Response to Ministry of Justice Green Paper
Justice and Security

Executive summary

1. Government wishes to introduce sensitive material, obtained by its security and intelligence services, in civil cases through Closed Material Proceedings (CMPs). A CMP would be triggered in cases where the public disclosure of such sensitive material would be "likely to result in harm to the public interest". If implemented the Commission is of the view that these proposals would fail to satisfy the UK’s human rights obligations under Article 6 ECHR and Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) (the right to a fair trial). The Commission’s response states:

- Public interest immunity is sufficient for protecting the public interest in civil cases.

- The use of closed material procedures should not be broadened any further.

- The special advocate arrangements should be revised for existing closed material procedures only. The changes should ensure that the 'suspect' is aware of the evidence against him and be able to challenge it.

2. Government also proposes introducing CMPs in inquest proceedings. The Commission states that CMPs are not suitable for inquests and will fail to satisfy the Article 2 ECHR requirement for an effective investigation in which there is sufficient involvement of the next-of-kin and public scrutiny to ensure accountability.

3. The Commission advises that human rights compliance requires that decisions around disclosure of evidence should
be left to judicial control not given to the executive, which is inherently an interested party if not the defendant in civil cases.

4. The Commission contends that Government has failed to put forward sufficient evidence as to why the current system of public interest immunity is not working sufficiently and how its proposals are compatible with its human rights obligations.

5. The Commission states that Government’s proposals in relation to reform of the oversight and scrutiny of intelligence and security services do not go far enough as to be truly rigorous and independent of Government. In any case, even radical reform of existing oversight and scrutiny arrangements could not be compensation for waning the right to challenge Government through the courts.
Consultation response

1. The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function the following statutory advice is submitted to the Ministry of Justice on the Justice and Security Green Paper.

2. The Commission welcomes this opportunity to respond to the consultation on the Justice and Security Green Paper. The consultation paper outlines a number of far-reaching proposals in the context of civil proceedings. These include civil proceedings instigated against the Government, the inquest system and proceedings overseas in which Government might be required to disclose information.

3. To summarise, Government wishes to introduce sensitive material, obtained by its security and intelligence services, in civil cases through Closed Material Proceedings (CMPs). A CMP would be triggered in cases where the public disclosure of such sensitive material would be “likely to result in harm to the public interest”. In a CMP the ‘other side’ (most likely to be the claimant) would be represented by a special advocate. This, it is claimed, would protect the sensitive material as well as the interests of a fair trial and open justice. The following proceedings are identified as appropriate to be heard in part or full in closed session:

   - civil cases in which government is the defendant in order to avoid large out of court payments to the claimant or have the case thrown out because Government cannot disclose all the relevant material
   - inquests.

4. In addition the Green Paper proposes ways in which sensitive material could be withheld in proceedings when Government believes disclosure is not in the public interest. It explores:

   - how to safeguard sensitive material held by the UK but acquired and shared by foreign governments
   - how to avoid sharing sensitive information required by someone fighting their case overseas.

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1 Northern Ireland Act 1998, s.69 (1).
5. Views are also sought on how to modernise/reform parliamentary and independent scrutiny of security and intelligence services.

**Human rights standards**

6. As indicated in the Green Paper, the UK is obliged to hold trial arrangements in both civil and criminal cases that meet the requirements of Article 6 ECHR and Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR). However, civil cases are also a means to seeking remedy and redress for alleged human rights violations. Government proposals therefore also engage, for example, Article 13 ECHR\(^2\), Article 2 ICCPR and Article 2 of the UN Convention Against Torture under which the UK is obliged to have in place competent authorities for the determination of rights violations. Indeed, the impetus behind the proposals, and cited repeatedly in the Green Paper, are the cases of *Al-Rawi*\(^3\), *Binyam Mohamed* and others who alleged that British agents were complicit in their torture at Guantanamo Bay. While no liability has been accepted by the UK Government the very serious nature of these civil cases must not be lost sight of. A human rights compliant *process* is of fundamental importance when its *outcome* will determine the redress and reparation for any individual claiming to be a victim of human rights violations.

7. The proposals for changes to the inquest system engage the right to life under Article 2 ECHR and Article 6 ICCPR. The duty to protect the right to life also involves a duty to effectively investigate when life has been taken by agents of the State. Inquests are one way in which the UK Government has sought to meet that obligation.

