CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

CAJ's submission no. S374

CAJ's Submission to the Ministry of Justice 'Justice and Security' Green Paper on extending 'secret justice' provisions

January 2012

2nd Floor, Sturgen Building
9-15 Queen Street
Belfast BT1 6EA

Tel – 028 9031 6000
Email – info@caj.org.uk
Web – www.caj.org.uk

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding).We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

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Submission to the Ministry of Justice 'Justice and Security' Green Paper on extending 'secret justice' provisions, January 2012

Committee on the Administration of Justice ('CAJ')

CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

This response is to highlight our concerns in relation to the proposals contained in the October 2011Ministry of Justice 'Justice and Security' Green Paper (CM8194), which proposes to extend 'secret justice' measures to civil cases and to legislate to limit obligations to reveal sensitive information in court.

Urging Government to think again: Lessons from Northern Ireland

Based on the experiences of counter-terrorism measures in Northern Ireland, CAJ has long argued against knee-jerk reactions to particular events. Reactions such as the introduction of unnecessary 'emergency'-type legislation are often counterproductive and can set dangerous and long lasting precedents permanently eroding long-held democratic principles. In our experience measures which effectively bypass rule of law standards and establish, in essence, a parallel justice system lead to human rights abuses which can fuel a conflict as well as contributing to the growing marginalisation of 'suspect communities'. There is also a risk of 'mission creep' whereby measures introduced in one area are gradually rolled across into other areas of the criminal justice system. Such matters were highlighted in our publication *War on Terror: Lessons from Northern Ireland* which derives from CAJ submissions to the Eminent Jurists Panel on Terrorism, Counter Terrorism and Human Rights set up by the International Commission on Jurists in 2005, in which we concluded:

> CAJ has long believed that human rights abuses fed and fuelled the conflict in Northern Ireland. We fear that, if the lessons from places like Northern Ireland are not taken on board, major world advances in protecting the dignity and worth of all human beings, as summed up in the 1948 Universal Declaration of Human Rights will be undermined, perhaps irretrievably.[1]

[1] 'War on Terror: Lessons from Northern Ireland' (Belfast, CAJ 2008), page 2.

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The summary of the equality impact assessment contained in the Green Paper does recognise that if the proposed changes are made in relation to inquests there will be 'significant impact' in relation to Northern Ireland, given the legacy of outstanding conflict-related inquests.[2] As well as our general concerns about existing and proposed 'secret justice' procedures, CAJ will address this element of the Green Paper, given the potentially very serious ramifications changes could have in this jurisdiction.

The present 'secret justice' proposals

The Green Paper proposes a raft of reforms to allow evidence, presumably based on Security Service intelligence data to be given in secret in relation to a whole range of civil court cases. Government argues this is to allow information too sensitive to be seen in open court to be used in such cases in order for the judiciary (but not the other party) to get a full picture of the evidence. Clearly hearing evidence in this way will also reduce the potential for such evidence to be subject to challenge, including of its origins and source, which could also reduce the potential to uncover and hold the Security Services accountable for malpractice or human rights abuses in which they are involved.

In relation to civil proceedings the Green Paper indicates an intention to move away from utilising the present common law doctrine of Public Interest Immunity (PII - whereby certain sensitive evidence is excluded from the proceedings) towards a system of Closed Material Procedures (CMP- whereby the state presents evidence to the judiciary in secret, with a 'Special Advocate' appointed to represent the interests of the other party). In order to do this there are now plans to legislate for CMP's in civil proceedings. It is the Government who decide when a CMP is to be used, subject to judicial review. Considerable emphasis is placed within the Green Paper that the measures are required for 'national security'. However, the proposals appear to actually provide a much broader threshold of application permitting CMPs when the Secretary of State decides sensitive material could 'cause damage' or 'harm' to the 'public interest'.[3] This could therefore be used to apply across a whole range of legal contexts.

