

REPRIEVE

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

FOR THEIR EYES ONLY

**Liberty and Reprieve Second Reading
briefing on the Justice and Security Bill
in the House of Lords**

June 2012

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research. Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

About Reprieve

Reprieve, a legal action charity, uses the law to enforce the human rights of prisoners, from death row to Guantánamo Bay. Reprieve investigates, litigates and educates, working on the frontline, to provide legal support to prisoners unable to pay for it themselves. Reprieve promotes the rule of law around the world, securing each person's right to a fair trial and saving lives. Reprieve's current casework involves representing 15 prisoners in the US prison at Guantánamo Bay, assisting over 70 prisoners facing the death penalty around the world, and conducting ongoing investigations into the rendition and the secret detention of 'ghost prisoners' in the so-called 'war on terror.'

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Executive Summary

The Justice and Security Bill is rotten to the core: it fatally undermines the Rule of Law, eroding bedrock principles of open justice and equality before the law and weakening Government accountability. It will prevent serious state abuses – such as torture – from coming to light; give Ministers the power to skew court proceedings heavily in their favour; and severely damage public access to justice over Government wrongdoing. Liberty and Reprieve urge the House of Lords to vote against giving this Bill (which did not appear in any election manifesto nor the Coalition Programme for Government) a Second Reading.

If passed, this Bill will make unprecedented changes to the civil justice system:

- It will allow for ‘secret courts’ – or Closed Material Procedures (CMP) – to be extended to the ordinary civil law in any case where ministers claim ‘national security’ is involved. CMP involves a closed court with the litigant, their lawyers, the public and the press excluded and the Government given licence to present a one sided case to a judge. This is a fatal blow to the British system of justice: an adversarial system in which evidence is properly challenged and tested by both sides.
- It will also strip courts of the power to hear ‘Norwich Pharmacal’ applications which seek the disclosure of information held by UK authorities on serious human rights abuses by other states, in which Britain has been involved.

The proposals have been widely criticised by both expert groups and the media:

- The Special Advocates – expert lawyers who act in CMPs – have stated that *“CMPs remain fundamentally unfair,”* adding that *“no...reason has been identified”* for the proposed *“sweeping powers.”*
- Parliament’s Joint Committee on Human Rights, in a report critical of the proposals, has warned that *“closed material procedures are inherently unfair.”*
- Former Director of Public Prosecutions, Lord Macdonald QC has said the Bill will mean that *“Government wrongdoing in the area of national security is going to be less likely to see the light of day.”*

This Bill has been prompted by litigation challenging policies of extraordinary rendition, torture and indefinite detention without charge or trial pursued during the darkest periods of the War on Terror. Rather than shine a light on

these dark practices which have no place in a liberal democracy, the Government is introducing legislation which will sweep them under the carpet – this would include, for example, cases currently underway which aim to get to the truth of UK involvement in renditions to Gaddafi's Libya.

Liberty and Reprieve urge Peers to reject this Bill:

- **It will create a system which is unfair.** CMP allows for Government lawyers to have a private chat with the judge about material used in their defence, which the claimant will never even get to see, let alone challenge.
- **Protection against disclosure which would harm national security is already provided for under the law of Public Interest Immunity (PII).** The law of PII has been developed to allow for non-disclosure of material where there is a genuine risk to national security. Under PII it is a judge who weighs the competing public interests at play, allowing as much information as is consistent with the protection of national security to be disclosed and using techniques such as redaction, anonymity orders and in camera hearings to meet genuine national security concerns. Crucially, if it would cause harm, the evidence is excluded from the case and neither side can rely upon it. PII will remain available, but at the imperative of the Government who have every reason to opt for CMP which allows them to adduce evidence immune from effective challenge. If implemented these proposals will give the Government a permanent strategic advantage in litigation, undermining the important fair trial principle of equality before the law.
- **So-called safeguards in the Bill are entirely inadequate and do not remedy the central unfairness of its provisions.** The requirement of judicial approval is not a serious concession. Judges hands will be tied, their discretion to consider competing interests in disclosure – such as the interests of justice – entirely removed.
- **The evidential case simply has not been made for this constitutional change.** This Bill is not based on evidence but rather on hypotheses and speculation. The Government has not been able to point to one case in which the operation of PII has led to disclosure damaging to national security, however in recent years there have been a number of cases in which the Government has sought to exclude evidence which has no real implications for national security, but is very embarrassing for the security services.

Accordingly, Liberty and Reprieve urge Peers to reject these unprecedented proposals which, if passed, will fundamentally undermine the Rule of Law.

Introduction

1. A fundamental principle of British justice is that no one – including the Government – is above the law. This principle is reinforced by the constitutional right, embedded in the common law and our human rights framework, to open justice and a fair trial. The Justice and Security Bill, if passed, will change this framework of protection for all time. Liberty and Reprieve, drawing on our cumulative extensive expertise in this area of law and policy,¹ have joined together to urge the House of Lords to reject the unprecedented proposals in this Bill which, if passed, will fundamentally undermine the Rule of Law.

2. The key proposal made in the Bill is to introduce Closed Material Procedures (CMP) to the ordinary civil law where the Government considers that evidence on which it seeks to rely may raise an issue of national security. CMP involves a closed court, where the litigant, their lawyers, the public and the press are excluded from the court room while the evidence is outlined and relied upon by the Government in support of their own case. The second proposal seeks to oust the jurisdiction of the courts to hear applications seeking the disclosure of information held by UK authorities to assist in uncovering wrongdoing by other States, which may also uncover unlawful actions by the UK authorities. The Bill will also make structural and substantive changes to the mechanism for oversight of the intelligence services, and introduce CMP to exclusion, naturalisation and citizenship hearings in the Special Immigration Appeals Commission.

3. It is self-evident that this Bill has been prompted by litigation challenging the policies of extraordinary rendition, torture and indefinite detention without charge or trial pursued during the darkest periods of the War on Terror. It is through this litigation, along with investigative journalism, that such practices have been exposed. It is a bitter irony that a key plank of the Government's formal response to these revelations is this Bill, which, if passed, will make it far easier for these practices to remain secret. Indeed, had this Bill been in force for the past decade, it would likely

¹ Together Liberty and Reprieve have significant litigation experience in areas of law underpinning the Bill, having intervened or acted as legal representatives in a number of cases including: *Chahal v UK* (1996) 23 EHRR 413, *A v Secretary of State for the Home Department* [2005] 2 AC 68, *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, *Secretary of State for the Home Department v MB* [2008] 1 AC 440, *RB (Algeria) & Ors v Secretary of State for the Home Department* [2009] UKHL 10, *A v UK* (2009) 49 EHRR 29, *Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London (7/7 Inquests)* [2010] EWHC 3098 (Admin), *Al-Rawi v Security Service & Ors* [2011] UKSC 34.

have prevented even the worst of these practices from being exposed. Rather than shine the light on dark practices which have no place in a liberal democracy, the Government has committed to a policy that will limit accountability and transparency.

4. If Parliament does pass this Bill, it will be doing so not on the basis of an unequivocal, evidence-based case for change, but rather the hyperbole and hypotheses which the Government has advanced in support of the reform and what the Joint Committee on Human Rights has referred to as “*vague predictions*” and “*spurious allegations*”.² The Justice and Security Green Paper³ which preceded the Bill has received an overwhelmingly negative response – not only from Liberty⁴ and Reprieve,⁵ but also from the Joint Committee on Human Rights,⁶ across mainstream media⁷ and by the specialist legal practitioners experienced in CMP on whose involvement this reform relies.⁸ Given the negative reaction, it is both surprising and disappointing that rather than allowing for in-depth scrutiny of the policy posited in the Green Paper the Government has skipped from, as described by the Lord Chancellor, a ‘*very green Green Paper*’ straight to legislation without allowing for the opportunity of further pre-legislative scrutiny.

² Joint Committee on Human Rights *The Justice and Security Green Paper* (Twenty-fourth Report of Session 2010-12) (HL Paper 286; HC 1777), available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/justice-and-security-green-paper-report/> at para 72.

³ *Justice and Security Green Paper*(CM 8194) (October 2011), available at <http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/green-paper.pdf>.

⁴ See Liberty’s consultation response to the Justice and Security Green Paper (January 2012), available at <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-response-to-the-ministry-of-justice-consultati.pdf>, and Liberty’s evidence to the Joint Committee on Human Rights Inquiry into the Justice and Security Green Paper (February 2012), available at <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-evidence-to-the-jchr-inquiry-into-the-government-s-justice-and-sec.pdf>.

