary party dated 5 January 2012

Chapter 3

Non-judicial oversight

3.1. The Green Paper sought views on proposals to improve the effectiveness of the existing system for oversight of the intelligence community. 30 of the responses addressed the issue of non-judicial oversight.

Independent Parliamentary oversight

3.2. Seven responses believed that the Green Paper oversight proposals for reform of the ISC did not go far enough and, in particular, did not address the fundamental reasons why reform was necessary. Their general tenor was that the proposals in the Green Paper would make little difference in practice. The Bingham Centre said that the ISC had failed to offer meaningful, robust or effective scrutiny, and pointed to perceived failures over Iraqi weapons of mass destruction, rendition, handling of detainees and 7 July 2005. Amnesty said that investigations conducted by the ISC showed a lack of capacity to detect, let alone remedy, failures by the Agencies to act consistently with the UK's international human rights obligations. JUSTICE said that the proposals were merely a formalisation of the status quo, and that without greater scope, ambition and commitment to the appointment of an independent Parliamentary Committee, any new version of the ISC would fall foul of the criticism of its existing incarnation. JUSTICE's view was that a reformed ISC would be underfunded, underpowered and entirely lacking in independence.

3.3. Other respondents said, to the contrary, that the proposed reforms to the ISC would make a significant difference. Hugh Bochel, Andrew Defty and Jane Kirkpatrick from the University of Lincoln said that the Green Paper included valuable and important proposals for the reform of the ISC, which would considerably enhance the effectiveness and the credibility of parliamentary oversight of intelligence. In particular, they welcomed the proposals to acknowledge the wider role that the ISC was already playing by extending its remit to include operational aspects of the work of the Agencies, and to encompass the wider intelligence community. They also endorsed proposals to enhance the powers of the Committee.

3.4. Twelve respondents made specific proposals as to how the ISC's status might be changed. Liberty, Guardian News and Media and the Bingham Centre, for instance, proposed that the ISC's status should be aligned to that of a departmental select committee. They said that Parliament should appoint its members, the ISC should decide on its Chair and the Government's veto on the publication of sensitive material should be removed. Other respondents supported the Green Paper proposals on status. Peter Gill, of Liverpool University argued for amending the status of the ISC more or less in line with what the ISC had itself recommended as endorsed in the Green Paper. Lord Carlile supported the revision of the ISC so that it became a statutory Committee of Parliament.

3.5. Ten respondents said that the ISC should have access to all the information it needed to undertake its work. Guardian News and Media said that any power to veto the supply of information should rest with the Secretary of State and be subject to overriding public interest requirements in favour of disclosure. Exercise of the veto should be subject to legal challenge. Amnesty commented that the ISC should be able to compel the attendance of witnesses, including any member of the Agencies, and ask them to give evidence under oath.

3.6. Seven respondents raised the issue of resourcing. Liberty, for instance, said that the ISC must be appropriately funded and staffed with independent experts able to undertake detailed forensic investigations. Reprieve said that the ISC should be better financed and better staffed, including with forensic investigators and accountants. Support staff to the ISC should be independent and not government employees.

3.7. The ISC in their response said that if there was to be greater protection for matters of national security in terms of judicial scrutiny, then it must be balanced by more oversight of such matters in non-judicial fora. They noted that the Agencies were not subject to the range of scrutiny given to other public bodies. They further said that it was essential that both the Intelligence Commissioners and the ISC had the powers and resources necessary to carry out this work effectively. Although broadly welcoming of the Government's proposals, the ISC remained concerned about the extent to which they would be allowed to take forward operational oversight and the levels of resourcing that would be available to them.

3.8. The Chair of the Public Accounts Committee (PAC) said that the arrangements for reporting the results of the National Audit Office's work to the ISC should be placed on a formal footing and that the PAC Chair should sit as an ex-officio member for any ISC hearings dealing with finance or Value For Money.

3.9. In terms of the ISC's relationship with Parliament more widely, Hugh Bochel, Andrew Defty and Jane Kirkpatrick from Lincoln University said that the ISC could and should do more to engage with Parliament in order to enhance wider knowledge and understanding of the Agencies, and of the nature and limitations of intelligence. The Chair of the Foreign Affairs Select Committee supported the proposals to reform the ISC, but sought clarity as to whether the ISC's remit would interfere with any other parliamentary body.

The Commissioners

3.10. The Interception of Communications Commissioner said that his auditing role was clearly set out in statute. In his view it had clear boundaries, and seemed to work well in practice. He saw no compelling reason to change the nature of the role or its boundaries.