In addition to this Government also proposes to legislate to restrict access to sensitive information in civil proceedings in the UK the state is not party to.[4] This, the Green Paper indicates, is largely related to preventing disclosure of information (in the hands of UK agencies but that originated from the intelligence agencies of other countries) that

[2] 'Justice and Security' Green Paper, (CM8194), Appendix K; this equality impact assessment also concedes that, given the pattern of recent cases, the proposals would likely have a 'differential impact' on Muslims and men from Asian, Arab and North African racial groups. Government however argues that this would not be an 'adverse impact' (i.e. discriminatory detriment), a conclusion predicated on the assertion that the proposals merely seek to improve "procedural fairness". CAJ urges this is revisited.
[3] Green Paper, paragraph 2.7.
[4] See 'safeguarding material' proposals, paragraphs 2.72-2.97.

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individuals are seeking in order to pursue a claim for matters such as torture against them by that country. In order to put an end to this Government proposes a power to prevent disclosure of information when it deems it is not in the 'public interest' to do so.[5] This power is aimed to go beyond the existing provisions of Public Interest Immunity as Government is concerned that in a small number of cases the independent judiciary has not endorsed Ministerial views as to what is to be disclosed, and therefore there is a 'real risk' of not being able to rely on the judiciary to uphold the Government's view.[6]

Rationale for the Proposals

Whilst the proposals are presented in language of procedural fairness and the rule of law these appear to be neither the objective nor outcome of what is in the Green Paper.[7] It is clear from the Ministerial Forward that the proposals are a response to "increasing numbers of cases challenging Government decisions and actions in the national security sphere." Concerns are then expressed regarding increased use of judicial review and specifically that an increasing number of court cases have affected the Security Services with Government contrasting the 14 cases against the Security Services which have reached the UK's highest court in the last decade, compared with none in the first 90 years of its (largely undeclared) existence.[8] Government also cites with concern that a handful of cases where applicants have sought UK-held information originating from foreign intelligence agencies is souring relationships with these agencies. Finally concerns are cited at having had to reach compensation settlements with individuals relating to UK involvement their unlawful detention and treatment in Guantanamo Bay.[9] This is attributed to the lack of a framework in which sensitive material can be heard secretly, which the Ministerial Forward states "leaves the security and intelligence agencies unable to clear their name." Statements like this are worrying to the extent that they indicate a prior assumption that there can have been no wrongdoing on the part of such agencies.

CAJ reminds government that the Security Agencies of states are neither infallible, beyond criticism nor above the law. In particular the UK has a duty under international and British law to hold officials to account for complicity or participation in torture.[10]

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[5] Paragraph 2.91.
[6] Paragraphs 2.76-2.77

[7] For example paragraph 1.2 states "Government recognises that preserving a strong and independent judiciary is one of the most effective safeguards of the freedom, rights and liberties of its people" however by contrast the rationale for proposals appears to be a reaction to a strong and independent judiciary.
[8] Paragraphs 1.15-7.
[9] Paragraphs 1.18.
[10] *Article 4(1) o*f the UN Convention Against Torture commits the UK to ensure that all acts of torture are offences under its criminal law and that the same shall apply to an act by any person which constitutes

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Little weight appears to be given within the Green Paper to protecting the interests of persons in UK jurisdiction who wish to take forward claims relating to torture or other human rights abuses against them. Rather primacy appears to be given to international relations with other states against whom the allegations are made together with the underlying concern the reputation of the UK's Security and Intelligence Services are being tarnished by the increased potential for its activities to be scrutinised in open court. However, the document itself highlights the majority of such cases relate to recent measures and state practices in the 'war on terror', such as extraordinary rendition and control orders.[11] CAJ respectively submits it is involvement in these practices which should be seen as having tarnished the image of the UK rather than the potential for the courts from shining a light on the same. The seriousness of these matters cannot be understated. 'Rendition' relates to the extent of security service involvement in kidnap, incommunicado detention and torture. A truly independent process to properly get to the bottom of security service involvement in such practices followed by robust measures to prevent recurrence would be the appropriate response.

