

RESPONSE TO THE JUSTICE AND SECURITY GREEN PAPER

Public Interest Lawyers (“PIL”) have extensive experience of acting for claimants in cases concerning issues of foreign and defence policy, national security and intelligence gathering. Notable cases include: *Al-Jedda (SIAC)* SC/66/2008; *Zatuliveter (SIAC)* SC/103/2010; *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin); *R (Al-Sweady & ors) v Secretary of State for Defence* [2009] EWHC (Admin); *R (Ali Zaki Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334; and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587 and others. These cases have included both Public Interest Immunity (“PII”) and closed material procedures. Our experience in these cases informs our response to the Green Paper which follows.

1. Proposal – Extension of Closed Material Procedures

1.1 Current Position

The admissibility of sensitive material – material that might cause damage to the public interest were it to be disclosed – is currently, in judicial review and civil cases, determined by a Court taking into account Public Interest Immunity (PII) principles. The Court reviews the material and decides whether the information should be admissible in the case as evidence, weighing the public interest in disclosure against the potential damage that might be caused by disclosure.

In addition, since 1997, it has been possible in prescribed circumstances for sensitive material to be heard in closed court – under Closed Material Procedures (CMPs) - for example in the Special Immigration Appeals Commission (SIAC) or in determining the imposition of a control order. CMPs see the relevant Government department requesting consideration of sensitive material in a closed Court. The other party to the proceedings is not allowed access to the Court during these proceedings and his/her interests are represented by an independent, security cleared Special Advocate. This Special Advocate however, is not allowed to discuss the details of the material considered during CMPs with the instructing client or his/her legal team. In practice the Special Advocate’s communications to the litigant’s legal team are extremely constrained and often non-existent. The party may receive a ‘gist’ of sensitive material but, in effect, he/she is left unaware of the details of the evidence being considered.

1.2 Government Proposal

The Government proposes to extend the circumstances in which CMPs can operate to further civil proceedings.

1.3 The Government Argument for Extending Use of CMPs

i.) Enhancing Procedural Fairness

The Government argues:

...it is fairer in terms of outcome to seek to include relevant material rather than to exclude it from consideration altogether and ... the public interest is best served by enabling as many such cases as possible to be determined by the courts.¹

The Government argue that PII considerations mean that material is often considered too sensitive to be disclosed. This may render a central part of a case non justiciable and, in extreme cases, may mean the case cannot proceed at all (as in *Carnduff v Rock* [2001] EWCA Civ 680). The Government argue it is fairer for a case to be heard in closed Court than not at all and that a 'judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material'.

It is unusual, if not unprecedented, for a Government to be concerned to ensure the justiciability of its actions. This apparent concern is at a variance with its litigation position taken in such cases – Treasury Counsel is never slow to raise the 'keep out' sign of justiciability – and other evidence of Government attempts to forestall such litigation whether by fair means or foul.² It is necessary therefore to scrutinize this proposal very carefully.

Taking the proposal at face value, the Government's justification is based upon the assumption that 'the contexts in which CMPs are already used have proved that they are capable of delivering procedural fairness.'³ This is not accepted.

ii.) Inadequacy of Current Legal Procedures in the Changing Justice and Security Landscape

When considering the possibility of enshrining PII principles in legislation, the Government admits:

Examples of cases in which the courts do not uphold the Government's claim to PII are few and the courts have stated that they will continue to give weight to Ministerial views on the damage to national security that would result from disclosure. However, the fact of these cases, together with others where there has been a very real risk of a certificate not being upheld, mean that the Government and its partners have less certainty that they will be able to continue to protect material in court.⁴

The implication is that the security afforded to the Government by PII procedures does not adequately protect its national and international interests.⁵ The Government makes reference to the *Binyam Mohamed*⁶ case in which the possibility of disclosing sensitive material about the torture of a Guantanamo detainee at the hands of US agencies apparently caused considerable diplomatic difficulties between the UK and US authorities. Paragraph 1.22 states:

¹ UK Justice and Security Green Paper, p 21

² See PIL case *R (Evans) v Secretary of State for Justice* [2011] EWHC 1146 (Admin), in which the Divisional Court quashed changes to the legal aid rules prompted by MoD concerns about judicial review. Laws LJ stated (para 25): "For the State to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government ... frankly inimical to the rule of law."