8. From the outset, the Commission is alarmed at the scope of most of the proposals. If implemented they would constitute a radical departure from the current system of adversarial trials and inquests in a manner that could only represent retrogression in human rights terms. The Green Paper repeatedly cites the cases of *Al-Rawi* and *Binyam Mohamed* by way of illustrating that the current arrangements are unsatisfactory. The Commission contends, however, that these cases do not indicate that current arrangements fail to protect, or risk the protection of, the public interest. They have caused the UK Government embarrassment. They have also

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\(^2\) Although not given domestic effect in the *Human Rights Act 1998*.  
\(^3\) *Al Rawi v Security Service* [2011] UKSC 34.
highlighted the inadequacy of the oversight and scrutiny mechanisms for the security and intelligence services. However, these are not acceptable reasons for restricting the right to a fair trial. Government has itself conceded that “there are no other common law jurisdictions in which closed material procedures are available in the full range of civil proceedings other than for the purposes of determining disclosure”. Yet the Green Paper fails to provide an adequate evidence base for such sweeping changes to the current system. A more detailed response to the consultation questions is now provided.

**CMPs and the requirements of a fair trial**

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

9. Evolving jurisprudence of the European Court of Human Rights has established that CMPs do not of themselves violate the right to a fair trial. The Green Paper cites a number of cases in this regard, including *Kennedy v UK*; *Chahal v UK*; and; *A and others v UK.* However, this is not the whole picture in relation to CMPs and fair trial requirements under Article 6 ECHR and indeed the procedural requirements of Article 5 (4) ECHR (the right to challenge deprivation of liberty). In *Kennedy v UK* the court held that it was necessary for legitimate purposes not to disclose all the relevant information to the applicant in making a complaint to the Investigatory Powers Tribunal. In *Chahal v UK* the court held that an internal Home Office Advisory Panel did not satisfy the requirement of Convention rights but that it was possible to employ techniques “which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice”. In *A and others v UK* the judgment did indicate that the Special Immigration Appeals Commission of itself did not constitute a violation of Article 5 (4) or Article 6. However, after consideration of the way in which SIAC operated in respect of the some of the applicants a violation of Article 5 (4) was ruled.

10. The UN Human Rights Committee called on the UK Government, in 2008, to review the closed material procedure

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6 *Chahal v UK* (1997) 23 EHRR 413.
whereby control orders were imposed: “in particular, it [the UK] should ensure that the judicial procedure whereby the imposition of a control order can be challenged complies with the principle of equality of arms, which requires access by the concerned person and the legal counsel of his own choice to the evidence on which the control order is made”.8

11. What the Green Paper fails to point out then is that while CMPs can in theory satisfy the requirements of ECHR their operation have also in some cases constituted a violation of ECHR and related rights.

12. The Commission is of the view that the cases for which CMPs are now proposed along with the procedures for triggering and operationalising them fail to satisfy the UK’s human rights obligations. Government’s proposals seek to introduce CMPs for protection of the “public interest” a concept which is not defined satisfactorily in the document. Strasbourg jurisprudence states “There may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person”.9 The Glossary of Terms in the Green Paper states; “there are different aspects of the public interest, such as the public interest that justice should be done and should be seen to be done in: national security; international relations; the detection and prevention of crime; and the maintenance of the confidentiality of police informers’ identities, for example”. These are therefore just some examples and moreover examples not grounded in human rights law and its jurisprudence. The suggestion is that it would be for Government to decide what the public interest is and when protecting it requires a CMP.

13. Judicial scrutiny of the executive decision is proposed in two ways. One, Government’s decision to trigger a CMP could be challenged by the claimant under the principles of judicial review. Two, once the CMP is triggered a judge would be involved in deciding which of the sensitive material can be disclosed to the claimant and which should be dealt with in closed session. Judicial involvement of this nature is not a satisfactory balance to the executive decision. Under judicial review principles Government’s decision to trigger a CMP could be challenged as unfair, irrational or disproportionate,

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8 CCPR/GBR/CO/6(HRC) 2008.
9 Kennedy v UK; A and others v UK.
however, this is not a human rights test. In any case, there could be no meaningful challenge of Government’s decision without sight of the evidence being presented by Government.

