Title: Justice and Security Green Paper – Chapter 2 proposals **IA No:** MOJ112 **Lead department or agency:** Ministry of Justice **Other departments or agencies:** Home Office, Cabinet Office	**Impact Assessment (IA)** **Date:** 18/10/2011 **Stage:** Consultation **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** justiceandsecurity@cabinet-office.x.gsi.gov.uk

Summary: Intervention and Options

Cost of preferred (or more likely) option				
Total net present value	**Business net present value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of one-in, one-out (OIOO)?**	**Measure qualifies as:**
£m	£m	£m	Yes/No	In/Out/Zero net cost

What is the problem under consideration? Why is government intervention necessary?

Recent civil proceedings in the UK have brought to the fore the challenges in relying on sensitive material in court or in protecting it completely from public disclosure. Existing mechanisms are under strain and the number, range and complexity of cases where sensitive information is relevant is increasing. In those cases the Government has been faced with a choice between causing real damage to national security or international relations by disclosing material, or withdrawing from the whole case and, in some cases, settling out of court. Government intervention is necessary because only government has the power to take forward changes in this area.

What are the policy objectives and the intended effects?

A framework is needed which will enable the courts to consider material which is too sensitive to be disclosed in open court, but which will protect the fundamental elements that make up a fair trial without jeopardising UK national security.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The following options have been assessed against the base case of 'no change' (Option 0):

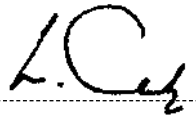
Option 1: Extend closed material procedures for all civil cases and reform the Special Advocate system

Option 2: Extend closed material procedures for all civil cases; reform the Special Advocate system; and limit the applicability of Norwich Pharmacal

Option 3: Extend closed material procedures for all civil cases; reform the Special Advocate system; limit the applicability of Norwich Pharmacal; and clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** January 2012						
Does implementation go beyond minimum EU requirements?			N/A			
Are any of these organisations in scope? If Micros not exempted, set out reason in Evidence Base.	**Micro** No	**< 20** No	**Small** No	**Medium** No	**Large** No	
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A		**Non-traded:** N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible signatory:  Date: 18 October 2011

Summary: Analysis and Evidence

Policy Option 1

Description: Extend closed material procedures for all civil cases and reform the Special Advocate system

FULL ECONOMIC ASSESSMENT

Price base Year 2011	**PV base Year** 2011	**Time period Years** 10	**Net benefit (Present Value (PV)) (£m)**		
			Low: 11.0	**High:** 5.8	**Best estimate:** 0.0

COSTS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total cost** (PV)
Low	Optional		Optional	**10.7**
High	Optional		Optional	**27.6**
Best estimate				**16.6**

Description and scale of key monetised costs by 'main affected groups'

There would be costs to making closed material procedures (CMPs) available more widely and there may be potential for new generated demand (legacy cases), although the limitation periods for litigation would constrain the volume of cases. There may be costs on government in the form of judicial and representation costs (including legal aid where applicable).

Other key non-monetised costs by 'main affected groups'

There may be costs from greater reliance on senstive material in civil proceedings. Vetting and/or exclusion may be seen as excessive or intrusive, leading to resentment or a reduction in confidence in court processes. Harmful disclosure of sensitive information would be unlikely if the arrangements are right, but if it did occur the damage would be significant. There may be costs from vetting jurors and from training Special Advocates, but these are not quantified.

BENEFITS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total benefit** (PV)
Low	Optional		Optional	**14.6**
High	Optional		Optional	**19.4**
Best estimate				**16.5**

Description and scale of key monetised benefits by 'main affected groups'

The extension of CMPs would lead to a reduction in Public Interest Immunity (PII) applications by the Government, which would lead to lower costs for hearings and preparatory work. Widening access to information at inquests would lead to significant savings from reduced PII applications and reduce the need for public inquiries.

Other key non-monetised benefits by 'main affected groups'

Greater use of relevant sensitive information would lead to more informed judicial decisions and therefore better serve the interests of justice. UK national security would be better protected. The UK would also benefit from a reduction in reputational costs abroad and increased international co-operation.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

The assessment is sensitive to assumptions on the following: volume of civil cases and inquests; unit cost assumptions for legal representation and judges; and cost and volume of public inquiries. There is particular uncertainty regarding what the potential response of litigants might be and the extent to which new cases may be generated or filtered out. The analysis is also sensitive to standard appraisal assumptions, e.g. appraisal period. Where possible, sensitivity tests have been undertaken.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (equivalent annual) £m:			**In scope of OIOO?**	**Measure qualifies as:**
Costs: 0	**Benefits:** 0	**Net:** 0	Yes/No	In/Out/Zero net cost

Summary: Analysis and Evidence

Policy Option 2

Description: Extend closed material procedures for all civil cases; reform the Special Advocate system; and limit the applicability of Norwich Pharmacal

FULL ECONOMIC ASSESSMENT

Price base Year 2011	**PV base Year** 2011	**Time period Years** 10	**Net benefit (Present Value (PV)) (£m)**		
			Low: –9.0	**High:** 6.2	**Best estimate:** 0.9

COSTS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total cost** (PV)
Low	Optional		Optional	**10.4**
High	Optional		Optional	**25.5**
Best estimate				**15.7**

Description and scale of key monetised costs by 'main affected groups'

Same as Option 1.

Other key non-monetised costs by 'main affected groups'

Same as Option 1.

BENEFITS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total benefit** (PV)
Low	Optional		Optional	**14.6**
High	Optional		Optional	**19.4**
Best estimate				**16.5**

Description and scale of key monetised benefits by 'main affected groups'

Same as Option 1.