⁵ See Reprieve’s response to the Justice and Security Green Paper consultation (December 2011), available at http://www.reprieve.org.uk/static/downloads/Microsoft_Word_-_2011_12_12_INT_FINAL_Green_Paper_consultation_response.pdf.

⁶ See the Joint Committee on Human Reports report on the Green Paper, *ibid*.

⁷ See the Daily Mail’s media coverage and campaign *No to Secret Courts* – see, for example, <http://www.dailymail.co.uk/news/article-2109596/Cameron-defies-critics-plans-bring-secret-courts.html>, <http://www.dailymail.co.uk/news/article-2153754/Climbdown-secret-courts-Nonsense-Now-worse-How-Ken-Clarkes-masterclass-spin-hid-REAL-story-new-justice-laws.html>. Editorials across the press have described the plans as: “*excessive and dangerous*” (*The Times*), and a “*chilling threat to liberty and justice*” (*Daily Mail*); *The Guardian* warns they would “*shake our constitution to its common law roots*,” the *Independent* fears a move “*towards the closed courts...so favoured by despots*,” and the *Financial Times* has cautioned against the “*Kafkaesque cases*” which would result.

⁸ See the Response of Special Advocates to the Justice and Security Green Paper, available at http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf.

5. We urge the House of Lords to put a stop to this Bill by voting against it at Second Reading. This Bill did not feature in any party manifesto leading up to the 2010 General Election, nor was there a hint of the reform in the Coalition Programme for Government. Voting against giving this Bill a Second Reading is vital to ensure that the fundamental underpinnings of our civil justice system remain intact.

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| Extending the use of Closed Material Procedure to the ordinary civil law (Part 2, clauses 6 to 10) |
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6. Clauses 6 to 10 of the Bill will allow for the extension of a 'Closed Material Procedure' beyond its current tightly circumscribed use and into ordinary civil law. The Government argues this is necessary to ensure that sensitive information which it considers would damage national security is not disclosed. Liberty and Reprieve accept that some highly sensitive material which may genuinely cause harm to national security should not be disclosed. However we believe that the current law already provides a judicious solution to this problem, while upholding the right to a fair trial and open justice in a way that CMP simply does not.

Background

Current protection for sensitive material in civil litigation

7. The law of Public Interest Immunity (PII) has been developed by the courts to prevent open disclosure of material that would damage national security. Importantly, the Government has been unable to identify a case where the operation of PII has failed to prevent damage to national security or which has resulted in public harm or even a threat to public harm.

8. The PII principles allow a balance to be struck between the requirements of justice and the protection of the public interest. If a Minister considers that disclosure of a document could harm the public interest he or she must sign a certificate to that effect. The court then considers the issue – looking at the material in question if necessary – and balances the public interest in withholding the document against the interests of justice in disclosing it. PII does not operate to exclude entire categories of material. Rather the judge has to engage with the facts in question, weighing factors such as the relevance of the material concerned, its particular sensitivity and the interests at stake (including their seriousness). The judge must simultaneously consider a number of mechanisms by which material can still be disclosed, while

maintaining a requisite level of confidentiality. If a judge decides that the nature of certain material requires some protection there are many more options available to the judge than simply refusing disclosure. These include, for example, allowing redactions, providing for the protection of the identity of witnesses, in camera hearings and imposing confidentiality rings.

Current use of Closed Material Procedure

9. CMP is a controversial mechanism used in a tightly limited number of cases in highly specified circumstances. The use of CMP and Special Advocates was introduced by statute in 1997⁹ to improve procedural protection when the Special Immigration Appeals Commission (SIAC) was created. SIAC is a specialist immigration tribunal dealing with cases linked directly to national security. It considers, for example, the deportation of foreign nationals who pose a risk to national security. The introduction of the CMP mechanism followed the European Court of Human Rights judgment in *Chahal v UK*.¹⁰ The case concerned, in part, the UK's procedure for decisions about the deportation of foreign nationals considered to present a risk to national security. The UK was found to be in breach of Article 5(4) Human Rights Convention as a result of its then entirely closed procedure for deciding to detain and then deport a foreign national considered to be a security risk. Following *Chahal* the UK Government sought to enhance the procedural protection for foreign nationals it was seeking to deport for national security reasons. Under the new system, where an individual seeks to appeal their detention and deportation order, secret evidence relating to the perceived risk they pose to national security is disclosed to a Special Advocate (SA) who is instructed to represent the appellant's interests in a CMP.

10. Given the blanket secrecy which preceded it, the creation of the CMP mechanism for SIAC proceedings was relatively progressive. The new measure was designed to give a form of administrative appeal to a subset of foreign nationals – i.e. those for whom a national security deportation was being considered – who otherwise had no right of appeal because they had no right of abode in the UK. The new measure therefore introduced some protection to foreign nationals – albeit in a highly unsatisfactory and limited way - in the face of the Home Secretary's sweeping discretion to deport in national security cases. The introduction of CMP to SIAC proceedings was based on the recognition by the courts that no fair trial rights were

⁹ *Special Immigration Appeals Commission Act 1997*.

¹⁰ *Chahal v UK (1996) 23 EHRR 413*

being afforded to these individuals in these particular legal proceedings. Accordingly the reform did not then *remove* ancient fair trial rights as the provisions in this Bill propose, rather it *added* measures where before there was no protection.

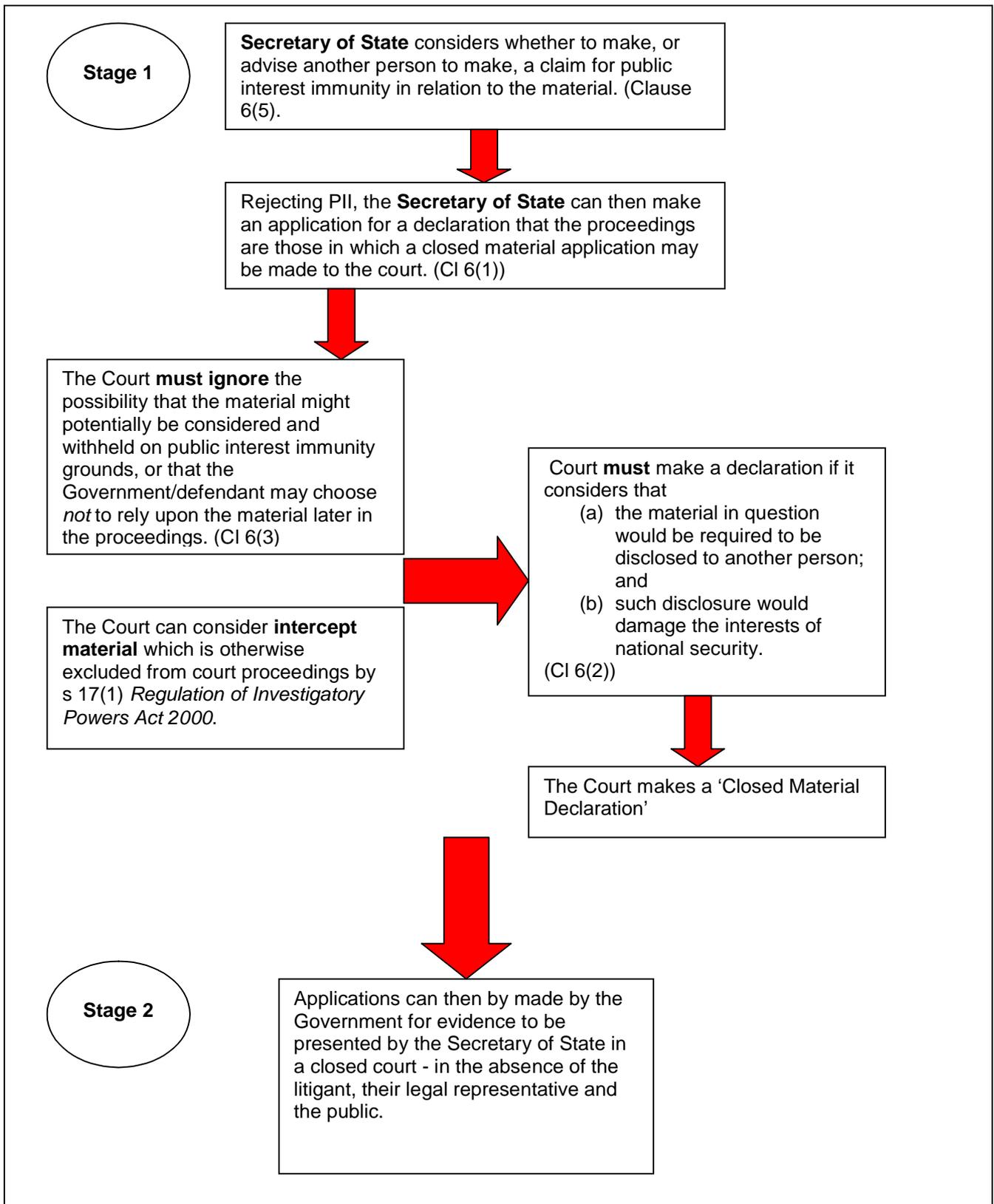
11. Further, while the involvement of a SA in the CMP system may, on the face of it, appear reassuring, the ability of a SA to properly test the evidence and represent the party excluded from the CMP is minimal. SAs are prohibited from direct communication with the litigant without Government permission and can never discuss the content of secret evidence. They are unable to challenge non-disclosure by the Government or challenge evidence relied on in secret proceedings, and they have little practical ability to call their own evidence. Former SA, Dinah Rose QC, has described the SA role as follows:

It is impossible for me adequately to convey the frustration and helplessness felt by a barrister seeking to represent a client when a closed material procedure applies. I have sought to do it in control order and SIAC cases on many occasions. Most of your time is spent outside court, waiting to be allowed back in. when you are able to cross examine, you have no idea whether the questions you are asking are pertinent, or unhelpful. You do not know whether your submissions are on point, or wholly irrelevant. Representing a client in these circumstances has been described as like taking blind shots in the dark at a hidden target.¹¹

The proposals in Part 2 of the Bill: a new two-stage procedure

12. Part 2 of the Bill will allow for restrictions on the disclosure of sensitive material in civil litigation by enabling the Secretary of State to trigger the use of CMP for evidence raising national security concerns. The two-stage procedure to allow for CMP in a case, incorporated in clauses 6 and 7, is set out in the table below.

¹¹ Atkin Memorial Lecture 2011 “Beef and Liberty: Fundamental Rights and the Common Law”, available at http://www.reprive.org.uk/media/downloads/Atkin_Memorial_Lecture_Final_version.pdf.



13. Once a Declaration has been made in Stage 1, the proceedings become 'section 6 proceedings' in which successive applications may be made for CMP in respect of particular material (Stage 2 above). The detail of this second stage of the

process will be largely confined to prescribed Rules of court, which have not been published. The Bill provides that the Rules must make provision for the following:

- I. Each application for material to be heard in CMP will be heard in secret, in the absence of every party other than the Secretary of State (cl 7(1)(b)).
- II. The court **is required** to give permission for CMP if it considers disclosure of the material would be damaging to the interests of national security. Thus the discretionary balancing exercise central to PII proceedings is entirely removed (cl 7(1)(c)).
- III. When permission for CMP is granted, the court must **consider requiring** the Secretary of State to provide a summary of the material to every other party and their legal representative (cl 7(1)(d)), but the court **is required** to ensure that the summary does not contain material which would damage national security if disclosed (cl 7(1)(e)).

14. Even where a court refuses the application for material to be considered in CMP because it would not damage national security to disclose it, the Government will still be able to elect not to disclose the material in any event (as envisaged in cl 7(2)). The Government will also be able to refuse to provide a summary of material which has been required under clause 7(1)(d) (cl 7(2)(b)). This means that even where the *court* considers that the material ought to be disclosed because there is no risk of damaging the interests of national security the Government will still be able to determine whether it is disclosed. This will be subject to the proviso that the court will be able to order the Government not to rely on certain points raised in the material where to do so would adversely affect their case or support the other party's case, or it may direct the Government to "*make such concessions or take such others steps as the court may specify*" (cl 7(3)(a)(ii)). In any other case where the Government opts not to disclose material or a summary of the material, the court may order the Government not to rely on it (cl 7(3)(b)).

15. As currently drafted, the Bill applies to "relevant civil proceedings", which are defined as any proceedings other than criminal proceedings before the High Court, the Court of Appeal or the Court of Session (cl 6(7)). The Bill, however, leaves the door open for the further expansion of the CMP procedure. Clause 11(2) provides that the Secretary of State may amend the definition of "relevant civil proceedings" by statutory order. This order may be exercised in particular to add or remove a court or

tribunal. This creates a very real danger that CMP will be extended beyond the remit currently envisaged to accommodate new areas of the civil law.

16. Where a CMP is ordered, the claimant and their lawyer will be excluded from the court. Instead, a Special Advocate may be appointed to represent their interests.¹² The Special Advocate is expressly stated not to be responsible to the claimant: rather, their duty is to the court.¹³ This distinguishes the SA's role from ordinary legal counsel, who have a duty to best represent their client's interests.— representation by a SA is therefore categorically different to normal legal representation.

Fair trials and open justice

17. Liberty and Reprieve believe that closed, secret hearings where the Government presents evidence to the judge in support of their case or to attack the claimant's case without the claimant or their lawyer being present, is entirely anomalous to our adversarial justice system. We do not agree with the Government's claim that the limited use of CMP in specialist areas to date has shown that it is a mechanism capable of delivering procedural justice.¹⁴ The majority of Special Advocates, in their response to the Green Paper, similarly concluded:

*Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not 'work effectively', nor do they deliver real procedural fairness.*¹⁵

Further, there has been widespread concern since CMP was created that it affords little more than a fig leaf of procedural fairness and the procedure has been subject to huge controversy and legal challenges. In *A v UK*¹⁶ the Court of Human Rights held that, in the context of procedures for reviewing the lawfulness of an individual's indefinite detention, the CMP/SA system was a breach of the right to a fair hearing guaranteed by the Human Rights Act.¹⁷ The Court held that sufficient information had to be disclosed to enable the appellant to effectively challenge the case against him.

¹² Clause 8(1).

¹³ Clause 8(4).

¹⁴ See the arguments put forward in the Green Paper, *ibid*, at para 13.

¹⁵ See the Response of the Special Advocates to the Green Paper, *ibid*, at para 15.

¹⁶ (2009) 29 EHRR 29.

¹⁷ Article 6 of the European Convention on Human Rights protects the right to a fair trial, as incorporated into domestic law by the *Human Rights Act 1998*.

The House of Lords applied this principle to the use of CMP/SA system in control orders in *Secretary of State for the Home Department v AF (No. 3)*;¹⁸ as a result of this legal requirement, a number of control orders have been revoked or struck down.

18. The Bill requires that nothing in the above clauses “*is to be read as requiring a court or tribunal to act in a manner inconsistent with*” the right to a fair trial under Article 6 of the Human Rights Convention (cl 11(5)(c)). While this subclause is welcome, it is important to recognise that the Article 6 right provides only a bare minimum of protection in an adversarial jurisdiction. Indeed, British common law has provided far greater protection for civil fair trial rights than that afforded by Article 6. Accordingly it is against these wider principles that the Bill should also be measured. Core constitutional common law rights include the right to know the case against you, equality of arms and the principle that no-one should be a judge in their own cause. Under CMP these foundational principles are fatally undermined as one party is:

- denied the right to attend the trial of his own case;
- denied the knowledge of another party’s statement of case;
- denied knowledge of, and the opportunity to challenge, the evidence on which another party may rely;
- denied the opportunity to make submissions on another party’s case;
- denied knowledge of material that may support his case or harm another party’s case;
- denied the right to receive a statement of the court’s reasons for its decisions in his case; and
- denied an effective right to appeal the decision of the court (if adverse to him), based on that court’s reasons.

19. CMP also fatally undermines the core principle of open justice. Open justice goes beyond the maxim that justice must be seen to be done. As articulated by the Lord Chief Justice in the *Binyam Mohamed* case (discussed below), a distinct aspect of the principle goes beyond scrutiny of the judicial process:

In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or

¹⁸ [2009] UKHL 28.

*acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.*¹⁹

Case study: the al Saadi family

In 2004, the UK worked with Libyan intelligence to render Gaddafi opponent Sami al Saadi, along with his wife and four young children, from Hong Kong back to Libya.

Mr al Saadi has described how, during their rendition, he saw his young daughter lose consciousness and his wife “screaming as they were handcuffed”; upon reaching Libya he was separated from his family and imprisoned. His children were aged 12, 11, 9 and 6 years old at the time.

Documents discovered after the overthrow of Colonel Gaddafi show that UK officials were not merely assisting but actively organising this illegal rendition of an entire family. A March 2004 fax from the CIA to Libyan intelligence confirms that Libyans were “cooperating with the British to effect [Sami al Saadi’s] removal to Tripoli”. The documents also support Mr al Saadi’s claim that UK agents interrogated him whilst he was in secret detention in Libya.