3.11. The Intelligence Services Commissioner stated that any system of oversight needed to cover issues of legality and resourcing. The system should not be overly burdensome on the Agencies and should inspire public confidence. He said that the role of the Commissioners was to consider legality and he would not be comfortable going beyond that. He observed that issues of resourcing and policy in the

Agencies were ultimately for the ISC to oversee. He said that it was for the government of the day through its Ministers to decide on operational policy pursued by the Agencies, in relation to which they would be answerable to Parliament and ultimately the electorate. Overall, he proposed that the present system of oversight should be retained but expanded to strike the right balance between government, parliamentary and judicial oversight. He saw public confidence as being the key issue.

3.12. The ISC said that the work of the Commissioners in providing a compliance and audit function was vital in giving assurance to Ministers. The Green Paper said that there was a need for the Commissioners' work to have a greater public profile. The ISC supported this view on the basis that greater awareness of the work of the Commissioners could only increase public confidence in their roles. The ISC also supported the proposal for the Commissioners existing additional duties to be put on a statutory footing. However they wanted to avoid any blurring of boundaries, between their role and that of the Commissioners, implied by the proposal to expand the Intelligence Services Commissioner's remit to include oversight of operational policies.

3.13. The Interception of Communications Commissioner observed that it would be difficult to make his role any more public facing due to the nature of the material he examined. In his view as much public information as possible was already being provided but, for good and compelling reasons, the whole picture could not be disclosed.

Inspector-General

3.14. Five of the 11 respondents who commented on the Inspector-General proposal were sceptical that it would add anything to current arrangements. Liberty said that it was difficult to see what a new Inspector-General role would add, aside from possibly consolidating the roles of the two existing Commissioners. The ISC said that the proposed benefits of subsuming the work of the two Commissioners into one Inspector-General role would be largely presentational only.

3.15. The Intelligence Services Commissioner noted that the Inspector-General model was a system which worked to varying levels of success in other parts of the world. He said that Inspectors General may be politically appointed figures charged with issuing warrants and checking their legality. His reservation was that Inspectors General could be seen by intelligence and security Agencies as adversarial, which could be detrimental to working relationships. The Interception of Communications Commissioner acknowledged that the Inspector-General model appeared to work well in other jurisdictions but noted that it did have drawbacks and it was easy for incumbents to find themselves accused of either being too close to government or too keen to find fault with the agencies.

3.16. Other respondents supported the Inspector-General proposal. The Guardian Media Group said that such an independent figure would have a more effective and more credible role than the existing Commissioners. Peter Gill of Liverpool University said that the introduction of an Inspector-General, with

a supporting secretariat of legal advisers and investigators, was most likely to achieve the Government's objective of an oversight framework that was a cohesive whole, and should be in conjunction with a strengthened ISC. In his view effective oversight required full-time specialist staff and the mandate of an Inspector-General should be based on legality, propriety and rights.

Other Proposals

3.17. Lord Carlile advocated the appointment of a National Security Commissioner. Such a person, in his view, should not be a career civil servant, and could be a senior judge seconded for a period for the purpose, or some other independent person of very high standing. This would be a separate and different role from that of the Independent Reviewer of Terrorism Legislation. Lord Carlile thought it would be essential for a new Commissioner to work full-time, at a level comparable in salary and conditions with a senior judge. (S)he would require a small office and staff, at least one of whom should have direct experience of working in theatre for one of the security and intelligence Agencies. If not an experienced lawyer, Lord Carlile said such a Commissioner would require employed legal counsel.

Balance in the Oversight System

3.18. Respondents tended to concentrate on the risk of overlap between oversight bodies. Peter Gill of Liverpool University said that the best way to avoid overlap or excessive oversight would be less through formal legal definition of the respective tasks of the ISC and say an Inspector-General (should one be created) and more by requiring them to cooperate on their respective agendas. The ISC believed that it had the general responsibility for oversight of Agency policies and should retain that remit. They did not want it to be a shared responsibility with the Commissioners as this would risk confusion and duplication. Hugh Bochel, Andrew Defty and Jane Kirkpatrick from Lincoln University noted that while the Government was rightly concerned to avoid duplication of effort and the burden this might place on the Agencies, overlap of accountability mechanisms was preferable to accountability gaps, and was arguably best avoided by closer cooperation between the various oversight bodies.

3.19. The Rt Hon David Blunkett MP said that he would prefer the strengthening of the ISC and its resources and reporting, rather than the creation of an Inspector-General post.

Chapter 4

Next Steps

4.1. The Government has given careful consideration to the responses to the proposals set out in the Green Paper and has endeavoured to develop a focussed package of reforms that balances the interests of justice and the public interest in safeguarding national security.