14. Once a CMP has been triggered, the claimant is excluded from the proceedings. The judge has sight of the material and can decide that some or perhaps all of the material should be disclosed to the claimant. The claimant is represented by a special advocate at this stage. But once the special advocate has seen the sensitive material he/she can have no contact with the ‘client’ without the permission of the Secretary of State. The special advocate cannot relate any information to the claimant regarding the evidence he/she has seen and therefore the claimant cannot dispute it. The evidence therefore is untested. A crucial point made by Lord Kerr in the Supreme Court’s decision in *Al-Rawi* was that it is a fallacy to suggest that putting more evidence before the judge leads to better justice: “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, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead”.10 The introduction of CMPs in civil cases equally mean that evidence is unchallenged, potentially misleading and that justice is not served.

15. In the civil cases in which Government seeks to introduce CMPs, Government is itself the respondent. It will decide whether information acquired by its agencies is relevant to a civil case, it will decide if it is going to use this information and then decide that the claimant cannot have access to it. This process fails to satisfy the requirements of a fair trial which demands equality of arms between the parties concerned. Moreover, moving decisions around disclosure from judicial to executive control carries a very real risk that political embarrassment becomes conflated or confused with the public interest without any meaningful mitigation of that risk.

16. Government also states that CMPs are needed in civil proceedings because without them there is a risk that some cases simply cannot be heard. *Carnduff v Rock*11 is cited as an example whereby the nature of the evidence was such that without the option of a CMP the Court of Appeal had no option

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11 *Carnduff v Rock and another* [2001] EWCA Cov 680.
but to strike out the case. Disclosing the evidence in open session was not considered consistent with the public interest.

17. However, on probing from the Joint Committee on Human Rights, Government has been unable to provide any other such example.

18. The Commission’s response to the first consultation question therefore is that in order to support and enhance procedural fairness the use of CMPs should not be broadened any further. Government has simply not put forward sufficient evidence as to why they are needed in this context, why the current system of public interest immunity is not working sufficiently and how its proposals are compatible with its human rights obligations.

**Should any of the proposals for handling of sensitive inquests be applied to inquests in Northern Ireland?**

19. The Green Paper acknowledges that the coronial system is devolved but nonetheless seeks views on whether the proposals in relation to England and Wales be extended to Northern Ireland. As stated above the proposals in relation to civil cases are a misguided response to the judgement in *Al-Rawi*. However, the Green Paper goes further in suggesting that CMPs could be used in inquest proceedings also. With respect to the Troubles, inquests are part of what has become known in Northern Ireland as “dealing with the past” as well as meeting a legal requirement under Article 2 ECHR and Article 6 ICCPR. The consultation question therefore is particularly pertinent for Northern Ireland and transitional justice.

20. The 2009 report of the Consultative Group on the Past is cited in the Green Paper: “the outstanding inquests raise important questions and... some families have fought for many years through the courts to establish their rights in these proceedings”. The suggestion being that the introduction of CMPs in inquests would help families “establish their rights” and “may help to increase the confidence of the families involved that all relevant information could be considered by an independent figure rather than being excluded from the process entirely under public interest immunity”.

21. There have indeed been serious problems in the legacy inquests and most notably Government delays in disclosing information to the Coroner. Indeed Government’s execution of the judgement of the European Court of Human Rights in
Jordan v UK\textsuperscript{12} is under enhanced supervision by the Council of Europe’s Committee of Ministers. However, far from meeting the requirements of the judgment in Jordan let alone enhancing rights the proposals in the Green Paper can only, in the Commission’s view, represent a retrogressive step in terms of Article 2 compliance. The case of Jordan v UK ruled that an Article 2 compliant investigation/inquest requires that:

- the inquiry must be on the initiative of the state
- it must be independent
- it must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death
- it must be prompt and proceed with reasonable expedition
- it must be open to public scrutiny to a degree sufficient to ensure accountability, and
- the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

22. Subjecting families to security vetting and excluding them from part of the inquest proceedings, as is being proposed, will not meet the objectives of public scrutiny and sufficient involvement of next-of-kin. Moreover, a family member’s right to sufficient involvement in the inquiry is not conditional on their passing security vetting procedures imposed by the State whose actions are the subject of the inquest.