The al Saadi family has instructed lawyers to bring a claim against the UK Government for their alleged complicity in their extraordinary rendition from Hong Kong to Tripoli in March 2004; and Mr al Saadi’s subsequent unlawful detention, torture, inhuman and degrading treatment, batteries and assaults perpetrated by the Libyan authorities.

The al Saadis would like an apology, an explanation of how this was allowed to happen, and assurance it will never happen again. The UK Government has refused to give any of these, and now the measures in this Bill, if implemented, will prevent the truth from emerging through the courts.

As in every civil case, it will be for the al Saadis as claimants to prove their case against the Government, and the Government in turn will submit evidence in their defence. Once a CMP Declaration is made, while the al Saadis can only submit evidence in open court, the Government will be able to choose if it wants to conceal evidence against them in a closed court. The al Saadis clearly have cogent evidence which, fortunately, has been publicly – and accidentally – released following the fall of Gaddafi.

There will, however, inevitably be related evidence which the Government will argue should be protected under the broad – and undefined – exemption of ‘damage to national security’. There may be further correspondence, for example, or perhaps a memo from the Foreign Secretary to the agencies. In the case of the al Saadi correspondence, the Government would likely argue that this is precisely the type of evidence which should not be disclosed in open court due to national security concerns. Under PII, the judge would balance the national security implications with the public interest in open justice and transparency. In order to strike the balance correctly the judge currently has a number of tools at his disposal, including redaction and witness anonymity orders.

¹⁹ Per the Lord Chief Justice Lord Judge at para 39 in *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

Under the new system, the judge will not be able to strike a balance. Indeed he will have to ignore the public interest in disclosure if a document has national security implications. Once an application for CMP is granted, the Government would be able to submit evidence in support of its defence that the al Saadis and their lawyer will never get to see. This is a significant departure from current arrangements which create equality of arms by providing that neither party can rely on the excluded evidence. If the al Saadis lose their claim, they will never know why. Similarly the public, which has seen the instrumental role that their Government has played in overthrowing a despotic regime, will never get to the truth of the seemingly close relationship our agencies had with Gaddafi's intelligence services and the truth of what has been done by those agents in our name.

Mr al Saadi's eldest daughter, Khadidja – who was 12 at the time of the family's rendition – recently wrote to the Justice Secretary about the Government's plans: "I do not understand how a country that claims to be democratic and fair could do something as shameful and dreadful as rendering me and my entire family to Gaddafi," she says.

"What is important for me now is for Britain to apologise for what happened to me and my siblings. And it is also important that I get answers to all the questions that are going through my head; Why and who is responsible? [...But] worst of all is this news that you are changing your laws to make our case secret on the grounds that it will threaten Britain's national security. I believe this is unfair and is not compatible with a democratic country.

"The new law reminded me with Gaddafi's secret trial which sentenced my father to death. My father told me that he was never given a chance to know the evidence against him and so he was never able to defend himself. We only learnt about the verdict when my father was made to wear the red jumpsuit in Abu Salim prison. We were devastated. I ask the British government now; Why the secrecy and what is it that the British government has to say about me when I was 12 that is secret?"

Analysis: CMP with safeguards?

20. On the publication of the Bill much was made of the purported procedural safeguards presented as a remedy to the flaws identified following the publication of the Justice and Security Green Paper. However no procedural safeguard will remedy the core problem: the one-sided presentation of evidence in a closed court. In practice, we do not believe these so-called 'concessions', discussed in turn below, will remedy the Bill's central injustice.

Secretary of State duty

21. Before applying for a Closed Material Declaration the Secretary of State must "*consider*" whether to make a claim for PII instead. This is the only nod to PII in the two-stage process. In reality this will be an empty clause. It equates to the Secretary

of State deciding whether she would prefer to (a) leave it to a judge to determine what ought to be disclosed (in keeping with the PII obligation to disclose as much as possible without undermining the public interest), or (b) apply to the court to exclude herself from such judicial scrutiny. The claimant could apply to judicially review the Secretary's decision – that is, show that the Secretary's exercise of discretion was flawed on grounds of unreasonableness or irrationality, but in reality the requirement to 'consider' invokes an extremely low threshold, and it will be difficult to even gather the evidence (which is likely to be considered non-disclosable) to prove the flaws in the decision-making process.

A judicial – not Ministerial – process?

22. The Government claims to have remedied the key criticism of the Green Paper by creating a role for judges. In reality this amounts to little more than co-opting judges into the system to provide a thin veneer of procedural fairness. On a close analysis of the clauses shows that this is not the kind of judicial process offering a robust safeguard against unilateral decision-making by the Executive. In practice a judge's hands will be tied by the prescriptive clauses, which have removed effective judicial discretion. A judge *must* order the CMP Declaration requested by the Government where any of the material presented in support of the application would engage national security interests. A judge *must* ignore that the material might not even be relied upon in the substantive case. A judge *must* ignore the ban on intercept proceedings which means, perversely, the Declaration sought can be based on the product of intercept which would not even be admissible in the substantive proceedings.

23. Importantly, the balancing exercise required in a PII application is also entirely absent from the CMP clauses. At the first stage the judge will have to ignore whether the material could be disclosed in whole or in part using one of the PII mechanisms. At the second stage, it will be up to the Government to determine if they would prefer to subject the material in question to the judicial balancing exercise or apply for it to be heard in secret proceedings. When deciding if CMP is justified a judge will not be able to determine that the material may be sufficiently dealt with under PII principles.

Continued availability of PII

24. The Government continues to stress that both CMP and PII will be available throughout the case: clause 11(5)(b) states that clauses 6 to 10 do not affect the common law PII rules. The Government however chose not to define CMP as a last

ditch option which could easily be done by providing that PII ought to be exhausted before CMP becomes a possibility. In practice the continued availability of PII will not address the unfairness of introducing CMP into the ordinary civil law. Once a Closed Material Declaration has been made by the Court, CMP will be available on tap to the Government, giving them a clear strategic advantage in litigation. There will frequently be no incentive for the Government to opt for PII in preference to the ease, and advantages, of a CMP procedure.

25. We believe the attraction of secret courts by opting for CMP will simply prove too great a temptation for Government in defending their actions. Our concern is exacerbated by a number of recent examples (see boxed text below) of unwarranted government reliance on national security arguments to justify secrecy in situations where Government embarrassment – rather than national security – was at stake.

Case examples: use of the national security exception

***Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs*²⁰**

In the fifth open judgment of the Divisional Court in Binyam’s case, MI5 had insisted that information which would ordinarily be the subject of disclosure be extensively redacted in the interests of national security. MI5’s insistence on non-disclosure was unexpectedly withdrawn when the matter came before the Court of Appeal. On analysis of the full, disclosed text, the Court found previously redacted information to be anodyne, and already in the public domain. The Security Services were heavily criticised in this judgment following their refusal to concede that non-disclosure on national security grounds was unsustainable. This refusal was maintained despite a clear concession that, first, the material in question had no national security implications and secondly that its substance had already been placed in the public domain by an American judge.

***Al Sweady v Secretary of State of Defence*²¹**

In this case the Ministry of Defence (MoD) initially asserted that material relating to the techniques of “tactical questioning” of captured individuals by Armed Forces interrogators could not be disclosed to the claimants. At a later stage in the proceedings the MoD conceded that a significant proportion of the redacted material had previously been disclosed in open hearings and was therefore already in the public domain. The Court concluded that the fact of previous disclosure must, or should, have been known within the MoD before the PII certificates were signed.

***Home Secretary v AN*²²**

This case is a particularly worrying example of the misuse of a national security rationale to avoid disclosure of material disadvantageous, or indeed fatal, to the

²⁰ [2009] EWHC 2549 (Admin).

²¹ *R (Al-Sweady) v SSD* [2009] EWHC 1687 (Admin).

²² 12 March 2010

merits of the Home Office's case. Following the reinstatement of redactions in documentary evidence disclosed by the Home Secretary in an appeal against a control order, it became apparent that information withheld included references to internal Home Office documents in which it was admitted that there was no necessity for a control order at all because the suspect was detained on remand in Belmarsh prison. As a result, the Home Office's case fell away and the control order was revoked.

Decision of the Proscribed Organisation Appeals Commission

In the only case decided by Proscribed Organisation Appeals Commission (POAC) to date, the intelligence services sought the redaction of a passage from a previous Court of Appeal judgment in a case relating to the status of an Iranian organisation. It transpired that the passage in question was one which stated that the decision had been a very poor piece of administrative decision making. This case constitutes yet another example of the use of subterfuge by intelligence services, in a highly sensitive context, in order to avoid embarrassing revelations.