Other key non-monetised benefits by 'main affected groups'

Same as Option 1. However, limiting the applicability of Norwich Pharmacal proceedings would lead to greater certainty about how sensitive material is handled, especially in the context of foreign proceedings.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Same as Option 1. However, there are additional sensitivities associated with case volumes for Norwich pharmacal proceedings.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (equivalent annual) £m:			**In scope of OIOO?**	**Measure qualifies as:**
Costs: 0	**Benefits:** 0	**Net:** 0	Yes/No	In/Out/Zero net cost

Summary: Analysis and Evidence

Policy Option 3

Description: Extend closed material procedures for all civil cases; reform the Special Advocate system; limit the applicability of Norwich Pharmacal; and clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply

FULL ECONOMIC ASSESSMENT

Price base Year 2011	**PV base Year** 2011	**Time period Years** 10	**Net benefit (Present Value (PV)) (£m)**		
			Low: –9.0	**High:** 6.2	**Best estimate:** 0.9

COSTS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total cost** (PV)
Low	Optional		Optional	**10.4**
High	Optional		Optional	**25.5**
Best estimate				**15.7**

Description and scale of key monetised costs by 'main affected groups'

Same as Option 2.

Other key non-monetised costs by 'main affected groups'

Same as Option 2.

BENEFITS (£m)	**Total transition** (Constant price)	Years	**Average annual** (excl. Transition) (Constant price)	**Total benefit** (PV)
Low	Optional		Optional	**14.6**
High	Optional		Optional	**19.4**
Best estimate				**16.5**

Description and scale of key monetised benefits by 'main affected groups'

Same as Option 2.

Other key non-monetised benefits by 'main affected groups'

Same as Option 2. However, there may be additional benefits with a reduction in the number of contexts in which it is necessary to provide 'AF (No.3)' disclosure. The extent of these benefits would depend on the range of contexts identified.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Same as Option 2.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (equivalent annual) £m:			**In scope of OIOO?**	**Measure qualifies as:**
Costs: 0	**Benefits:** 0	**Net:** 0	Yes/No	In/Out/Zero net cost

1. Scope of the Impact Assessment

1.1 This Impact Assessment (IA) accompanies the Justice and Security Green Paper (Cm 8194). It assesses the proposals designed to respond to the challenges of how sensitive information is treated in the full range of civil proceedings. The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the proposed options. It follows the procedures set out in the *Impact Assessment Guidance* and is consistent with the HM Treasury *Green Book*.

Objectives and scope of the proposals

1.2 The Green Paper seeks to find solutions to the challenges posed by the increasing number of civil court proceedings in which sensitive information is relevant. An existing approach protects material by excluding it from proceedings, but this means the case cannot always be dealt with fairly for both sides. Judges are unable to take account of key information. The work has been guided by some key principles:

- rights to justice and fairness must be protected
- even in sensitive matters of national security, scrutiny is in the public interest
- national security, including sensitive sources, capabilities and techniques and relationships with international partners, must be protected
- as much relevant material as possible should be considered by the courts
- reforms drawn from existing, tried and tested procedures will be easier to implement and more likely to succeed
- proposals should be flexible enough to operate in any context or circumstance in which they may be required in the future.

1.3 In order to fulfil the above objectives, the Government is consulting on:

- extending the availability of closed material procedures (CMPs) to all civil proceedings
- whether or not these arrangements should be extended to inquests
- limiting the circumstances in which sensitive information can be disclosed
- otherwise enhancing civil proceedings through various options, including reform of the operation of the Special Advocate system.

1.4 These proposals are explored in more detail in Section 3 ('Options Analysis') in order to assess their impacts on society.

Groups and sectors affected by the proposals

1.5 The proposals covered in this IA affect all of the UK, with particular impacts on the following groups:

- **the general public**, as consumers of justice and beneficiaries of wider security measures
- **the judiciary**, as primary suppliers of justice, especially in respect of court operations
- **legal service providers**, both for government (e.g. legal support) and private litigants

- **wider government**, including the security and intelligence agencies
- **overseas intelligence agencies**, which may routinely share sensitive information with the UK.

Analytical principles

1.6 The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a cost benefit analysis (CBA) of the proposals. A CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and distributional considerations. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.

1.7 The CBA underpinning this IA rests on answering two basic questions:

- What is the problem that the proposals are seeking to address that has led the relevant sector not functioning properly?
- In what way can government intervention help to mitigate this problem? What options are available to resolve the resultant problems, and would the available options recommended have the desired impact? To establish a case for government action, an assessment of the possible costs and benefits of government involvement must be made to show that the benefits are likely to outweigh the costs.

1.8 In addressing these questions, the IA has focused mainly on key monetised and non-monetised impacts, with the aim of understanding what the net social impact to society might be from improving the process by which sensitive material is handled in civil proceedings, and clarifying associated issues such as the requirement to disclose or summarise sensitive material. Where it has not been possible to quantify costs and benefits at this stage, the IA indicates where further analysis might be done over the consultation period to inform the post-consultation IA. This assessment should therefore be treated as tentative.

1.9 An important consideration for any IA is the relevant scope of the assessment. The scope of this IA includes:

- **impacts that fall within the physical geography of the UK.** This means focusing on assessing the impacts of the proposals on those in the UK, e.g. the UK justice system.
- **impacts that fall on both present and future generations.** In line with the HM Treasury *Green Book* and *Impact Assessment Guidance*, the appraisal assesses whether any of the options will yield a positive net social benefit to all who may be affected by it. As the Green Paper proposals will continue in the distant future, we have appraised the impacts between 2013 and 2022 (ten years), with a real discount rate of 3.5%.

1.10 The IA does not attempt to assess every issue that is in the Green Paper. It is restricted to the key elements of the Green Paper that have been identified as potentially having some impact on the UK in practice and which will be of interest to the general public. Further work will be done after the consultation period to build on issues raised during the process.

2. Rationale for Government Intervention

2.1 This section explains the current problems regarding the use of sensitive material in civil judicial proceedings and the basic policy rationale for government intervention.

Current practice

2.2 The first duty of any government is to protect UK national security. In delivering this, the Government produces and receives sensitive information. This information must be protected appropriately, as failure to do so may compromise investigations, endanger lives and ultimately diminish our ability to keep the country safe.

2.3 Sensitive information can be used to prevent terrorist attacks or to disrupt serious crime networks and is used to make the case for executive action such as deportation and asset freezing. The decisions forming the basis of these actions are often challenged, and reliable procedures are needed to allow such cases to be heard fairly, fully and safely in the courts. PII enables sensitive material to be excluded from such cases, but excluding key material means the case cannot always be contested fairly by both sides. In recent years the Government has been called on to defend itself in an increasing number of civil proceedings initiated by others in which sensitive information is at the heart of the case.