23. Government acknowledges that previous plans to exclude jurors and family members altogether from some inquests in the Coroners and Justice Bill were dismissed by Parliament. The current proposals suggest that instead of excluding jurors altogether it would be possible to subject them to some form of vetting before allowing them sight of the sensitive material. Currently, exceptional procedures are in place for Northern Ireland whereby defendants are denied a jury trial in certain circumstances. The Justice and Security (Northern Ireland) Act 2007 makes provision for non-jury trials on the basis that given the particular circumstances in Northern Ireland, in certain cases there is a risk that juries will return a ‘perverse’ verdict or be subject to intimidation by proscribed organizations. While expressing concerns on the specific wording of the Justice and Security (Northern Ireland) Act 2007 this Commission accepted that there was a need to

\textsuperscript{12} Jordan v UK (Application No 24746/94) 2001.
protect against both possibilities.\textsuperscript{13} In a stark departure from recognising the risk that jurors in criminal cases might face, Government is now proposing that jurors in inquests could have sight of sensitive material that the public, press and the deceased’s next-of-kin would not. No recognition is displayed of the pressure that jurors in these circumstances might be put under by proscribed organizations to reveal that information.

24. With respect to the proposals to security vet jurors there is a risk that certain political aspirations and their expression through legitimate and legal means would still not meet the security vetting requirements. The risk is that as a consequence of security vetting individuals are excluded because of their political views.

25. The proposals would only further add to the current delays and the perception that Government is being obstructive in attempts to bring the truth out in the public domain. In 2004 the UN Committee Against Torture expressed concern at the “investigations carried out by the State party into a number of deaths by lethal force arising between the entry into force of the Convention in 1988 and the Human Rights Act in 2000 which have failed to fully meet its international obligations”. It called on the UK to take “all practicable steps to review investigations of deaths by lethal force in Northern Ireland that have remained unsolved, in a manner, as expressed by representatives of the State party, “commanding the confidence of the wider community”\textsuperscript{14}

26. The Commission urges Government to disclose the necessary information to the current inquests, to address the outstanding concerns of the Council of Europe’s Committee of Ministers and the UN Committee Against Torture and to give serious consideration to the need for full public inquiries for some of the legacy deaths.\textsuperscript{15} These measures would satisfy many of the UK’s human rights obligations including “commanding confidence of the wider community”.

27. As with other measures in the Green Paper, there is simply no evidence to suggest the proposals would be a proportionate response to an existing problem. There are serious issues however, with the current approach to transitional justice and

\textsuperscript{14} CAT/C/CR/33/3, 2004.
the Commission uses this opportunity to, briefly, advise Government on that broader issue.

28. The Consultative Group on the Past, referred to above, undertook an extensive consultation exercise across Northern Ireland on a wide range of issues relating to the “Troubles” before reporting to Government in 2009. At the time of writing it is being reported that Government is to convene talks with political parties in Northern Ireland on transitional justice, taking account of the Group’s report. This Commission urges Government to use that opportunity to bring forward a human rights reflection across all stakeholders on transitional justice. The current fragmented approach is an anomaly for post-conflict societies across the world and has overall, led to unsatisfactory outcomes for victims and truth recovery. The Commission advises Government to reconsider the current proposals in relation to inquests and to draw on international best practice for appropriate transitional justice measures for Northern Ireland.16

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

29. There is a need to alter the current special advocate arrangements for those exceptional cases where a closed procedure is justified. This need was established in Secretary of State for the Home Department v AF.17 In that case involving a number of individuals that had been the subject of control orders following the use of CMPs, all nine Law Lords ruled that in order to meet the requirements of a fair trial the suspect had to be aware of the nature of the evidence against him and be able to challenge it. The CMP in that context therefore clearly did not meet the requirements of Article 6 ECHR. The Senior Law Lord, Lord Phillip, said “a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him”.18

30. While the Green Paper puts forward some possible changes to the special advocate arrangements these are unlikely to be sufficient in human rights terms. Simply offering the special


17 Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28.

18 Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28, para 63.
advocate more training in analysing sensitive material and/or creating a Chinese wall between Government counsel and those clearing the communication request within an Agency do not overcome the fundamental obstacle of the special advocate being unable to truly represent and receive instruction from the ‘client’ and therefore being able to challenge the evidence that Government will rely on to secure a judgement in its favour.

31. The Commission therefore advises Government to meet the requirements of AF for existing contexts in which CMPs are used but does not accept the case for broadening their use to civil proceedings and therefore modifying the special advocate arrangements in that context. The ruling in AF has led to what has now become known as the ‘gisting’ requirement. This leads Government to ask:

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

32. The Commission is of the view that under Article 6 ECHR and Article 14 ICCPR the presumption should always be in favour of the disclosure requirement. The Commission cannot envisage any cases where open disclosure could be ruled out before the case even commences. It is sufficient that the ‘gisting’ requirement be tested on a case-by-case basis. The Commission is alarmed at the suggestion that Government would seek to define in legislation legal cases which would limit the rights of the ‘other party’ from the outset and without any judicial scrutiny of the facts of the individual case. Government’s only justification for legislation of this nature is that it “would create a degree of predictability”. It then goes on to state that “it would of course still be possible for affected individuals to bring proceedings under the Human Rights Act 1998”. Convenience on the part of Government is not sufficient reason for enacting legislation that breaches fundamental human rights.