Problems with proposed and existing procedures

CAJ is concerned that the some of the language and rationales in the Green Paper accord with that usually associated with less democratic societies. The document proclaims "This Government will never take risks with the security of our country"[12] and qualifies its commitment to the benefits of transparency in justice by stressing the need to balance this against the "important imperative" of national security.[13] The first sentence of the consultation paper states "The first duty of government is to safeguard our national security."[14] CAJ contests that the first responsibility of Governments is the protection and promotion of human rights. This is set out in the first article of the Vienna Declaration adopted by the international community, including the UK, at the UN World Conference on Human Rights.[15] The Green Paper however appears to promote only the interests of the Security Services rather than those affected by their potential actions.

The present proposals are a response to the Supreme Court judgement in *Al Rawi and others v the Security Services*[16] in which a number of former Guantanamo Bay prisoners had sued the UK alleging involvement in their unlawful detention and ill-treatment. In this case the state sought unsuccessfully to argue that provision of secret evidence in

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complicity or participation in torture; sections 134-5 of the Criminal Justice Act 1988 make it an offence for any person acting in an official capacity to commit torture anywhere in the world.

[11] Paragraph 1.17.
[12] Paragraph 155.
[13] Paragraph 1.10.
[14] Executive summary, paragraph 1.
[15] UN doc A/CONF.157/23 12 July 1993.
[16] [2011] UKSC 34.

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civil cases through closed procedures could be derived from the common law. This was rejected by the Supreme Court which indicated that not only the existing Public Interest Immunity scheme would suffice but that to do as the state wished would involve impinging on a fundamental right. The following paragraphs from the concurring judgement of Lord Kerr capture succinctly problems that 'secret evidence' through closed procedures can have on a fair trial:

> 89. As I have observed in the associated case of *Tariq v Home Office* [2011] UKSC 35, the right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process [....] The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness [....] Without it, as Upjohn LJ put it in *In re K (Infants)* [1963] Ch 381, a trial between opposing parties cannot lay claim to the marque of judicial proceedings.
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> 90. And so the key nature of this right and its utter indispensability to the fairness of proceedings must occupy centre stage in the debate as to whether it may be compromised to serve the interests which the [Government] claim require to be served and which are said to justify a departure from it.
>
> 91. [Government] have advanced two principal arguments in support of the claim that a closed procedure is required in this case [...] It is first asserted that the exercise involved in conducting a conventional public interest immunity exercise would be so daunting that some means should be found to avoid it. The second argument is that the adoption of a closed procedure will actually conduce to a fairer trial than would otherwise be possible.
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> 92. The first of these arguments can easily be [...] disposed of and I need say little more about it. As has been observed, unless there is to be complete abandonment of public interest immunity procedure as a means of catering for the tension between disclosure of relevant material and protection of the public interest, the exercise cannot be avoided. For the reasons given by Lord Clarke, to desert that procedure, so deeply embedded in our system of law, for reasons of expediency simply cannot be contemplated. The seemingly innocuous scheme proposed by the [Government] would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellants would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said [...] has been established for more than three centuries.
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> 93. The [Government's] second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I

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> go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.[17]

The Green Paper highlights the existing provisions for Closed Material Procedures in, for example, Control Orders proceedings as well as number of Northern Ireland specific matters. The Green Paper argues that CMPs are an "an existing mechanism that has been proven to work effectively" and that the "contexts in which CMPs are already used have proved that they are capable of delivering procedural fairness" citing in particular the effectiveness of the Special Advocate system being central to this.[18] CAJ is concerned at the picture presented of existing CMPs as unproblematic and operating effectively, taking little congruence of valid and authoritative critiques of the system. For example the Joint Committee on Human Rights, having taken "disquieting" evidence from Special Advocates themselves, concluded in 2007 that the "the Special Advocate system, as currently conducted, does not afford the individual the fair hearing, or the substantial measure of procedural justice, to which he or she is entitled under both the common law and human rights law."[19] Four years on CAJ is aware that in response to the Green Paper practicing Special Advocates themselves have stated that CMPs "represent a departure from the foundational 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" and have come to the "clear view" that the proposed extension of CMPs to civil litigation is "insupportable".[20]
The Green Paper lists a number of existing CMP provisions in Northern Ireland which relate to provisions in for recalling to prison prisoners with conflict-related convictions who were released on licence during the peace process.[21] Clearly the use of secret evidence to recall prisoners engages the same range of problems referenced above.