2.4 Where the Government takes executive action and that action is subsequently challenged in the courts, there is ultimately the option – however damaging to national security – of dropping the action and withdrawing the case if the sensitive material will not be adequately protected. Equally, when the Government is defending itself and if too much material has been excluded from the court, the Government may have little choice but to settle cases without a chance to defend itself.

2.5 In these and other cases, judges have had to deliver judgments without being able to take into account key information. This weakens the UK's reputation as a free and fair democracy, respectful of human rights and the rule of law. It also means that security and intelligence agency activity risks remaining largely outside the scope of the justice system. There is an increasing risk that the Government may have to settle cases that it is prevented from defending.

2.6 These challenges have manifested themselves in a number of areas, which are covered in more detail below.

Court mechanisms

2.7 Broad mechanisms that the courts can use to deal with the challenges posed by material that is too sensitive to be disclosed publicly include the following:

- **Private hearings**, which are sessions from which the public and the press, but not the opposing litigant or counsel, are excluded.
- **Confidentiality rings**, which can be established when parties to the litigation agree to abide by restrictions on the disclosure of material outside the proceedings.
- **CMPs**, which enable relevant material in a case, the disclosure of which would harm the public interest, to be dealt with in a separate, closed part of the proceedings. CMPs differ from private hearings in that a party to the proceedings will be excluded from the closed part of proceedings, as well as the press and public. Sensitive information is not disclosed to excluded parties. Instead, it is disclosed to a Special Advocate appointed by the Attorney General to assist the court by representing the interests of the excluded party.

In some circumstances excluded parties may be given a summary (a 'gist') of the detailed sensitive material to enable them to instruct the Special Advocate representing their interests. Statutory provision for CMPs is made in a limited number of contexts, but doubt has been cast on a court's inherent ability to order a CMP where statutory provision does not exist, following the Supreme Court's recent judgment in *Al Rawi*.[1]

- **PII** protects sensitive information during the course of legal proceedings. PII is a common law principle. The courts have long recognised that evidence, while relevant to the issues between the parties in a case, may be excluded if the public interest in withholding the information outweighs the public interest in disclosing it. This involves the court balancing competing aspects of public interest: the public interest in the confidentiality of certain documents and the public interest in the administration of justice. The areas of national interest which may be protected by PII include national security, international relations, and the prevention or detection of crime.

Norwich Pharmacal principles

2.8 A 'Norwich Pharmacal' action is an equitable remedy requiring a respondent to disclose certain documents or information to the applicant. The respondent must either be involved in, or mixed up in, wrongdoing by others, whether innocently or not, and is unlikely to be party to the potential proceedings. An order will only be granted where it is deemed necessary in the interests of justice. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

2.9 Relief under Norwich Pharmacal principles is intended to be exceptional. Until recently a Norwich Pharmacal action had not been used where there was any question of disclosure causing a real risk of damage to the public interest in protecting national security. In this sphere it is, however, a growing area of litigation, with the Government having defended no fewer than seven such cases since 2008. Cases of this kind have had a disproportionate impact on our international, diplomatic and intelligence relationships with foreign governments.

Article 6 of the European Convention on Human Rights

2.10 Article 6 requires that in proceedings determining a person's civil rights, the person is entitled to a fair trial. Hearings should normally be held in public, although exceptions are permitted on grounds such as national security. Relevant evidence should generally be disclosed to the parties to civil proceedings, but this right is not absolute, and limits on disclosure may be justified, for example in the interests of national security in order to protect the public from harm. In some circumstances, even if it is justified not to disclose all of the evidence to the parties, Article 6 may require that the gist of the evidence should be disclosed.

Current problems

2.11 In recent years there has been a significant increase in the number, range and complexity of cases reaching the courts in which evidence of a genuinely national security sensitive nature is relevant to proceedings. Although still few in absolute terms relative to the overall number of non-sensitive cases being heard every year, these cases have a disproportionately high impact.

2.12 In a large proportion of these sensitive cases the interests of justice are not being served as fully as they might be. The well-established and understood mechanism of PII becomes less effective in cases where large proportions of the relevant material are potentially excluded from the court – judgments risk being reached based only on some of the relevant facts. PII

[1] *Al Rawi v the Security Service* [2011] UKSC 34

has worked well in cases where the ability to adduce the sensitive information is not critical to the outcome of the proceedings. But PII works by excluding material from proceedings such that neither side can rely on it, which tends to limit the evidential base on which the court will reach its decision. In some cases which involve substantially all and only sensitive material, the only option could be for the case to be struck out for a lack of a mechanism with which to hear it.

2.13 Where they are provided for in legislation, CMPs enable justice to be done and sensitive material to be safeguarded. CMPs, however, are not available in many contexts in which, increasingly, they would benefit the interests of justice. It was their lack of availability in the former Guantanamo detainees' civil damages claims, for example, that led to an expensive out-of-court settlement, without the merits of the case having been argued.

2.14 Private hearings and confidentiality rings exist and operate effectively for less sensitive material, where the risks of leaking can be managed and contained. Where national security is at stake, private hearings and confidentiality rings do not provide sufficient protection.

Policy rationale

2.15 A framework is needed that enables courts to consider material which is too sensitive to be disclosed in open court, but which also protects the fundamental elements that make up a fair trial without jeopardising UK national security.

3. Options Analysis

3.1 This section sets out the costs and benefits of the options, the associated assumptions and sensitivities, and the risks associated with each option. It is not practically feasible to undertake a forensic assessment of each of the Green Paper proposals. As such, the options analysis has restricted itself to impacts which may have substantial social and economic impacts on the UK and which are likely to be of interest to the public. The assessment does not explore options which are not central to the Government's proposals.

3.2 The Green Paper contains a wide range of proposals on different areas. It has been necessary to group them into coherent packages which are then appraised against a common 'base case' or 'do nothing' option. This is designed to allow the reader to effectively compare feasible coherent alternatives. However, these should not be treated as hard or fixed alternatives. The packaging is for appraisal purposes, with potential scope for alternative combinations to emerge following consultation.