In civil cases where sensitive material is relevant and were closed material procedures are not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?
33. Again, the Green Paper fails to provide adequate evidence that public interest immunity is not sufficient for dealing with sensitive material in all civil proceedings. It cites one case, *Binyam Mohamed*, in which the Court of Appeal did not uphold the Foreign Secretary’s claim for public interest immunity. The fact the Government did not get the outcome it desired from the courts does not warrant changes to current arrangements. The Commission therefore agrees with Government’s conclusion that it does not propose to legislate for public interest immunity. However, the Commission restates its view that public interest immunity as it stands is itself sufficient in civil proceedings for dealing with sensitive material.

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

34. Currently civil applications can be made by a claimant to obtain the disclosure of information from a defendant who is associated with the arguable wrongdoing of a third party. These applications are known as Norwich Pharmacal applications. In order for the information to be disclosed under Norwich Pharmacal, the court will apply the following test:

- there must be arguable wrongdoing on the part of the third party
- the defendant must be mixed up in that arguable wrongdoing, even if innocently
- it must be necessary for the claimant to receive the information by making the Norwich Pharmacal application i.e. if the information can be obtained by another route the court may refuse to grant the order
- 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 it is to be strictly confined to the necessary information
- the court must be satisfied that it should exercise discretion to make the order sought.

35. By way of illustration, Norwich Pharmacal was relied on by *Binyam Mohamed* when he was challenging his detention in the US courts. The UK Court of Appeal in that Norwich Pharmacal application ruled that *in principle* the UK Government could be required to release a number of documents to Binyam.

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19 *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.
Mohamed which corroborated his claims of torture at the hands of US authorities. Ultimately, following a number of appeals involving public interest immunity, applications by the Secretary of State in the UK and in fact the release of some of the information by the US authorities themselves the information was not disclosed by the UK Government at that time. Binyam Mohamed was released by the US and a decision was made not to pursue criminal charges against him. No other cases are cited in the Green Paper in which Norwich Pharmacal applications have been made and in the Government’s view would have threatened national security.

36. However, the Green Paper provides an explanation of the ‘Control Principle’ by means of justifying why legislation is necessary that would limit the opportunity for applications under Norwich Pharmacal. Under the ‘Control Principle’ “it is essential that the originator of the material remains in control of its handling and dissemination. Only the originator can fully understand the sensitivities around the sourcing of the material and the potential for the sources, techniques and capabilities to be compromised by injudicious handling... 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’.

37. The legislation that Government sees benefits in introducing would bring an end to any Norwich Pharmacal application if Government raises an exemption that the information to be potentially disclosed is Agency-held or originated. It appears from the Green Paper that Government would not even have to claim that national security was at risk. If the potential disclosure under Norwich Pharmacal would in Government’s view cause damage to the public interest but was not Agency held or originated that would also bring an end to the court proceedings. Although in the latter situation the decision could be challenged by way of judicial review.

38. First, Government’s proposals go much further than satisfying the Control Principle. Government wishes to bypass the role of the courts simply if the information is Agency held or originated not only when it is originated overseas.

39. Second and more importantly, however, an essential element of the Norwich Pharmacal test is that there is claimed wrongdoing on the part of a third party and possibly it is the UK Government that is knowingly or unknowingly involved in
that wrongdoing. Government essentially pursues measures that will insulate it and others from attempts to establish that unlawful acts have been committed. This has broad and deep implications for the UK and those whose human rights it has the duty to protect. Had legislation of this nature been in place at the time of Binyam Mohamed’s detention in the US, his legal team would have had no avenue to seek disclosure of what they believed to be vital information held by the UK. Government is attempting to place obstacles in the way of those attempting to challenge and seek redress for human rights abuses as serious as the unlawful deprivation of liberty and torture.