³ UK Justice and Security Green Paper, p 21

⁴ UK Justice and Security Green Paper, p 33

⁵ Also see the discussion of the role of the Security Services in 'Appendix A: Secret intelligence, diplomacy and protecting the public' of the Green Paper from p 49

⁶ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

The Government has received clear signals that if we are unable to safeguard material shared by foreign partners [and not see it disclosed in Court], then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected.⁷

1.4 PIL's Concerns

PIL remain firmly opposed to the current use of CMPs in SIAC and in relation to control orders, let alone their proposed extension to other civil proceedings. PIL refute the Government's un evidenced assertion that CMPs are 'capable of delivering procedural fairness' and that intelligence is being compromised by recent litigation. PIL have first hand experience of representing clients in CMPs⁸ and, with a number of other commentators⁹, consider the procedures to be systematically unjust; providing the Government with an unfair advantage over other parties to proceedings in such a way as to undermine fundamental legal rights such as the right to see and challenge all the evidence massed against you as well as the principle that justice should take place in public. Ultimately, the right to a fair trial is compromised and as a result, the right to be free of torture, to liberty and to life are also diminished. These are fundamental rights and supposedly British values that are threatened by this proposal.

In contrast, PIL consider the proposed extension of CMPs to be an attempt by this Government to further insulate itself from judicial scrutiny of executive decisions.

At the outset, PIL would like to make clear their objections to the use of CMPs in **any** circumstances. As Lord Dyson suggested in *R (Al Rawi and ors) v The Security Service* [2011] UKSC 34 (at para 14) '...unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and natural justice principles'.¹⁰ As CMPs became more widespread following their inception in 1997, the Joint Committee of Human Rights reviewed the increasing use of Special Advocates in 2007. Their concluding remarks are telling:

After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening...has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.¹¹

⁷ UK Justice and Security Green Paper, p 8

⁸ PIL have recently represented Ekaterina Zatuliveter in proceedings before SIAC – see our press release at http://www.publicinterestlawyers.co.uk/news_details.php?id=198 – and are representing another client in deportation proceedings - *R (Al-Jedda) v Secretary of State for the Home Department* [2010] EWCA Civ 212

⁹ See, for example; <http://www.guardian.co.uk/law/2011/nov/16/justice-and-security-green-paper> and also note concerns raised by a Special Advocate who has worked within CMPs - <http://ukhumanrightsblog.com/2011/12/01/should-more-trials-be-held-in-secret-part-2-a-special-advocates-comment/>

¹⁰ The Supreme Court's concerns about CMPs are expressed throughout the *Al-Rawi* judgment and, although the appeal turned on whether or not the Court had the power to implement a procedure similar to CMPs itself, it is clear that the very idea of CMPs was one with which their Lordships were extremely uncomfortable.

¹¹ Joint Committee on Human Rights' Nineteenth Report: 'Counter-Terrorism Policy and Human Rights: 28 days, Intercept and Post-charge Questioning'; HL Paper 157 HC 394; p55

Some five years later, PIL note that the Special Advocates interviewed for the Joint Committee's reports appear to retain the fears expressed above and are concerned at proposed extensions to the procedures. Angus McCullough QC acted as a Special Advocate in the Ekaterina Zatuliveter proceedings to which PIL was a party and he has recently expressed his concern about extending the arenas in which CMPs can operate:

CMPs represent a departure from the fundamental principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own. They also undermine the principle that public justice should be dispensed in public...