Base case (Option 0)

General description

3.3 The *Impact Assessment Guidance* requires that all options are assessed against a common base case. The base case for this IA is one in which there are no changes to how sensitive material is dealt with in civil proceedings in the UK. This would mean that the current problems set out under Section 2 would continue to persist with ongoing impacts on the UK.[2] As the base case compares against itself, the net present value is zero.[3]

Option 1: Extend closed material procedures for all civil cases and reform the Special Advocate system

General description

3.4 This option comprises a package of measures that include the following:

- **Extension of CMPs so that they are available for all civil proceedings where sensitive material is relevant.** There would be a statutory scheme to make CMPs available in all civil proceedings, including judicial reviews and civil damages claims.
- **Greater access to relevant sensitive material in inquests for jurors and interested persons.** This would permit members of the jury to consider sensitive evidence after security vetting. It would also include use of Special Advocates to represent properly interested persons (PIPs), especially families.
- **Reform of the Special Advocate system as an independent option or part of the broader set of reforms.** This would include standardisation of the operation of the system across all contexts; extended training for Special Advocates; and a possible 'Chinese wall' mechanism to assist communication between the Special Advocate and the individual whose interests they represent.

[2] It is possible that in the long term, without legislation, the common law might evolve in a way which might address some of these problems.

[3] However, it should be noted that certain drivers/factors are likely to change over time and may amplify the profile of impacts within the base case relative to the current year.

Costs of Option 1

Monetised costs

3.5 There would be monetised costs associated with extending CMPs and greater access to relevant sensitive material in inquests for jurors and PIPs. These are discussed below.

Closed material procedures

3.6 Extending CMPs would lead to costs of court hearings in cases which would otherwise have proceeded with PII certificates for the sensitive elements. The non-sensitive elements would either have been heard in open court and the case concluded, or the case could have gone on to be settled outside of court in civil damages cases where the removal of material through the PII process would either have been extremely resource intensive or would have left the Government with no defence to make in open court. Under the CMP process the case would continue for a longer period in court relative to settling, resulting in additional costs.

3.7 For these cases, the additional costs (relative to the do nothing option) from the introduction of CMPs would depend on the following:

- how much of the case would use the CMP process
- the level of legal support provided to government and the non-state litigant for CMP purposes
- the costs to the judiciary of additional judicial and administrative staff time
- the number of civil cases that would utilise CMPs. The number of civil cases has been estimated based on the current volume of cases across the UK.

3.8 Full assessment of the monetised impacts of CMPs, including consideration of various sensitivity tests, is set out at Annex A. The total monetised annual cost is estimated to range between £0.4 million and £2.5 million. This equates to a discounted estimate of £9 million over the appraisal period (2013–22), within the range of £3.4 million to £20.3 million.

Greater access to sensitive material at inquests

3.9 There would be costs associated with greater access to sensitive material in the following areas:

- **Costs of hearings.** There would be hearing costs in inquests in which sensitive information is relevant but would have been excluded using PII certificates. These inquests would use a CMP for some parts of the inquest, with other parts continuing under open proceedings. This would extend the length of the inquest and would result in additional costs, including those to the coroner system, provision of Special Advocates and juror costs.
- **Costs of vetting jurors.** There would be costs associated with security vetting potential jurors to enable them to handle sensitive material.

3.10 There may also be costs associated with the following:

- **The possibility that some individuals, especially family members, may resent the use of CMPs during inquests.** It is also possible that jurors may find the vetting procedure intrusive, leading to resentment of the judicial process and unwillingness to participate in jury service.

- **Higher risk of potential security breaches due to a larger number of individuals accessing sensitive information.** It is impossible to assess the level of risk and the likely cost of any potential breach. However, the Government's willingness to settle out of court to protect such information suggests that the value of such information is significantly high. Therefore any potential breaches may impose substantial costs to UK security.

3.11 A full assessment of the monetised costs of using of sensitive information during inquests is at Annex B. The total annual costs would range between £0.7 million and £1.1 million. The total discounted[4] cost over the ten-year appraisal period would range between £5.9 million and £8.9 million. The central cost is estimated at just over £7.3 million.

Special Advocate reform

3.12 There may be costs associated with Special Advocate reform. The extent of these costs would depend on the nature and scale of the proposed reforms. There are two potential areas that may lead to further costs:

- **Further training on intelligence analysis and assessment methods** in order to enable more rigorous challenge of closed material. These would incur costs over and beyond the current Security Service training course offered to Special Advocates. The training could potentially include refresher modules, re-attendance at the introductory course or specific training on particular issues.
- **The introduction of improved methods of communication** with the party whose interests they are representing after service of the closed material. A key aspect of this may include the creation of properly functioning 'Chinese walls' between government counsel (including Treasury Solicitors) and those clearing communications requests between the non-state litigant and Special Advocates. Such mechanisms would entail resource costs.

3.13 Although these costs are potentially monetisable, it is difficult at this stage to quantify the costs with an acceptable degree of accuracy. Further work will be undertaken over the consultation period.

Non-monetised costs

3.14 There would be non-monetised costs with greater access to sensitive material during inquests and Special Advocates reform.

Benefits of Option 1

Monetised benefits

3.15 There would be monetised benefits associated with extending CMPs and greater access to sensitive material at inquests for jurors and PIPs, as stated below.

Closed material procedures

3.16 Extension of CMPs so that they are available in all civil proceedings would lead to a reduction in the use of PII certificates as it would be less necessary to withhold information. The scale of the savings would depend on the volume and costs of PII certificates with the new CMPs relative to their use without CMPs in place. It is assumed that some form of PII would continue to exist in certain circumstances in civil proceedings. The total savings per annum

[4] Discounting is a technique used to compare costs and benefits that occur in different time periods. Discounting is a separate concept from inflation and is based on the idea of 'time preference', i.e. in general people prefer to receive goods and services sooner rather than later and prefer to put off paying for things as far into the future as they can. It is the same for policy proposals: the sooner the benefits can be realised and the further into the future the costs must be met, the more it may be preferred. The recommended discount rate is 3.5%, in line with the HM Treasury *Green Book*.

are estimated to range between £0.8 million and £1.4 million. The total discounted benefits over the ten-year appraisal period would range between £6.5 million and £11.3 million. The central benefit is estimated at just over £8.4 million.