It is also worth paying due regard to the background and current context of provisions relating to national security exemptions to fair employment (anti-sectarian

[17] *Al Rawi and others v the Security Services* [2011] UKSC 34, paragraphs 89-93.
[18] Green Paper, paragraph 2.3.
[19] Joint Committee On Human Rights - Nineteenth Report of Session 2006-7, paragraph 212.
[20] Response to Justice and Security Green Paper from Special Advocates, Paragraphs 2(1) and 39(1).

[21] The Green Paper, as well as making reference to similar provision for Terrorism Act 2000 offences further to the *Northern Ireland (Remission of Sentences) Act 1995*, sets out that the *Northern Ireland (Sentences) Act 1998* and associated rules (which provided for early release of paramilitary prisoners further to the Belfast/Good Friday Agreement) allows the Secretary of State to certify information as 'damaging' and to present it to the Sentence Review Commissioners, prisoners are provided with a 'gist' of the information and provision is made for Special Advocates.

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discrimination) legislation in Northern Ireland, and the jurisprudence of challenges against them, including its relevance to the disclosure of sensitive documents. [22]

Inquests and secret evidence

> The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events (Jordan v the UK).[23]

The Green Paper examines the potential to extend CMPs to inquests but concedes this does involve 'particular challenges' and appears to recognise the potentially far reaching consequences in relation to legacy inquests into conflict-related deaths in Northern Ireland, with Government giving an assurance it is 'extremely mindful' of the role of families in such inquests to date.[24] Government does not however rule out the extension of CMPs to Inquests in Northern Ireland and elsewhere. Whilst referencing a 'small number' of recent Inquests, including those into the 7/7 2005 London bombings, where sensitive information has been "relevant" to proceedings it is notable that Government is not able to cite a single inquest where it views it would have been actually necessary, in its view, to invoke such a procedure.

The human rights compliance of inquests has been a major issue since the establishment of Northern Ireland. Regulation 10 of the infamous *Civil Authorities (Special Powers) Act (Northern Ireland) 1922* allowed the Minister of Home Affairs power to prohibit the holding of an inquest (or inquests in general) or for the Coroner or Coroner's Juries function's to be delegated elsewhere. In more recent times CAJ have

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[22] *Section 42 Fair Employment (Northern Ireland) Act 1976*, which allowed the Secretary of State to issue a national security certificate to block a discrimination claim without effective recourse to an independent hearing , was found to be incompatible with the right to a fair trial under the European Convention on Human Rights in *Tinnelly and others v UK* (Application no. 62/1997/846/1052-1053) in which access to the relevant material in the hands of the state was a factor in the judgement. Other cases such as *Devlin v the UK* (Application no. 29545/95) were also successful in Strasbourg, in which recently in *Frances Devlin v the Chief Constable for Northern Ireland* the applicant had is damages claim settled having sued for malicious falsehood and negligent misstatement. [See news report http://www.u.tv/news/Man-gets-damage-payment-over-IRA-claim/5ded63ca-8f44-4477-8902-3ef4beb7edd9 accessed 6 January 2012]. This is the type of civil case in which an applicant could be disadvantaged by the introduction of CMPs. The *Northern Ireland Act 1998* included provisions for a 'special tribunal' to deal with cases whereby a discrimination claim has been taken and is blocked by a certificate from the Secretary of State claiming that the said discriminatory act was done to safeguard national security, public safety or public order and allows rules to be made for the tribunal whereby evidence is kept secret, the applicant and their representative is excluded and the Attorney General can appoint a 'special advocate' to represent their interests (*Sections 90-92 Northern Ireland Act 1998*) Contemporary Fair Employment legislation made provision for referral to be made to this 'Special Tribunal' (*Fair Employment (Northern Ireland) Order 1998, article 80*.)