...I would urge all those interested in the fairness of judicial procedures in this country to review, and consider responding to, the Green Paper.¹²

When CMPs cause disquiet even amongst those working within the system, careful consideration must be given to any proposed extension. For the avoidance of doubt, PIL consider CMPs to be flawed for the following reasons:

- i.) They prevent the other party to proceedings from knowing all the evidence against him / her as proceedings take place in a closed court.
- ii.) They prevent adequate challenge to the evidence adduced by the Government by only allowing for representation by a Special Advocate who cannot take full instructions from the client. Proceedings are thus unjustly weighted in the favour of the executive seriously undermining the principle of 'equality of arms'.
- iii.) CMPs make litigation more difficult for claimants. Quite apart from the problem of not being able to see key material, claimant solicitors have two sets of counsel to instruct, one set of which (the Special Advocates) cannot talk back to them. This amounts to a significant litigation disadvantage. It is like fielding a football team the defensive half of which can't cross the halfway line or even see where the attacking half are, and the attacking half can't talk back to their team mates or the manager. Of course, the Government side, being security cleared, have no such disadvantage.
- iv.) The sensitive material considered in CMPs is likely to be intelligence based evidence and, therefore, unlikely to conform with the usual evidential standards expected in UK Courts (e.g. it could be hearsay from an unidentified source or from an unreliable third party agency). Whilst such evidence should therefore be the subject of rigorous challenge, CMPs prevent such challenge.
- v.) The standard of proof in CMPs in which PIL has been involved has been changeable. SIAC proceedings appear to lower the standard of proof at will¹³ and the standard of proof in the imposition of control orders is that of 'reasonable suspicion'. Given the procedural weaknesses of CMPs, adopting a standard of proof below the usual civil and criminal standards appears to be a further worrying dilution of safeguards afforded to defendants.

¹² <http://ukhumanrightsblog.com/2011/12/01/should-more-trials-be-held-in-secret-part-2-a-special-advocates-comment/>

¹³ See proceedings in *Zatuliveter* (SIAC) SC/103/2010

Public Interest Lawyers

- vi.) If CMPs are allowed to operate on the basis of unchallenged evidence (and potentially with a lower burden of proof), the efficacy of the very important work undertaken by the Government and its Security Services is not challenged. Mistakes in procedure and policy are not highlighted allowing the Government to forge ahead with ill-informed and misguided approaches to national security rather than adopting and developing new and better practices.
- vii.) CMPs operate so as to exclude, not only other parties to proceedings, but also the wider public from the justice system. The integrity of UK governance remains outside of the purview of the British public and the effect is to insulate Government policy from the national interest it seeks to protect. As recent litigation such as the *Binyam Mohamed* proceedings, as well as the litigation in which PIL has been involved that lead to the Baha Mousa and Al-Sweady inquiries, demonstrates, there is a very real public interest in understanding and being able to monitor decisions made by the UK executive both at home and abroad. The risk is that a British public, already concerned by recent revelations about Government domestic and foreign policy, becomes further disillusioned by attempts to hold increasing numbers of important legal cases in closed Courts.
- viii.) The concept of 'justiciability', which traditionally barred judicial consideration of issues of legality surrounding what are often the most important decisions taken by democratically elected government (foreign and defence policy) is an outmoded concept that is properly being gradually eroded by the courts. This Green Paper appears to be as much a response to this quite proper development of the rule of law as it is to any perceived dangers to national security that arise from documentary disclosure. Let concerns attaching to documents be dealt with on an *ad hoc* basis but do not force the critical parts of proceedings themselves behind a cloak of secrecy.
- ix.) CMPs also risk a parallel public disillusionment developing with regard to the judiciary and the justice system as a whole. In PII proceedings, a Judge is afforded the opportunity to consider the interests of both parties before determining whether or not material should be disclosed. Under CMPs, the executive presents material to the Judge declaring it to be sensitive and prevents such a judicial weighing of interests from taking place. The risk is not only that the power of the Courts to review executive decisions is undermined but also that the Courts may be seen to be complicit in attempts to keep such information secret. Justice needs to be seen to be done effectively and fairly. Reducing the judicial role to the rubber stamping of an executive decision that an item should remain outside of public consideration (as opposed to allowing the Court to make that decision itself taking into account public considerations) could lead to a fatal undermining of the judiciary's integrity. Moreover, that justice must be 'seen to be done' is not empty rhetoric. When the justice in question concern acts of Government, it goes to the heart of democratic participation. Without public knowledge of cases such as Baha Mousa and Binyam Mohamed, the public would be blind to British acts of torture. We would all be the poorer for it. Reforms which have followed would not, in our view, have occurred, if these matters had been heard behind closed doors.