The removal of inquests from the scope of the Bill

26. The Green Paper originally proposed that CMP should also be extended to coronial inquests. In attempting to argue that CMP was necessary in inquests the Government's premise was that while a number of highly sensitive and high-profile inquests have been successfully concluded under current arrangements (including again the PII process) in future there may be some inquests where the current framework is insufficient both to protect sensitive material and to allow inquests to continue. As with the Government's general CMP proposals, an unsubstantiated prediction does not amount to a solid case for radically overhauling centuries of justice. This is especially the case given the recent successes of the coronial system in dealing with sensitive, national security related material in a number of recent inquests (including the inquests into the death of Gareth Williams, the shooting of Jean Charles de Menezes and the 7/7 inquest).

27. Unsurprisingly, the Government dropped inquests from the Bill. This was a significant victory and entirely welcome. However it is important to note that simply dropping inquests will not leave families of victims immune from the impact of CMP. The purpose of an inquest is to conduct an independent and transparent investigation into the circumstances surrounding the death of their loved one. Once armed with the answers from an inquest families frequently choose to seek legal redress, particularly so when the death was caused by Government wrongdoing. In the second phase of seeking redress for their loved one's death families may find crucial evidence to the claim is heard behind closed court room doors.

The Government's justifications for the extension of CMP

28. The arguments put forward by the Government in support of these proposals fail to withstand scrutiny: the evidential case for this unprecedented reform simply has not been made. Of great importance has been the response of the majority of Special Advocates - whose role is central to the reform outlined in this Bill - given they have categorically rejected the change. In their response to the Green Paper they stated that the proposal to extend secret process to the ordinary civil law “*could be justified only by the most compelling of reasons*” concluding that “*No such reason has been identified in the Green Paper, and, in our view, none exists.*”²³

29. We discuss the key tenets of the Government's arguments in support of the Bill below.

(i) ‘CMP provides for enhanced procedural fairness’

30. The Government has argued that CMP is preferable to the current system of PII as it will provide for greater procedural fairness, allowing for more information to be put before the judge rather than it being excluded under PII. These assertions, however, are based on an entirely flawed premise. The material placed before a judge in a CMP cannot be equated with the evidence tested in open court – in fact it is not really evidence at all. It is clear that Special Advocates cannot advocate their ‘client’s’ case as in normal legal proceedings. It is therefore a fallacy to suggest that putting a greater volume of material before the judge necessarily results in better justice, or is more likely to lead to the “right” outcome. If the information is untested it may well be unreliable. Worse still, it may positively mislead, resulting in perverse outcomes in individual cases. This risk was articulated by Lord Kerr in the Supreme Court case of *Al Rawi*²⁴ where the Government had sought to persuade the Supreme Court that the power to initiate a CMP could be drawn from the common law and that the CMP could lead to greater procedural fairness. Responding to this submission in his judgment, Lord Kerr noted

The central fallacy of that argument...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,

²³ See para 2(6) of the Special Advocates response to the Green Paper, *ibid.*

²⁴ *Al Rawi et al v Security Service & Ors* [2011] UKSC 34.

*evidence must be capable of withstanding challenge. I go further. **Evidence which has been insulated from challenge may positively mislead.***²⁵

(ii) ‘The claimant will be in receipt of the same information under each procedure’

31. The Government has also argued that under the Bill provisions the claimant will be entitled to as much information as they would following a PII exercise.²⁶ This justification, however, sidesteps the core issue. Even if a claimant receives a summary of the information their standing in proceedings is materially diminished as their opponent may rely on information they will never have the chance to test. PII does not allow for damaging evidence against the claimant, which they cannot properly challenge, to remain in play to the advantage of the Government’s case.

(iii) ‘CMP will ensure that cases can be heard’

32. The Government has argued that cases consisting of serious allegations have had to be settled due to the inadequacies of PII, with independent judgment thereby precluded. The Government points to the settlement of the civil damages claims brought by former Guantanamo Bay detainees – the *Al Rawi et al* litigation – as showing that the PII system is inadequate.

33. Relying on the case of *Al Rawi* to justify making CMP available rather than relying on PII is entirely disingenuous. In *Al Rawi* a number of men who had been subject to extraordinary rendition, torture and extended detention without charge or trial in Guantanamo Bay brought civil claims for damages against the UK Government and the Intelligence Agencies, alleging that the Government was liable for assault, negligence and other torts, and because it had been complicit in their rendition, torture and extended detention. In the Court of Appeal, the Government sought to argue that the court should find it within their jurisdiction to create a CMP to hear the Government’s defence to the claim. After the Court of Appeal ruled against the Government on this point the Government was granted permission to appeal to the Supreme Court. Rather than appealing this point, the Government chose to settle the claims for an undisclosed sum. PII procedures were never fully put to the test.

34. Accordingly the Government cannot rely on the *Al Rawi* case as an example of it being forced to settle a case because of flaws in the current law. It is impossible

²⁵ Emphasis added. At para 93.

²⁶ See the Ministry of Justice ‘Mythbuster’, available at <http://www.justice.gov.uk/legislation/bills-and-acts/bills/justice-and-security-bill>.

to know why the Government settled the case, but it is entirely feasible that the scale of the litigation, the strength of the claimants' case and the reputational damage caused by disclosing embarrassing – but not security sensitive – material in open court was sufficient motivation to settle, rather than settlement being the result of inherent risks or inadequacies in the application of PII. Responding to this argument, the Special Advocates concluded that the *Al Rawi* experience did not establish “*that the operation of PII procedures would have led to harmful disclosures of significantly sensitive material*”.²⁷

35. The Government also argues that the alternative to PII is 'no justice at all' because cases may be struck out in future because CMP is unavailable. In support of this argument it refers to a Court of Appeal case dating back to 2001 – *Carnduff v Rock & Anor*.²⁸ In this case a former police informer sought to recover payment for information he supplied to West Midlands Police. The police denied any contractual liability to make the payments and denied that the information provided by the claimant had led to the arrests or prosecutions which the claimant suggested. The case reached the stage where disclosure of documents was being sought in relation to all issues and at that point the defendants argued that the court should not even consider the claim, due to the sensitivity of information that they said they would have to disclose to defend the claim. The application for the case not to be heard by the court was argued before the disclosure application but it was dismissed in the first instance by Judge Nicholl. The dismissal of the application was then appealed to the Court of Appeal. Crucially, the use of PII was not considered at any stage before the appeal against refusal to strike out was heard by the Court of Appeal. In a majority decision, the Court of Appeal (Waller LJ dissenting) upheld the appeal by the defendants. In his strong dissenting judgment Waller LJ doubted whether the Court had the power either under the Civil Procedure Rules or through its inherent jurisdiction to strike out a claim at such an early stage because a defendant contends that a hearing could not take place fairly without access to a large amount of sensitive material that it couldn't disclose. At paragraph 26 of the judgment he said:

I see all the obvious difficulties that there may be in relation to the disclosure of highly sensitive material if this case is allowed to go forward. But, as I see it, the court should at least at this stage be considering only two alternatives. It should either say this case can be decided summarily against the claimant on the basis

²⁷ See paragraph 37 of the Special Advocate response to the Green Paper, *ibid*.

²⁸ [2001] EWCA Civ 680.

that it is simply inconceivable that the police will have made a binding agreement as alleged, or, if it cannot do that, it should allow the question of whether there was a legally binding agreement to be fought out as a preliminary point... The court should then see whether there is machinery available to enable the questions that will arise thereafter to be tried fairly. I believe that machinery should and would if necessary be found, because it would not seem to me to be right in such circumstances that the police should simply be released from a binding contract that on this assumption they have made with their eyes open.

36. *Carnduff*, which involved very unusual factual circumstances was, in our respectful view, arguably wrongly decided. While claims may of course be struck out at an early stage if there is insufficient evidence to make out an arguable case on the balance of probabilities; in *Carnduff* PII and the procedural mechanisms that can be adopted to allow for necessary partial disclosures, were not put to the test. It is also worth noting that *Carnduff* has not since been expressly followed and, as a Court of Appeal decision, could in future be overturned. Further, in the ten years that have since passed, the courts have become even more comfortable with PII and the flexibility it provides, in our view making the *Carnduff* precedent even more unsafe.

37. We accordingly believe that the likelihood of a future civil case being struck out, following the completion of the PII process, due to the unavailability of CMP is speculative at best.