Greater access to sensitive material at inquests

3.17 There would be benefits of greater access to sensitive material in the following areas:

- **Reduced PII applications.** There would be benefits from reduced PII applications by the Government in order to withhold sensitive information during inquests.
- **Public inquiry savings.** The decision by the Government to utilise CMPs may have the benefit of reducing the need for a full-scale public inquiry where the inquest cannot consider centrally relevant sensitive material. The avoidance benefits are likely to vary from case to case, but may be substantial.

3.18 The full assessment of introducing CMPs during inquests is set out at Annex B. The total annual undiscounted benefits would range between £0.8 million and £1.2 million. The total discounted benefits over the ten-year appraisal period would range between £7.6 million and £9.1 million. The central benefit is estimated just over £8.2 million.

Non-monetised benefits

3.19 There would be non-monetised benefits with extension of CMPs to all civil proceedings, greater access to sensitive material at inquests and Special Advocate reform, as stated below.

Closed material procedures

3.20 Extension of CMPs for all civil proceedings would lead to the following non-monetised benefits:

- **Reduction in government workload** from the reduced need to complete the PII balancing exercise and Ministerial authorisation of individual PII certificates, although the significance of such benefits is difficult to quantify.
- **Greater information available to the courts**, which would improve the accuracy of judicial decisions and therefore serve the interests of justice, resulting in a reduction in reputational costs to the UK associated with the current system. The use of CMPs may also lead to greater international co-operation by reassuring intelligence partners that we can protect their information. Although difficult to monetise, such co-operation is vital to UK safety and security.

Greater access to relevant sensitive material in inquests

3.21 Greater access to relevant sensitive material would lead to greater availability of information to the coroner, which would further serve the interests of justice and improve the reputation of the UK inquests system.

Net impact of Option 1

3.22 Option 1 would generate a net positive impact of around £0.0 million over the appraisal period (2013–22). Table 1 provides the full range of sensitivity tests results.

Table 1: Option 1 costs and benefits (£m), 2013–22			
Scenario	**Benefits**	**Costs**	**Net PV**
Central case	16.53	16.58	–0.05
Test 1 – Low cost: civil cases	16.53	10.69	5.84
Test 2 – High cost: civil cases	16.53	27.55	–11.02
Test 3 – Low benefits (PII savings): civil cases	14.62	16.58	–1.96
Test 4 – High benefits (PII savings): civil cases	19.45	16.58	2.87
Test 5 – Low cost: inquest cases	16.53	15.20	1.33
Test 6 – High cost: inquest cases	16.53	18.21	–1.68
Test 7 – Low benefits (PII savings): inquest cases	15.94	16.58	–0.64
Test 8 – High benefits (PII savings): inquest cases	17.52	16.58	0.94

3.23 We have also assessed the non-monetised impacts of Option 1. In general, Option 1 would lead to non-monetised costs in terms of reputational costs and damage caused by open disclosure of sensitive material. There would also be additional costs which we have not been able to monetise at this stage. These would principally include costs associated with Special Advocate reform, for example further training in order to enable more rigorous challenge of closed material; and the introduction of improved methods of communication with the party whose interests they are representing after service of closed material.

3.24 The non-monetised benefits of Option 1 would lead to greater availability of relevant information during proceedings, which would increase the amount of information taken into account in making determinations and therefore serve the interests of justice and reduce reputational costs to the UK associated with the current system.

Assumptions, sensitivities and risks

3.25 The monetised assessment is sensitive to the assumptions set out at Annexes A and B. These include assumptions relating to volume of cases; unit costs; appraisal; and policy scope. Where possible, sensitivity tests have been undertaken to quantify the scale of uncertainty.

Option 2: Extend closed material procedures for all civil cases; reform the Special Advocate system; and limit the applicability of Norwich Pharmacal

General description

3.26 This option comprises a package of measures that include the following:

- **Extension of CMPs so that they are available for all civil proceedings where sensitive material is relevant.** There would be a statutory scheme to make CMPs available in all civil proceedings, including judicial reviews and civil damages claims.
- **Greater access to relevant sensitive material in inquests for jurors and interested persons.** This would permit members of the jury to consider sensitive evidence after security vetting. It would also include use of Special Advocates to represent PIPs, especially families.
- **Reform of the Special Advocate system as an independent option or part of a broader set of reforms to improve civil proceedings.** This would include standardisation of the operation of the system across all contexts; extended training for Special Advocates; and a possible 'Chinese wall' mechanism to assist communication between the Special Advocate and the individual whose interests they represent.
- **Disapply or limit the applicability of Norwich Pharmacal principles to cases involving sensitive material.** This would involve legislating to disapply or limit the principles currently applied in Norwich Pharmacal applications in cases seeking disclosure of sensitive material.

Costs of Option 2

Monetised costs

3.27 These would be the same as for Option 1, but limiting the applicability of Norwich Pharmacal principles would potentially lead to lower costs relative to Option 1 because fewer cases would need CMPs. It is estimated that around 10% of current sensitive cases are Norwich Pharmacal cases. The total additional costs of introducing CMPs assessed under Option 2 would therefore be 10% lower than those assessed under Option 1.

3.28 The total costs of Option 2 are therefore estimated to range between £10.4 million and £25.5 million, with a central cost estimate of £15.6 million over the appraisal period.

Non-monetised costs

3.29 These would be the same as for Option 1.

Benefits of Option 2

Monetised benefits

3.30 These would be the same as for Option 1.[5]

Non-monetised benefits

3.31 These would be the same as for Option 1, but limiting the applicability of Norwich Pharmacal principles would lead to greater certainty about how sensitive material is handled, especially in the context of foreign proceedings.

[5] The benefits of not having to contest Norwich Pharmacal claims are already assessed under the assumed lower estimated costs at paragraph 3.27.

Net impact of Option 2

3.32 Option 2 would generate a net impact of around £0.9 million. Table 2 provides the central case and sensitivity tests results.