With specific reference to the Government Green paper, PIL has the following observations:

- i.) For the reasons above, PIL cannot agree with the Government's assertion that CMP's are 'capable of delivering procedural fairness'.
- ii.) These proposals come in the wake of the settlement of the *Binyam Mohamed* litigation and it is believed that the Government's admission that they 'have less certainty' about the security afforded to them by PII procedures is more relevant than the professed desire to 'enhance procedural fairness'.
- iii.) The Government asserts one of its main concerns is cases being struck out following a PII determination and yet it can only provide one example (*Carnduff*) where this has happened. This is hardly indicative of an endemic problem requiring the curtailment of well established UK legal principles. A Claimant may always propose a different procedure in such circumstances.
- iv.) By contrast, the *Binyam Mohamed* litigation and the considerable embarrassment caused to the Government both domestically and internationally by legal challenges to UK foreign policy appears to provide the principal motive behind these proposed changes.
- v.) The proposals may well expand the circumstances in which sensitive material can go before a Court (as the Government suggests) but that is wholly undermined by procedures that will ensure that important scrutiny of such material will not occur. The effect might well be to subject more executive decisions to judicial process but the judicial process is so weakened by the procedural inequity of CMPs that the supposed enhancement of fairness suggested by the Government is, in fact, illusory.
- vi.) This results orientated approach ignores the fact that legal proceedings are a process. Every part of that process must be seen to be fair in order for a fair outcome to be achieved; if the process by which a result is achieved is seen to be compromised, it matters little that the result is the correct one. The UK judicial system is based upon principles of administrative and procedural fairness and the Government chooses to ignore this in the construction of these proposals.
- vii.) PIL remains very concerned by the suggestion that CMPs will be triggered when the Secretary of State considers that 'certain relevant sensitive material would cause damage to the public interest'¹⁴. This expands the scope of CMPs for beyond issues solely of national security and begs the question just how many cases and what extent of material will now be caught under the expanded CMPs scheme? For example PIL's pioneering litigation on behalf of victims of the Iraq war could all potentially be certified in this way by a Secretary of State keen to avoid embarrassment by the judiciary (as they often are ...). Similar litigation in relation to Afghanistan may well fall foul of similar certifications due to the multiplicity of ISAF coalition partners involved in that conflict. Key evidence would escape public attention as a result.
- viii.) Also in relation to the trigger for CMPs, PIL are concerned that the Government appear to propose that it is the Secretary of State who

¹⁴ UK Justice and Security Green Paper, p 22

should determine when CMPs are appropriate. The unfairness caused by a party to proceedings deciding when to adopt certain legal measures to ensure a fair trial should be self evident. Indeed, it also appears to contradict the current CMPs practice in which the decision to move to closed Court is made by the Court or Tribunal¹⁵.

- ix.) The Government offer judicial review as a suitable safeguard to challenge decisions to adopt the procedure yet, in practice, how will a claimant judicially review a decision to withhold information that they will not know the full details of? What appetite will there be for funding such claims by the Legal Services Commission (now part of the MoJ)? This will also increase unnecessary satellite litigation and effectively recreate a PII system under much more constrained circumstances i.e. potentially only the narrow “Wednesbury” test will apply. It will also cause unacceptable delay to what are often urgent cases. It is an illusory safeguard.

1.5 PIL's Suggestions

PIL considers the PII procedure to be a suitable legal mechanism by which to make determinations about the disclosure of sensitive material. The only position in which PIL can conceive of CMPs being acceptable is where, following a PII determination, it appears as if a case is going to be struck out. In these circumstances, PIL accept that CMPs are an appropriate alternative to a case not being heard at all to be taken only at the instance of the Claimant. However, the Courts on PII will need to be guarded about PII claims being loaded by Government departments with a “strike out” in mind, in order to force Claimants to elect for CMP procedures.