(iv) ‘CMP is a common legal mechanism’

38. The Government has argued that the introduction of CMP into the ordinary civil law is not a huge shift as the procedure is commonly used in our legal system and is familiar to practitioners.²⁹ The relevant practitioners refute this. As the ALBA³⁰ response to the Green Paper stated:

It is also not correct to state...that closed material proceedings are ‘familiar to practitioners’. ALBA is predominantly comprised of practitioners in the field of judicial review and public law. Very few of its members (which number in excess of 1000) would have any experience of litigation involving closed material. The use made of (CMPs) is, to date, extremely limited to a small number of specific areas, that fact further serves to emphasise the unusual and limited nature of

²⁹ See the Justice and Security Green Paper, *ibid*, at para 13.

³⁰ The Constitutional and Administrative Law Bar Association.
<http://www.adminlaw.org.uk/index.php>

(CMPs). They are not a familiar part of the legal landscape or of litigation. They are an unusual departure from fundamental principles.³¹

The Special Advocates themselves, in the context of their emphatic rejection of the Green Paper, responded similarly:

Contrary to the suggestion in the Green Paper, CMPs are not 'familiar to practitioners.' The way in which CMPs work in practice is familiar to only a very small group of practitioners. Of the 69 currently appointed to the list of Special Advocate, only about 32 have substantial experience in the role, and almost all are signatories to this response.³²

39. Further, current use of CMP in other contexts is clearly distinguishable from the proposals being made in this Bill. In cases where CMP is currently available, its use has been tailored to a very specific set of circumstances. In each case the Government has so specified its use because it has recognised that CMP is an unwelcome aberration from normal civil and criminal legal procedure. CMP is currently used, for example, in hearings relating to control orders and their replacement Terrorism Prevention and Investigation Measures (TPIMs), a regime involving punishment without trial entirely outside the criminal justice system to which Liberty and Reprieve remain resolutely opposed. However the counter view to such opposition upon which the Government has relied to justify this departure from the Rule of Law suggests that in extremis, the State must be able to use TPIMs to restrict a dangerous suspect against whom there is no disclosable evidence, to 'keep him off the streets and to keep the public safe'. The public safety argument is also used to justify the limited use of CMP in proceedings of the Special Immigration Appeals Commission (discussed above). This public safety argument simply does not arise in the context of this Bill. Here there is no dangerous terrorist suspect to detain or deport; rather it is the State attempting to prevent public scrutiny, during the process of litigation, which may expose its own wrongdoing. In normal litigation, whether you're News International or the British Government, if you want to avoid the embarrassment or reputational harm this open scrutiny may cause, you settle the claim out of court. Changing court procedure for the ordinary civil law to avoid such exposure is not a legitimate justification.

³¹ See Paragraph 7 of the ALBA response to the Green Paper, *ibid.*

³² See Paragraph 2(3) of the SA response to the Green Paper, *ibid.*

(v) The national security arguments

40. When originally published, the Green Paper proposals were astoundingly wide. The Paper proposed extending CMP to all cases where a Minister decided that certain material, if openly disclosed, would cause damage to ‘public interest’. ‘Public interest’ was so widely defined that CMP would have been allowed in areas as diverse as civil actions against the police, claims against the armed forces and even claims brought by public authorities against individuals. While the narrowing of the Bill to national security may be welcome, the Bill will still have a hugely negative impact.

41. The Government has been unable to point to a solid example of where the operation of the current law has led to national security being damaged by a decision taken by the courts. The Government initially indicated in the Green Paper that the issue of disclosure under PII representing a threat to national security was a widespread and significant problem which had to be addressed. No actual case where this had been a risk was identified. Ministers giving evidence to the Joint Committee on Human Rights subsequently argued that it was not the scale of the problem at issue, but just what would happen if disclosure were to occur in even a single case.³³ However no party in litigation can ever be forced to disclose evidence it has within its possession – proceedings can simply be conceded if necessary. This is commonplace in contentious litigation. The Joint Committee concluded that the case simply had not been made on national security grounds or otherwise to justify the proposals of the Government which, being unable to demonstrate where national security had been threatened by disclosure or threatened disclosure in a single case, fell

back on vague predictions about the likelihood of more cases being brought in future in which intelligence material will be relevant, and spurious assertions about the catastrophic consequences of information being wrongly disclosed (spurious because outside of the Norwich Pharmacal context there is no risk of such disclosure because the disclosure cannot be ordered by a court). These do not in our view come anywhere close to the sort of compelling evidence required to demonstrate the strict necessity of introducing Closed Material Procedures in civil proceedings in place of Public Interest Immunity.³⁴

³³ See the JCHR report at para 70.

³⁴ At para 72.

42. The Government has also ignored the deference shown by judges to the Executive on matters of national security which is cemented in our case law. Indeed legal challenges to sweeping Executive powers and changed operational practices during the War on Terror have required the courts to give greater consideration to issues concerning national security and international relations, and in several such judgments of recent years, the courts have demonstrated a considerable amount of deference to Government claims about damage to national security. In *Secretary of State for the Home Department v Rehman*³⁵ Lord Steyn in the House of Lords held that it “*is self-evidently right that national courts must give great weight to the views of the executive on matters of national security*”.³⁶ Lord Hoffman considered that “*the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.*”³⁷ His Lordship went on to say that in national security matters judges should “*respect the decisions of ministers of the Crown*”, in part because the executive “*has access to special information and expertise in these matters*”.³⁸ Even in the landmark *Belmarsh* judgment,³⁹ in which the court issued a declaration of incompatibility under the HRA, 6 out of the 7 judges deferred to the Executive’s decision in relation to a threat to public security. Lord Bingham said this was “*a pre-eminently political judgment*”;⁴⁰ Lord Hope said that “*great weight must be given to the views of the executive*”;⁴¹ Lord Scott noted that “*the judiciary must in general defer to the executive’s assessment*”;⁴² and Baroness Hale said that “[a]ssessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government”.⁴³

³⁵ *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122

³⁶ At [31]; page 135.

³⁷ At [50]; page 139.

³⁸ At [62]; page 142.

³⁹ *A v Secretary of State for the Home Department* [2005] 1 AC 68.

⁴⁰ At [29].

⁴¹ At [112].

⁴² At [154].

⁴³ At [226].

Background: Norwich Pharmacal applications

43. A *Norwich Pharmacal* (NP) application⁴⁴ is a common law equitable remedy that enables an applicant to obtain disclosure of information from a respondent who is associated with arguable wrongdoing of a third party in a set of very specific circumstances. So, for example, a claimant who has been extraordinarily rendered and consequently tortured may sue the company which operated the flight. The claimant may seek information held by the UK Government for documents or information in its possession which would prove that the flights took place (for example, by refuelling on its property) to assist it making out its claim against the company.

44. In order for the application to be granted⁴⁵, the court applies a five stage test:⁴⁵

- (i) there must be arguable wrongdoing on the part of a third party;
- (ii) it must be *necessary* for the claimant to receive the information by making the NP application – i.e. if the information can be obtained by another route, the court may refuse to grant the order;
- (iii) the defendant must be “mixed up” in that arguable wrongdoing;
- (iv) the defendant must be able or likely to be able to provide the information necessary to allow the wrongdoer to be sued – i.e. the information sought must be within the scope of the available relief; it should not be used for wide-ranging disclosure or evidence-gathering; and
- (v) the court must be satisfied that it should exercise its discretion to make the order sought.

Proposals in the Bill

45. Sections 13 and 14 of the Bill will oust the Norwich Pharmacal jurisdiction for cases where disclosure of ‘sensitive information’ thought to be held by the Government or a public agency is sought by a claimant to assist him to make out a claim against a third party in which the Government may be involved. The disclosure must be reasonably necessary to enable redress to be obtained, or a defence to be

⁴⁴ Established in *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133; and Rule 31.18 of the *Civil Procedure Rules* (Vol. 1).

⁴⁵ As summarised by the Court in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch).

relied upon, in connection with the wrongdoing (cl 13(1)). A court will be unable to order disclosure of the information sought where that information is 'sensitive information' (cl 13(2)). What could potentially fall in the category of 'sensitive information' is dangerously wide-ranging. The term will include information:

- held by an intelligence service (which includes the Security Service; the Secret Intelligence Service; the Government Communications Headquarters; or any part of Her Majesty's forces or of the Ministry of Defence which engages in intelligence activities);
- obtained from, or held on behalf of, an intelligence service;
- derived in whole or part from information obtained from, or held on behalf of, an intelligence service; or
- relating to an intelligence service. (Cl 13 (3))

Sensitive information will also include any information specified or described in a certificate issued by the Secretary of State, in relation to the proceedings, as information which the party should not be ordered to disclose (cl 13(3)(e)). A certificate can be issued where the Secretary considers it would be contrary to the public interest, because it would cause damage to national security or the interest of the UK's international relations, for disclosure of the information itself, the fact of its existence or whether it is even held (cl 13(4), (5)).