4.2. Alongside this Government response, the Government has laid before Parliament its response to the Joint Committee on Human Rights' report on the Green Paper, following the introduction of the Justice and Security Bill into the House of Lords.

4.3. The Bill will introduce closed material procedures for civil (not criminal) cases, so that judges can hear highly sensitive intelligence evidence; reform the 'Norwich Pharmacal' jurisdiction; and strengthen the current independent and parliamentary oversight regime for the Agencies and the wider intelligence community.

4.4. The provisions contained within the Justice and Security Bill will ensure that:

- Courts will be able to determine civil cases involving intelligence material after considering all the evidence. A judge would decide whether parts of a civil case involving material that would damage national security should be heard in a closed hearing. As much evidence as possible will continue to be heard in public. Evidence which would currently be withheld from the court entirely under PII – or that is not currently admissible, such as intercept material - would be put before the court and heard in closed session.

- Allegations made against the Government will be fully investigated and scrutinised by the courts. Under current rules, the only way of protecting intelligence material is to remove it from the courtroom entirely under the PII procedure. In a small number of cases, where sensitive intelligence material is centrally relevant, this can mean that a case can not be heard at all; or that the court has to find in favour of the Government because, if it cannot look at the underlying material, it has to accept that the Government had valid reasons to take the decision challenged (see *AHK and others v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin)). In either scenario, no independent judgment is brought to bear on what may be very serious allegations.

- The Government will no longer be forced to resort to settling cases which it would prefer to fight on their merits.

- Our intelligence sharing relationships are protected through reform of the Norwich Pharmacal jurisdiction.

- External oversight of the Agencies is improved.

Appendix A - List of Green Paper respondents

1. Iain Thomas Wolkowski
2. Andy Smith
3. John Hemming MP
4. James Greenwood
5. Investigatory Powers Tribunal
6. Intelligence and Security Committee
7. Intelligence Services Commissioner
8. Reprieve
9. Special Advocates
10. Raymond Deans
11. Roshan Lal
12. John Hall
13. ADM Shine Technologies
14. Clive Walker – University of Leeds
15. Coroner's Society of England and Wales
16. Constitutional and Administrative Law Bar Association
17. Hugh Bochel, Andrew Defty, Jane Kirkpatrick – University of Lincoln
18. Association of Police Lawyers
19. Newspaper Society
20. INQUEST
21. Haldane Society of Socialist Lawyers
22. Criminal Bar Association
23. Public Interest Lawyers
24. Lawrence McNamara – University of Reading
25. JUSTICE
26. Bingham Centre for the Rule of Law
27. Law Reform Committee
28. Liberty
29. Discrimination Law Association
30. Interception of Communications Commissioner
31. Stephen P. Walker
32. Robert Bromley
33. Jenny Payne
34. Emma Carrington
35. G.A. Gerrard
36. Helen Wood
37. Association of Chief Police Officers - Crime Business Area
38. David Knopfler
39. Alice Richardson
40. Tim Wakeford
41. Paul Foreman
42. Edward F. Bates
43. Jim Keys
44. Paul Benjamin Troop
45. Ashley Gray
46. Ronald Barry Bishop
47. REDRESS
48. Matthew Long
49. John Kissane
50. David Pybus
51. Peter Gill – University of Liverpool
52. Police Action Lawyers
53. British Irish Rights Watch
54. Amnesty International UK
55. Employment Lawyers Association
56. Employment Tribunals
57. Guardian News & Media
58. Equality and Human Rights Commission
59. Northern Ireland Human Rights Commission
60. Lord Carlile of Berriew CBE QC
61. Northamptonshire Police Constabulary
62. Wiltshire Police Constabulary
63. The Senators of the College of Justice
64. Police Service of Northern Ireland
65. Majid Akram
66. Serious and Organised Crime Agency
67. Committee on the Administration of Justice
68. Cambridgeshire Police Constabulary
69. Special Advocates – Part 2
70. David Blunket MP
71. David Ford MLA
72. Malcolm Bush
73. Public Accounts Committee
74. Foreign Affairs Committee
75. A Toth
76. Police Federation of England and Wales
77. Association of Chief Police Officers – Scotland
78. Albert Trecht
79. HM Inspectorate of Constabulary
80. Lancashire Police Constabulary
81. Kent and Essex Serious Crime Directorate and the Counter Terrorism Intelligence Unit
82. Lord Chief Justice – Northern Ireland
83. Metropolitan Police
84. Hudo Elmi

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ISBN 978-0-10-183642-5

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