In relation to CMPs generally, the Government should give consideration to the following suggestions:

1. The specific circumstances in which CMPs are to be employed must be made clear. As suggested above, CMPs should only be invoked as a matter of last resort when a PII determination means that a case would, otherwise, not proceed. The Government's current proposed test of invoking CMPs when ‘certain relevant sensitive material would cause damage to the public interest’ is too vague and would allow for abuse.
2. The decision to invoke CMPs is to be made by a Court on application by a Claimant and not, as is currently suggested, by the Secretary of State.
3. The Government is to confirm that the standard of proof used in CMPs will remain the civil standard without derogation.
4. The Government is to confirm that, after the adoption of CMPs in a case, their continued use will remain subject to review throughout proceedings and a move to open Court will happen as soon as is practicable.
5. Of particular importance is the position of Special Advocates who should be properly financed and adequately supported in their role and who

¹⁵ See Lord Hope's consideration at paragraph 7 of *Tariq v Home Office* [2011] UKSC 35 of the importance of this safeguard in ensuring CMPs compliance with Art 6 ECHR

should be afforded more opportunity to communicate with the clients whose interests they are seeking to protect.

2. Proposal – Consideration of Role and Powers of Special Advocates

2.1 Current Position

Special Advocates are employed in CMPs that currently take place whether at SIAC or in other proceedings. Their role has been described above.

2.2 The Government Argument for Considering Role of Special Advocates

The Government argues that the success of CMPs are dependent upon the abilities of Special Advocates to represent parties excluded from proceedings. The success of extending CMPs will be contingent upon the role of Special Advocates and, to that end, the Government will provide further training to Advocates and allow for better arrangements for communication with the person whose interests they are representing.¹⁶

2.3 PIL's Concerns

Clear Government guidelines widening the current scope of permissible communication are required, so that Special Advocates can be confident initiating discussions with "open" representatives and the litigant and vice versa. However, this will not remedy the fundamental inequity of the CMPs system. A defendant in a criminal trial could not be expected to provide his instructions to his advocate before his hearing begins and then not have an opportunity to consider the evidence adduced during the trial, nor to provide contemporaneous instructions based on that evidence. The result would be, in the words of Lord Bingham, a defendant and his advocate 'taking blind shots at a hidden target'.¹⁷

In arguing against the extension of CMPs, PIL by extension argue against the extended use of Special Advocates. PIL do not agree that ameliorating the position of Special Advocates can mitigate against the injustice of submitting a party to proceedings in which they cannot take a full and informed role.

3. Proposal – Restriction of Norwich Pharmacal disclosure

3.1 Current Position

The common law provides that a person or state that becomes mixed up in the wrongdoing of another comes under a duty to assist the victim of that wrongdoing by giving such information as he holds about the wrongdoing.¹⁸ By *Norwich Pharmacal* principles, the Government is obliged to provide information it may hold about someone who has, for example, been tortured by a third party agency following the UK's transfer of the person to that agency. This was the case in *Binyam Mohamed*, where the

¹⁶ UK Justice and Security Green Paper, p 25

¹⁷ *Roberts v Parole Board* [2005] UKHL 45 at para 18

¹⁸ *Norwich Pharmacal v Commissioners for Customs and Excise* [1974] AC 133

claimant sought information the UK Government held about his treatment at the hands of the CIA for the purposes of a claim he was making in the USA. PIL has experience of having dealt with *Norwich Pharmacal* cases, for example in the *Omar* case referred to above.

3.2 The Government's Proposal

The Government were concerned in the *Binyam Mohamed* proceedings about revealing sensitive material that may compromise current or future diplomatic relationships with the USA. At paragraph 2.84 of the Green Paper it identifies a need to:

...develop an improved legal framework that fits coherently with the procedures for managing sensitive information in cases heard in our own courts and with the established common law principles of PII and, above all, that avoids the development of new routes of disclosure that could fundamentally undermine the UK's national security co-operation with key partners.¹⁹

The Government does not propose to abolish *Norwich Pharmacal* all together (although it did consider that move – see para 2.90) rather it proposes to legislate for exceptions where the Government will not be required to disclose information where a claimant invokes *Norwich Pharmacal*.

The Government proposes to offer an absolute exemption for disclosure where the material requested is certified as having been 'held by or originated from one of the [Security] Agencies'.²⁰ If the material does not originate from 'one of the Agencies' but could still, in the opinion of the Secretary of State, cause damage to the public interest, an exemption for disclosure would be provided for by way of a ministerial certificate. The decision to withhold Agency material would not be reviewable. A decision to without non-Agency material could be challenged by way of judicial review. The Government proposes that such a review would be subject to CMPs (see paras 2.91-2.92).