46. The Secretary of State's decision to issue a certificate can be judicially reviewed, but only on the ground that the Secretary ought not to have determined that disclosure of the material in question would be contrary to the public interest (cl 14(2), (3)). Any judicial review proceedings will be able to be heard in closed proceedings under clause 7 of the Bill.

The Government's arguments for ousting the NP jurisdiction

47. Liberty and Reprieve do not believe that the Government has made out its case justifying this significant change to the law. The primary motivation outlined by the Government for this reform is to deal with the aftermath of the *Binyam Mohamed* torture litigation, discussed in further detail below. The Government also argues the reform is necessary to combat a "damaging form of legal tourism" where a person who is fighting a case outside this jurisdiction applies to UK courts using the NP jurisdiction to "force disclosure of intelligence information" held by the British

government. Just as with the extension of CMP, these justifications do not stand up to scrutiny. Should Parliament endorse these clauses in the Bill it will remove an important avenue of redress for victims of Government wrongdoing on the basis of hypothesis and hyperbole rather than an identified threat to national security.

The Binyam Mohamed litigation

48. Binyam Mohamed was arrested in Pakistan in 2002. At the time of his arrest he was a UK resident with exceptional leave to remain. Following his arrest, Mr Mohamed was detained in Guantanamo Bay for years without charge. While detained by the US authorities Mr Mohamed was subjected to horrific torture. Giving judgment in the *habeas corpus* application the District Court of Columbia recorded in open court the details of his treatment, none of which was disputed by the US Government. Over a two year period Binyam had his genitals mutilated, was deprived of sleep and food, summarily transported from one foreign prison to another, held in stress positions for days at a time and forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch black cell. During this time he was forced to inculcate himself and others in various terrorist plots, evidence which the District Court considered neither sufficient nor reliable enough to maintain his detention.⁴⁶

49. While being held in Guantanamo Bay at risk of execution upon conviction for a capital offence, Mr Mohamed filed a *Norwich Pharmacal* application in the UK seeking disclosure of information held by the UK authorities which would have demonstrated that confessions previously made by him had been made under duress while being tortured. The application was for the disclosure of the material to his US-security cleared lawyers - not the general public - specifically to assist Mr Mohamed's case in the US jurisdiction. Despite the restricted nature of the application which would have kept the material within a secret security-cleared ring, the UK Government fought against the NP disclosure.

50. Initially the Government argued that there was no basis or justification to Mr Mohamed's claim. The Government then shifted its position, arguing that this disclosure should not be permitted because of the "control principle" – that is the "*inviolable principle of intelligence co-operation*" that either party to such an operation

⁴⁶ As outlined in *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin); [2010] EWCA Civ 65.

does not “give away each other’s secrets”.⁴⁷ The Divisional Court and the Court of Appeal accepted that a NP action can be brought against the Government where it is suspected that it has become involved in the wrongdoing of another State. Specifically, the courts held that the UK intelligence services could in principle be required to provide information which corroborated Mr Mohamed’s claims of torture at the hands of the US authorities. It is the Court’s acceptance of the extension of the NP jurisdiction to these kinds of cases which has led to the reform proposed in the Bill. As explained below, however, the control principle as articulated by the Government in this case provides no justification whatsoever for ousting the NP jurisdiction altogether in this Bill. Disclosure in Mr Mohamed’s case was requested for his US lawyers who had already been security-cleared by the US Government to get access to precisely this type of material. There was no attempt to disclose the information in the UK or US publicly, rather it was to be held within the secret ring of security-cleared US lawyers – accordingly not only was this argument nothing to do with the control principle, nor was it about potential danger to national security.

51. Ironically, while the NP application was accepted in theory, the domestic courts never actually ruled on the application and the material Mr Mohamed sought was passed to his security cleared lawyer in the US by the UK Government after the first judgment was handed down. In any event, both the Divisional Court and the Court of Appeal considered that the NP action did not, at any stage, threaten to undermine national security. Both judgments made it clear that the courts gave huge weight to the Government’s assessment of risk to national security. Further, while the NP application was accepted in principle, the Government’s claim for PII in relation to the material was ultimately upheld. In reaching this decision, both the Divisional Court and the Court of Appeal made clear the seriousness with which they regarded their residual discretion to decide whether or not an NP application should be granted. In particular they made clear that they gave significant weight to the Government’s assessment of risk to national security should the “control principle” be breached. In giving judgment in the case, the Lord Chief Justice observed

It is nevertheless accepted by and on behalf of the Foreign Secretary in this litigation that in our country, which is governed by the rule of law, upheld by an independent judiciary, the confidentiality principle is indeed subject to the clear limitation that the government and the intelligence services can never provide the country which provides intelligence with an unconditional

⁴⁷ *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, at para 45.

*guarantee that the confidentiality principle will never be set aside if the courts conclude that the interests of justice make it necessary and appropriate to do so. The acknowledgment that the control principle is qualified in this way is plainly correct, and it appears to be accepted that the same limitation on the control principle would apply in the USA.*⁴⁸

52. The secondary issue in the case which arose after the NP application fell away concerned seven paragraphs in the Divisional Court judgment which the Government argued the Court of Appeal should keep redacted. The redaction issue is significant both because it has been conflated with the issue of *Norwich Pharmacal* relief, and because the arguments and tactics deployed by the Government to keep this information out of the public domain were, it was ultimately revealed, motivated not by national security concerns but by the desire to cover up Government knowledge of torture perpetrated by US agents. The paragraphs that the Government sought to keep redacted for “national security” reasons described reports given to the UK authorities about the treatment of Mr Mohamed during his detention by the US authorities. As the judgment containing these paragraphs emanated from the original NP application and applied long-standing PII principles, the courts’ handling of this question is instructive to the question whether the NP jurisdiction itself must be ousted. In its judgment, the Court of Appeal:

- was clear that the previously redacted paragraphs should only be published after a detailed examination of where the public interest balance lay in relation to publication;
- was clear that no intelligence material, sources, secret surveillance techniques were contained in those paragraphs; and
- indicated that it would have accepted the Government’s argument that the paragraphs should remain redacted, were it not for the fact that the information had already been put into the public domain by a US Court.

53. The Binyam Mohamed litigation is – one would certainly hope – entirely exceptional. Central to the courts’ acceptance of the NP application was that the matter at issue concerned the abhorrent, medieval-style, torture that Mr Mohamed had sustained.⁴⁹ Secondly, the information contained in the material ultimately helped Mr Mohamed’s defence to criminal proceedings in the US which, if he had not been able to refute with evidence of torture, could have meant that he faced the death

⁴⁸ Ibid, at para 46.

⁴⁹ See the judgment of the Lord Chief Justice, *ibid*, at para 57.

penalty upon conviction. The Government argues that Binyam's case is a "*damaging form of legal tourism*"⁵⁰ which will force the Government to release secret intelligence into the public domain if their application for PII fails. However as set out above, there was never an application for *public* disclosure of this material, rather the material was intended only for Mr Mohamed's security-cleared US lawyers. Additionally, as a matter of principle, the phrase 'legal tourism' fails to recognise that excluding this jurisdiction will prevent victims of State wrongdoing of which our Government had knowledge from defending themselves or gaining redress. Practically, regarding the Government's national security concerns, there is also no evidence on which the Government is able to base its fear that the courts will depart from its demonstrated commitment to withholding information that will damage the important intelligence sharing relationship. Indeed, the Binyam Mohamed case shows it is not the courts which cannot be trusted to act in the public interest, but – at times - the Government itself.

The control principle

54. The Government's key argument for ousting the NP jurisdiction in this Bill was originally attempted in the Mohamed litigation itself: the control principle. The 'control principle' was described in the Green Paper in the following terms: "*If the trust of the UK's foreign 'liaison' partners is to be maintained, there should be no disclosure of the content or fact of the intelligence exchange with them without their consent. This is known as the control principle.*" The Government contends that "*if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly*". At the same time, however, the Government was also clear that "*there is no suggestion that key 'threat to life' information would not be shared*".⁵¹ This admission is significant given past suggestions that the current legal framework could jeopardise intelligence sharing in such a way that puts lives at risk.