Table 2: Option 2 costs and benefits (£m), 2013–22			
Scenario	**Benefits**	**Costs**	**Net PV**
Central case	16.53	15.65	0.88
Test 1 – Low cost: civil cases	16.53	10.35	6.18
Test 2 – High cost: civil cases	16.53	25.52	–8.99
Test 3 – Low benefits (PII savings): civil cases	14.62	15.65	–1.03
Test 4 – High benefits (PII savings): civil cases	19.45	15.65	3.80
Test 5 – Low cost: inquest cases	16.53	14.27	2.26
Test 6 – High cost: inquest cases	16.53	17.28	–0.75
Test 7 – Low benefits (PII savings): inquest cases	15.94	15.65	0.29
Test 8 – High benefits (PII savings): inquest cases	17.52	15.65	1.87

3.33 We have also assessed the non-monetised impacts of Option 2. In general, Option 2 would lead to the same non-monetised costs and benefits as Option 1. However, Option 2 may lead to greater certainty about how sensitive material is handled, especially in the context of foreign proceedings.

Assumptions, sensitivities and risks

3.34 These would be the same as for Option 1. However, there would be more uncertainty associated with the volume of Norwich Pharmacal cases.

Option 3: Extend closed material procedures for all civil cases; reform the Special Advocate system; limit the applicability of Norwich Pharmacal; and clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply

General description

3.35 This option comprises a package of measures that include the following:

- **Extension of CMPs so that they are available for all civil proceedings where sensitive material is at issue.** There would be a statutory scheme to make CMPs available in all civil proceedings, including judicial reviews and civil damages claims.
- **Greater access to relevant sensitive material in inquests for jurors and interested persons.** This option would permit members of the jury to consider sensitive evidence after security vetting. It would also include use of Special Advocates to represent PIPs, especially families.
- **Reform of the Special Advocate system as an independent option or part of a broader set of reforms to improve civil proceedings.** This would include standardisation of the operation of the system across all contexts; extended training for Special Advocates; and a possible 'Chinese wall' mechanism to assist communication between the Special Advocate and the individual whose interests they represent.

- **Disapply or limit the applicability of Norwich Pharmacal principles to cases involving sensitive material.** This would involve legislating to disapply or limit the principles currently applied in Norwich Pharmacal applications in cases involving requests for disclosure of sensitive material.
- **Clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply.** This would involve legislating to clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply. Under any scenario, the principle would continue to apply in contexts in which the courts have already ruled definitively.

Costs of Option 3

Monetised costs

3.36 These would be the same as for Option 2.

Non-monetised costs

3.37 These would be the same as for Option 1.

Benefits of Option 3

Monetised benefits

3.38 These would be the same as for Option 1.

Non-monetised benefits

3.39 These would be the same as for Option 2. However, there may be additional benefits through the reduction in the volume of litigation concerning the circumstances in which the AF (No.3) principle applies. The benefits would mainly be related to a greater degree of efficiency in CMP litigation, where in many contexts uncertainty over requirements may spawn satellite litigation away from the substantive proceedings. For government, knowing in advance of proceedings that there will or will not be such a requirement would increase certainty with respect to the course of action it wishes to pursue in protecting national security. The extent of these benefits would depend on the range of contexts identified. Further work will be undertaken over the consultation period to identify the extent of savings, whereupon they may be included under monetised benefits.

Net impact of Option 3

3.40 This would be the same as for Option 2. Option 3 would generate a net impact of around £0.9 million. Table 3 provides the central case and sensitivity tests results.

3.41 We have also assessed the non-monetised impacts of Option 3. In general, Option 3 would lead to the same non-monetised costs and benefits as for Option 2. However, there may be additional impacts associated with limiting the range of contexts in which the 'AF (No.3)' disclosure requirement applies.

Table 3: Option 3 costs and benefits (£m), 2013–22			
Scenario	**Benefits**	**Costs**	**Net PV**
Central case	16.53	15.65	0.88
Test 1 – Low cost: civil cases	16.53	10.35	6.18
Test 2 – High cost: civil cases	16.53	25.52	–8.99
Test 3 – Low benefits (PII savings): civil cases	14.62	15.65	–1.03
Test 4 – High benefits (PII savings): civil cases	19.45	15.65	3.80
Test 5 – Low cost: inquest cases	16.53	14.27	2.26
Test 6 – High cost: inquest cases	16.53	17.28	–0.75
Test 7 – Low benefits (PII savings): inquest cases	15.94	15.65	0.29
Test 8 – High benefits (PII savings): inquest cases	17.52	15.65	1.87

Assumptions, sensitivities and risks

3.42 These would be the same as for Option 2.

Summary of options analysis

3.43 Table 4 presents a summary of the monetised and non-monetised costs and benefits, assuming the central case assumptions – that is, the Government's current best estimate of the likely costs and benefits. The net economic impacts range between £0.0 million and £0.9 million, depending on the option.

3.44 We have also assessed the non-monetised impacts of the three options. In general, all the options would lead to non-monetised costs from the potential security breach risk, especially in the context of inquests, and training costs in the context of Special Advocate reform. The non-monetised benefits relate to the increased amount of information that would be accessible in proceedings, leading to more efficient justice, increased public confidence, greater certainty and the possibility of improved international co-operation.

Table 4: Summary of options (£m), all options assessed over the period 2013–22				
		Costs	**Benefits**	**Net impact**
Option 1: Extend closed material procedures for all civil cases and reform the Special Advocate system	*Monetised*	Costs of CMPs at inquests and civil cases, which are estimated at £16.6m	Reduced PII certification for civil cases and inquests; and, in rare cases, the potential to avoid public inquiries into deaths. Benefits estimated at £16.5m	£0.0m (range: –£11m to £6m)
	Non-monetised	Potential security breach risk, especially in the context of inquests; and training and 'Chinese wall' costs in the context of Special Advocate reform	Increased amount of information accessible in proceedings, leading to more efficient justice; increased public confidence; and improved international co-operation	
Option 2: Extend closed material procedures for all civil cases; reform the Special Advocate system; and limit the applicability of Norwich Pharmacal	*Monetised*	Lower than Option 1 due to stricter application of Norwich Pharmacal principles. Costs estimated at £15.7m	Same as Option 1	£0.9m (range: –£9m to £6m)
	Non-monetised	Same as Option 1	Greater than Option 1 due to benefits of reduced PII associated with Norwich Pharmacal cases	

Table 4: Summary of options (£m), all options assessed over the period 2013–22 *(continued)*				
		Costs	**Benefits**	**Net impact**
Option 3: Extend closed material procedures for all civil cases; reform the Special Advocate system; limit the applicability of Norwich Pharmacal; and clarify the circumstances in which the 'AF (No.3)' disclosure requirement does not apply	*Monetised*	Same as Option 2	Same as Option 2	£0.9m (range: –£9m to £6m)
	Non-monetised	Same as Option 2	Same as Option 2, but includes increased efficiency and certainty in the context of 'AF (No.3)' disclosure	

Annex A: Closed Material Procedures in Civil Cases

A.1 This Annex explains how the assessment of the impact of introducing closed material procedures (CMPs) more widely in civil cases has been undertaken. The analysis presented here excludes provisions related to inquests which are discussed at Annex B.