3.3 PIL's concerns

The Government's proposals go a lot further than is necessary to achieve the stated aim. PIL are concerned that the proposals mark an attempt by the Government to prevent diplomatic embarrassment (either for the UK or its allies) rather than an attempt to ensure national security. The *Norwich Pharmacal* principle is a wholly legitimate development of the common law, of particular pertinence in an era of globalisation, coalitions, complicity and rendition and of easily manipulable concepts of state responsibility (for example, evidence in the *Evans* proceedings referred to above showed that a prisoner could be arrested by a British soldier, passed to a sole accompanying Afghan soldier, be taken to a British base, interrogated there by British personnel, transported under British guard in a British helicopter to another facility and all the while be deemed an "Afghan" prisoner because of the presence of a sole Afghan soldier – in these circumstances mechanisms imposed on 'third parties' are essential for the scrutiny of the acts of British personnel said to by the British Government to be mere bystanders in a foreign detention). The Government should not be in the business of legislating against rules of disclosure reflective of natural justice.

¹⁹ UK Justice and Security Green Paper, p 35

²⁰ UK Justice and Security Green Paper, p 36

The Courts are acutely aware of the need to preserve national security and the *Binyam Mohamed* proceedings demonstrate the careful process undertaken to weigh the risk of disclosure. Indeed, it should be remembered that the *Norwich Pharmacal* request in *Binyam Mohamed* was ultimately not decided upon as the material requested was provided to Mr Mohamed's US lawyers by authorities in that country. The argument in the proceedings eventually turned upon the strength of the judgment that the Court wished to hand down. Moreover, it is not clear that the material requested by Mr Mohamed would have been disclosed to the public in any event. He sought information to aid him in legal proceedings in the United States and there is no reason to think the information would not have remained confidential to those proceedings.

The Government's assertion that Freedom of Information (FOI) requests can be used in place of *Norwich Pharmacal* proceedings is laughable. Freedom of Information requests are processed by the executive who retain a discretion not to disclose information if certain exemptions apply. Costs caps prevent substantial material being provided. Appealing any refusal takes years. FOI is a useful albeit somewhat hobbled instrument of open government. It is not however significant in a justice context. The benefit of a *Norwich Pharmacal* request is that the discretion to disclose is weighed by an independent and impartial judge; a benefit that does not attract to FOI requests.

PIL are concerned that the proposals will serve to severely restrict the circumstances in which requests can be made of the Government to disclose sensitive information and that governmental transparency and accountability, as well as public access to justice, will be impaired as a result.

3.4 PIL's Suggestion

Norwich Pharmacal applications provide a vital means by which to secure information held by the Government and its agencies. The Courts are aware of the delicate position in which they are placed when considering an application to disclose information sensitive to the public interest. Courts remain the best, and only truly independent, arbiter of whether this information should be disclosed and should retain their discretion to hear *Norwich Pharmacal* applications under the current law.

4. Additional Proposals

The Green Paper also raises a number of additional questions regarding, *inter alia*, the use of sensitive material in inquests; legislation to limit the use of the 'gisting' requirement; reform of the Intelligence and Security Committee and intelligence oversight; and the expansion of the jurisdiction of the Investigatory Powers Tribunal. PIL defers to the submissions of Liberty and Justice in this regard, save to note the following:

- we support substantial reform of the ISC, its publications and its being placed more firmly on a parliamentary footing without compromising in any way litigants' ability to pursue redress through the courts. We do not consider its current composition or record of oversight to be sufficient;
- we oppose any expansion of the Investigatory Powers Tribunal, whose abolition we support in favour of open justice within the framework we have set out above;

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- we do not recognise the need for legislation regarding the 'gisting' requirement. The court decisions cited may be subject to appeal and later reconsideration in different factual circumstances. The courts should be free to develop this test in response. It is one thing for the courts to say that 'gisting is unnecessary' but another to impose a blanket rule that gisting should not take place.

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6 January 2012