55. The suggestion then is that the law is changed so that, in future, evidence of unlawful activity (such as rendition and torture) by a foreign power (in which the UK Government may well be complicit or of which it has knowledge) is not put in the public domain, in circumstances where the relevant information emanates from foreign intelligence sources, even if a court would find there is pressing public interest in disclosing the material. This reform will make the control principle

⁵⁰ See the letter of the Lord Chancellor regarding the Justice and Security Bill, May 2012.

⁵¹ See Paragraph 1.22 of the Green Paper, *ibid*.

absolute. In future, individuals like Binyam Mohamed will not be able to seek justice in British courts. As contemplated by the Lord Chief Justice in that case, it is hard to conceive of a clearer case for the disapplication of the control principle in a judgment where, should it be applied,

*would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law.*⁵²

56. We believe that the Government might well be overstating the extent to which intelligence sharing relationships are threatened by existing legal arrangements. Realistically, there is no possibility that sources, techniques, or intelligence material will be put into the public domain since the courts already take great care to ensure that any disclosure will not harm the public interest. In any event, the proposal of In any event ousting the jurisdiction of the court to consider foreign intelligence material in order to reassure foreign States that they will not face embarrassing revelations of wrongdoing in British courts cannot be entertained. It would effectively put the intelligence community above the law, reversing the accountability reforms of the past few decades by granting international diplomacy greater protection than universal rights and freedoms. Given that a NP order will only ever be considered where there is an arguable case of wrongdoing by another State, the granting of absolute secrecy by ousting the NP jurisdiction is tantamount to impunity and will do little to encourage better operational practices in the intelligence community.

Oversight of the Intelligence Services Committee (Part 1 of the Bill)

57. Part 1 of the Bill proposes changes to the non-judicial aspects of the scrutiny of Government activity concerned with national security. Official non-judicial oversight in this context is primarily undertaken by the Intelligence and Security Committee (ISC), established by the *Intelligence Services Act 1994*, and the Offices of the Intelligence Services Commissioner and Interception of Communications Commissioner.

58. We have long-standing concerns about the level of scrutiny provided by the ISC and firmly believes it must be comprehensively reformed if it is to provide

⁵² At para 57.

effective oversight of our Security and Intelligence Services. To date the Committee has consistently, and sometimes very publicly, failed in its duty to provide effective scrutiny of the Agencies. The ease with which the ISC has been misled and its failure to challenge information put before it by the agencies is of serious concern. For example, in a report published in 2009, the Joint Committee on Human Rights was markedly critical of the ISC, noting that its limitations were exposed by its handling of the case of former British Guantanamo detainee Binyam Mohamed *“in which the Security Service’s account of his treatment is presented apparently without challenge and relevant extracts of the Director General of the Security Service’s oral evidence are so heavily redacted as to make them incomprehensible”*.⁵³ Concerns have also been expressed about the extent to which the operation of the Committee is obscured by non-disclosure. While we recognises that some sensitive information cannot be put in the public domain, the level of redaction, as the JCHR has noted, is sometimes so great that *“it can be difficult to follow the Committee’s work and to understand its reports”*.⁵⁴ The internal workings of the Committee therefore remain largely obscure. We believe the proposals in this bill to amend the way that the Committee and Commissioners operate will do little to remedy these serious failings.

Proposals in the Bill

59. Clause 1 proposes structural amendments to the make up of the Intelligence and Security Committee, which is to consist of nine non-Ministerial members from both Houses of Parliament. Committee members are to be appointed by the House of Parliament after being nominated by the Prime Minister in consultation with the Leader of the Opposition. This is a reversal of the current appointments process, whereby the Prime Minister appoints ISC members after considering nominations from Parliament.

60. Clause 2 sets out the main functions of the ISC, which are to examine or otherwise oversee the expenditure, administration, policy and operations of the Security Service, Secret Intelligence Service and the Government Communications Headquarters. The ISC is also able to examine or otherwise oversee any other Government activities related to intelligence or security matters set out in a memorandum of understanding, which is to be agreed by the Prime Minister and the ISC and which must be published and laid before Parliament. This is similar to the

⁵³ *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR, Session 2008-2009, at para 60.

⁵⁴ *Allegations of UK Complicity in Torture*, *ibid*, at para 58.

current ISC remit, with the exception of the addition of review of *operations* and the potential for new matters to be considered under the memorandum of understanding, although the current Committee has in practice already expanded its remit to consider intelligence-related aspects of Cabinet office functions.

61. Clause 3 imposes a requirement on the ISC to make an annual report to Parliament on the discharge of its functions. Reporting requirements already exist, but the Committee reports to the Prime Minister who then reports to Parliament. Similarly to current arrangements the Prime Minister can exclude from that report, in consultation with the ISC, any matters considered prejudicial to the continued discharge of the functions of the security and intelligence services. If any matters are excluded the ISC may make a private report to the Prime Minister on those excluded matters.

62. As under the framework, Schedule 1 sets out that the Committee is to determine its own procedure (para 1). Paragraph 3 of the Schedule sets out provisions regarding the Committee's access to information, which are again similar to the current procedural framework. If the ISC requires the heads of the intelligence and security agencies to disclose information then they must do so, however the Secretary of State may decide that the information may not be disclosed to the Committee. Similarly if the ISC asks a Government department to disclose information, the department must do so unless the Minister determines that information cannot be disclosed. The Minister may refuse disclosure where it would not be in the interests of national security, or where it is 'sensitive information'. Sensitive information is defined in paragraph 4 to include sources of information or operational methods available to the agencies, information about particular operations or information provided by an overseas agency which has not consented to the disclosure of the information. The Minister may also refuse disclosure of information which he would not disclose to any other House of Commons select Committee on the ground that he considers it not proper to do so. The latter refusal need not be limited to national security.

63. Clause 5 provides for additional functions of the Intelligence Services Commissioner amending the *Regulation of Investigatory Powers Act 2000*. A new section 59A would provide for the Commissioner to keep under review, when so directed by the Prime Minister, the carrying out of any function of the intelligence service, head of an intelligence service or any part of Her Majesty's forces', or of the

Ministry of Defence's, engagement in intelligence activities. The Commissioner himself may require the direction to be made. Clause 5(4) provides an example of a direction which the Prime Minister could make under this clause: to keep under review the implementation or effectiveness of policies of the head of an intelligence service regarding carrying out of any of the service functions. This direction must be made public, unless it falls within a broad category of exemptions – which arguably will encompass all types of directions made under this clause – because it would be prejudicial to national security, the prevention or detection of serious crime, the economic well-being of the UK, or the working of any public authority whose activities are subject to review by the Commissioner.

Continued lack of effective scrutiny

64. While we welcome the attempt made to grapple with the obvious weaknesses in the ISC framework, these proposals do not provide the comprehensive reform needed. At best, they provide marginal strengthening of the ISC's scrutiny role, but the changes will do little to rectify serious defects in the oversight of the security and intelligence agencies. Crucially, ultimate control over appointments, what is reported and published to Parliament remains with the Prime Minister. Similarly, a veto over what information is provided by the agencies and Government departments to the Committee rests with the Minister and Secretary. These reforms fail to comprehensively address the Joint Committee of Human Rights' conclusion that *"the missing element, which the ISC has failed to provide, is proper ministerial accountability to Parliament for the activities of the Security Services"*.⁵⁵

65. As a bare minimum the ISC should have the status of a parliamentary committee, answerable solely to Parliament rather than to an executive in relation to which it is supposed to act as an effective check. It is also critically important for the real and perceived legitimacy of the ISC that concrete measures are put in place to ensure that evidence sessions take place in public, save where genuine issues of national security arise. We are disappointed that there has been no substantial attempt to deal with executive control over decisions about reporting and publication of ISC materials – a body capable of effective scrutiny must be in a position to take its own decisions on reporting and publication.

⁵⁵ *Allegations of UK Complicity in Torture*, *ibid.*

66. Further, an effective ISC must be appropriately funded and staffed with independent experts able to undertake detailed forensic investigations. The ISC has been critiqued, not just on the basis of its appointment procedures, but also in light of the fact it is staffed by Government employees.⁵⁶ We support the conclusions reached by the JCHR to the extent they conclude that an effective and robust ISC must have an independent secretariat, including independent legal advice.⁵⁷ An effective ISC should have strengthened powers not simply to require the production of information, but also to compel the attendance of witnesses. Whilst none of these additional protections will offer anything approaching the level of scrutiny provided by our judicial institutions, they will help to create a Committee which plays a valuable subsidiary role in securing Parliamentary scrutiny of the operation of Government functions branded as matters of national security.

⁵⁶ *Allegations of UK Complicity in Torture*, 23rd Report of the JCHR session 2008-2009, paragraph 58.

⁵⁷ *Ibid*, paragraph 66.