Policy proposal

A.2 The proposal is to make CMPs available in civil proceedings in which sensitive material is centrally relevant to the proceeding. This forms part of Options 1 to 4 in the Impact Assessment.

A.3 Currently, if the case involves sensitive material, disclosure of which would be harmful to the public interest or national security, there are the following courses of action: either a CMP is permissible where there is statutory authority; or the case is tried in open court, with Public Interest Immunity (PII) certificates made for the sensitive material; or it may be possible in some circumstances to have a CMP by agreement between the parties.

A.4 CMPs are currently provided for in a limited range of proceedings, such as sensitive immigration and control orders hearings. The proposal is to extend this procedure to make it clear that it is available in all civil proceedings, including civil damages claims and judicial review challenges.

Current framework

A.5 There are two elements under the current PII framework:

a) In cases involving sensitive material, the Secretary of State must consider whether there is a real risk that harm to the national security interest would result if the material was disclosed into an open court. This consideration involves balancing the public interest for and against disclosure. If the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld. These certificates are then put before the relevant court for consideration.

b) The court will then determine the balance between the public interest in withholding the evidence and the public interest in disclosing the information. The material cannot be admitted and the parties cannot rely on it if the public interest in withholding the information outweighs the public interest in disclosing it. However, if the public interest in disclosing the information outweighs the public interest in withholding it, then the document must be disclosed (unless the Government concedes the issue to which it relates). Where material cannot be disclosed, it may be possible to summarise the material, to produce relevant extracts, or to produce the material 'on a restricted basis'.[6]

A.6 The judge considers the PII certificates (in (b) above) in 'disclosure hearings' (separately from non-sensitive hearings relating to other non-sensitive parts of the case) with the potential to hold sensitive ex-parte hearings with Government alone. In some cases Special Advocates (SAs) are appointed to join hearings if the judge deems it necessary.[7] This can be a fairly protracted process until the judge decides which evidence may be withheld under PII.

[6] See *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274 at paragraphs 306H–307B.

[7] The assessment has assumed no such representations are made available.

A.7 In the event that the judge disagrees with the Government about the balance of public interest, the Government may be forced to either release the information or drop the points pertaining to the material that is subject to the overturned PII certificate. In some instances litigants may disagree with the court decision and will opt to appeal to higher courts. The analysis presented here excludes the 'appeals' element. Further work will be done over the consultation period.

A.8 A key source of costs under the current regime is the significant PII applications hearings as part of the disclosure process.

Proposed framework

A.9 The Green Paper proposes legislation to make CMPs more widely available across the full range of civil proceedings in which there is centrally relevant sensitive material.

A.10 The process would be as follows:

- The Secretary of State decides that certain relevant sensitive material would cause damage to the public interest if openly disclosed, a decision supported by reasoning and, where appropriate, by documentation.
- This decision would be reviewable by the trial judge on judicial review principles if the other side decide to challenge the Secretary of State's decision.
- If the Secretary of State's decision is not set aside, a CMP is triggered. In the first phase of the CMP the judge proceeds to hear arguments from the Special Advocate and counsel to the Secretary of State about the appropriate treatment (in closed or open court) of specific material or tranches of material, based on an assessment of damage to the public interest that would be caused by open disclosure – the aim here is to ensure that as much material as possible can be considered in open court. The ability of a Special Advocate to submit that any part of the closed material should move to open court will continue throughout the whole of the proceedings.

A.11 A key aspect of the proposed regime is that the CMPs application hearing is likely to replace prolonged PII applications hearings. However, there would, of course, still be a need for administrative hearings in the new system, most notably in which the Special Advocate would challenge the proper forum (open or closed) for the consideration of certain material. There would also be the potential logistical and cost impact of running concurrent closed and open hearings for the same legal proceeding.

Costs of proposed framework

A.12 Under the proposed system, some cases which are currently heard in open court with elements of the relevant material excluded through PII would be heard instead in a combination of open and closed court.

A.13 For these cases, the additional **cost per case** (over and above the 'do nothing') from the introduction of the CMP would depend on the following:

- **The nature of the CMP process.** In particular, the length of hearings to determine whether the CMP is needed and how much of the case would involve the CMP process. This is likely to vary depending on the type and complexity of the case. It could range from one to five days of hearings before the judge with arguments and evidence presented from both sides. The CMP component of the main trial would be likely to mirror the actual

length of the open court component. It is assumed that in most instances such CMP cases would run for five days, with scope to last double that (i.e. range up to ten days, with a lower case of two and half days).

- **The level of support provided to government and the non-state litigant for CMP purposes.** It has been assumed that government counsel would be in the region of three for most cases. The non-state litigant Special Advocate representation would also depend on judicial decisions relating to the nature of the case. It is envisaged in most civil cases that there would be two to four Special Advocates (Queen's Counsel supported by junior barristers).
- **The costs to the judiciary in the form of judicial and administrative staff time.** Judicial time would in most cases not be limited to substantive hearings but also include administrative hearings.

A.14 Table A1 and Table A2 set out the unit cost inputs and the resulting cost per case assumptions respectively that underpin the assessment. It is assumed that costs per case would vary between £0.02 million and £0.13 million.