40. Third, as with much of the Green Paper, Government simply has not made an adequate case for why existing arrangements are not sufficient. The Court of Appeals ruling in the Foreign Secretary’s public interest immunity application with respect to Binyam Mohamed’s case was not the one that Government sought. However, the court was clear on the weight it gave to Government’s claims regarding national security. Lord Neuberger stated in his judgment that “any judge must accord very substantial weight to the Foreign Secretary’s view as to the existence and extent of the risk to national security”.20

41. Much of what is contained in this Green Paper has been prompted by the attempts of Binyam Mohamed to receive information that would help fight his case against unlawful detention and torture and related civil cases brought by Binyam Mohamed, Al-Rawi and others against the UK for its alleged complicity in that torture. Therefore, Government must not lose sight of precisely what was at stake in these cases. The Lord Chief Justice stated, “it is hard to conceive of a clearer case for it’s [the control principle] disapplication than a judgment in which its application 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 itself”.21

42. There is evidence to suggest that Government’s attempts to use national security as grounds for withholding information in

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Trial proceedings have been disingenuous. For example in the case of *R (Al Sweady) v Secretary of State for Defence*, involving allegations of mistreatment and murder of a number of Iraqis a public interest immunity certificate was signed by a Ministry of Defence Minister. This was on the basis that disclosure would not be in the public interest on national security grounds. It emerged however, that a substantial number of the documents for which the public interest immunity certificate was signed had already been disclosed in other court proceedings and were therefore already in the public domain. In its judgment the court concluded, “There have thus been both systemic and individual failures within the MOD on a substantial scale in this case. Put bluntly, the left hand did not know what the right hand had done, or was doing, and even when it did, nothing was done to seek to correct the situation, and in particular to inform the court, until very late indeed in the day”. The judgment went as far as to state that it was “misled into making a number of rulings on a false basis, all of which were wrong and should never have been made”.

43. Given the threats to the administration of justice that have been highlighted above, in civil proceedings, whether seeking redress for the UK’s complicity in torture or any other human rights abuse, it is rightly the courts, not the executive who should make decisions around disclosure. The executive as an interested party, indeed as the defendant, in the proceedings cannot be the appropriate authority.

**Oversight and scrutiny**

44. The work of the intelligence and security services is vital to the protection of the UK’s national security. However, the clandestine nature of their activities also bring with them grave risk for human rights violations. Hence the need for robust oversight mechanisms. This Commission has previously expressed concern at the existing oversight arrangements with respect to the security and intelligence services. It therefore welcomes the acknowledgement in this Green Paper of the need to reform those arrangements in order to improve their effectiveness and credibility.

45. It is regrettable however, that the Green Paper does not mention the outstanding concerns and recommendations of the

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23 See NIHRC submission to "Home Office consultation on Possible Measures for Inclusion in a Future Counter Terrorism Bill".
Joint Committee on Human rights with respect to ministerial accountability for security and intelligence matters. In its report on Allegations of UK Complicity in Torture the current arrangements were described as “woefully deficient”. It went on to conclude that “a disturbing number of credible allegations of UK complicity in torture have emerged, and none of the existing mechanisms have come anywhere close to answering the questions raised or ensuring that the relevant information is placed in the public domain”. With respect to the Intelligence and Security Committee the report stated that it had failed to provide proper ministerial accountability. The Commission shares the JCHR’s concerns with the Intelligence and Security Committee, the Intelligence Services Commissioner and the Interception of Communications Commissioner as well as the Investigatory Powers Tribunal.

46. The Commission therefore refers Government to the UN “Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight”. The report outlines three principles that must be followed for effective oversight of intelligence agencies:

- Intelligence services should be overseen by a combination of internal, executive, parliamentary, judicial and specialized oversight institutions whose mandate and powers are based on publicly available law. At least one of these institutions should be civilian. The combined remit of the oversight institutions should cover all aspects of the work of intelligence services.

- Oversight institutions should have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to the information, officials and installations necessary to fulfill their mandates.

- Oversight institutions should take all necessary measures to protect classified information and personal data to which they have access.

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25 Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin.
Unfortunately the proposals in the Green Paper fail to satisfy the spirit of the principles outlined above. Government remains uncommitted to extending the remit of the Intelligence and Security Committee to look at operational activities. It still accords the Prime Minister undue control over the membership of the Intelligence and Security Committee and appears not to be minded to give it the status of a Parliamentary Committee with full powers of oversight of the agencies.

Overall, even if there were radical reform of the existing mechanisms that would not be an adequate replacement of the right of individuals to challenge wrongdoing through an open, adversarial system of trial. A more robust system of oversight cannot be compensation for such serious limitations in civil proceedings. Yet this appears to be the message of the Green Paper: reforms to oversight in exchange for the waning of the right to challenge Government through the courts.