[23] [2001] ECHR 327, paragraph 134.

[24] Executive Summary, paragraph 14, and paragraphs 2.21-3.

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been active on the issue of inquests for many years, including our 1992 publication *Inquests and Disputed Killings in Northern Ireland*.

Although we have provided advice and assistance in a range of other cases our focus has predominantly related to deaths caused by the security forces or where there have been allegations of collusion. Following inquests in to the killings of their relatives CAJ lodged and acted as for the families before the European Court of Human Rights in the judgements of *Kelly and others v UK*, *Shanaghan v UK* and more latterly *McShane v UK* where it was successfully argued that the UK had violated the procedural aspect of Article 2 of the ECHR guaranteeing an adequate ex post facto investigation of a killing involving the state.[25] CAJs present concern is that these and related cases[26] have not had the expected or anticipated knock-on effect of encouraging Article 2 compliant expedition in coronial proceedings either in the cases themselves or in a variety of analogous cases involving controversial killings in Northern Ireland.

There has been an endemic problem of delay in controversial inquests in this jurisdiction with institutional resistance to disclosing information from the state and its agencies being a significant factor. There has been a repeated reluctance of the security services to provide documentation to families even this is required by domestic legislation,[27] along with at times bizarre lengths that the security sources have engaged in to frustrate sharing of documents,[28] even when having previously agreed to share such documents.[29] CAJ fears the retrogressive consequences of any proposed application of CMPs on efforts to ensure human rights compliance in relation to Northern Ireland inquests.

A further proposal put forward in the Green Paper is for the 'security vetting' or light touch vetting of both coronial juries and family members in order for them to be given access to sensitive material.[30] It is important to point out the risks and clear problems created by such a process should it lead the exclusion of those deemed at a risk of being potentially 'disloyal' to the state. Particularly (but by no means exclusively) in the context of Northern Ireland this could be regarded as a form of political vetting.

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[25] *Kelly and others v the UK* (Application no. 30054/96) judgment of 4th August 2001), *Shanaghan v the UK* (Application no. 37715/97) judgment of 4th August 2001 and *McShane v UK* (Application no. 43290/98) judgment of 28th August 2002.
[26] *Jordan v the UK* (Application no. 24746/94) judgment of 4th August 2001, *McKerr v UK* (Application no. 28883/95) judgment of 4th August 2001, and *Finucane v UK* (Application no. 29178/95) judgment of 1st October 2003.
[27] see e.g. *Re McCaughey & Grew* (2004) NIQB 2, (2005) NICA 1 & *Re Jordan & McCaughey's* Application (2007) UKHL 14.
[28] e.g. *Re PSNI's Application*, (2008) NIQB100, 19th September 2008.
[29] See *Re Jordan's Application* (2008) NIQB 148.
[30] Paragraphs 2.13-15.

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Devolution of Justice to Northern Ireland

The Green Paper in outlining that the proposals apply across all jurisdictions of the UK recognises the issues 'interact' with devolved matters in jurisdictions like Northern Ireland where justice powers are the responsibility of the Northern Ireland institutions. The Green Paper proposes working with the devolved administrations to effect changes in each jurisdiction. [31] It would be welcome if there could be further clarity on whether Government regards the proposals on inquests and other civil proceedings as justice powers (and hence transferred to the Northern Ireland Assembly) or whether Government regards the changes as "national security" matters (and hence 'excepted' matters for Westminster alone to legislate on.)

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[31] Executive summary, paragraph 9.

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