Table A1: Cost per case assumptions

	Central	Low	High
Special Advocate support to litigant	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
HMG councel	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
CMP application hearings	3 days	1 day	5 days
CMP main hearings	5 days	2.5 days	10 days

Table A2: CMP cost per case (£m)

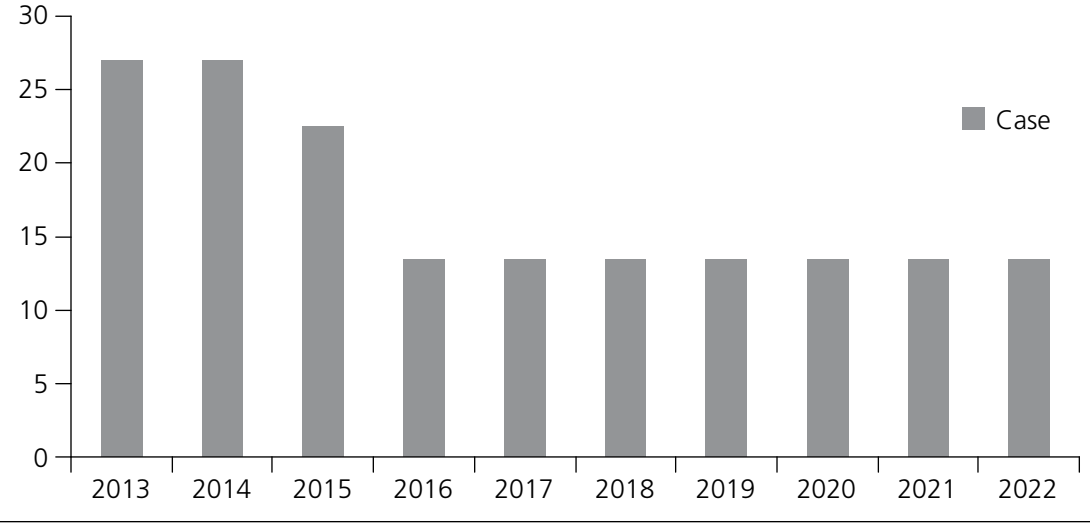
		Cost per case		
		Central	Low	High
Pre-trial CMPs	Judiciary	0.01	0.00	0.01
	HMG counsel	0.01	0.00	0.02
	SA support (litigant)	0.01	0.00	0.02
Main CMPs	Judiciary	0.01	0.01	0.03
	HMG counsel	0.01	0.00	0.03
	SA support (litigant)	0.01	0.00	0.03
Total		0.06	0.02	0.13

A.15 The assessment of the total costs of introduction would depend on the volume of cases that would utilise the CMPs. The estimate of the volume of civil cases has been based on the following:

- Current volume of pending and stayed cases: due to the absence of a clear historic trend, we have taken the current 'pending' cases as the best snapshot in time and assumed that these would decrease over time and stabilise annually in line with the current volume of PII certificates requested annually.
- The majority of cases relate to judicial reviews, with a few cases related to civil claims and damages.
- All jurisdictions are included in the analysis, although Scotland and Northern Ireland are assumed to have substantially lower volume.
- All sensitive cases related to inquests have been excluded as these are dealt with at Annex B.

A.16 Chart A1 sets out the current assumed profile of sensitive civil cases. This assumes current live cases would be dealt with in the first year, with stayed cases spread over the two years thereafter alongside other emerging cases. The cases are assumed to stabilise around current PII certificate applications.

Chart A1: Annual civil cases (court volumes)



A.17 The additional costs associated with the introduction of CMPs are set out in Table A3.[8] The total annual undiscounted costs would range between £0.4 million and £2.5 million. The total discounted cost over the ten-year appraisal period would range between £3.4 million and £20.3 million. The central cost is estimated at just over £9 million.

[8] This does not include reduction in costs from fewer PII processes; this is examined under the Benefits section.

Table A3: CMPs costs sensitivity tests (£m)			
	Sensitivity test assumptions		
	Central	Low	High
Average annual cost (undiscounted)	1.13	0.41	2.46
Spending period: 2013–14 (undiscounted)	3.55	1.30	7.75
Appraisal period: 2013–22 (discounted)	9.29	3.40	20.26

Benefits of proposed framework

A.18 The proposed system would lead to benefits from the reduction of potential PII costs. There may be cases which, in the absence of CMPs, would have gone to an open court with PII certificates on sensitive material; but such cases now could utilise the CMP process for part of the proceedings with other elements continuing in open court.

A.19 The main additional benefit would be the reduction in applications for PII certificates as a result of the reduced need to withhold substantial information. The benefits are likely to include the following cost avoidance under the current PII system:

- Reduction in government workload because of the reduced need for the balancing exercise and Ministerial sign-off, although the additionality of such benefits is harder to quantify. This would essentially be the cost of civil servants and government legal advice.
- A reduction in PII application hearings currently held as part of the disclosure process. These can last for long periods and a single case can involve as many as 12 hearings as various parties make their position known. For most of these hearings it is assumed that no Special Advocate is used by the non-state litigant.
- Reduction in ex-parte hearings with government counsel. Under the current system, the judge may request ex-parte hearings with government counsel to help establish the sensitive nature of the material. Such hearings would usually last for no more than two days. The introduction of CMPs would negate the need for such procedures.

A.20 The extent of the benefits would depend on the volume of PII cases. We have assumed that across the three UK jurisdictions there would be about 15 PII-related cases annually,[9] with a lower and upper range of 10 and 20 cases annually.

A.21 Table A4 and Table A5 set out the unit cost inputs and the resulting PII savings per case assumptions respectively that underpin the assessment. It is assumed that costs per case would vary between £0.05 million and £0.09 million. The case volumes associated with the above scenarios are set out in Table A4. These are based on the current estimate of annual PII cases (not certificates) that are issued across the three jurisdictions.

A.22 The cost savings associated with the introduction of CMPs are set out in Table A6. The total annual undiscounted benefits would range between £0.8 million and £1.4 million. The total discounted benefits over the ten-year appraisal period would range between £6.5 million and £11.3 million. The central benefit is estimated at just over £8.4 million.

[9] The PII savings are therefore based on a significantly lower volume than the CMPs costs. This is based on the assumption that many of the stayed and pending cases have already incurred PII costs and therefore there are no feasible savings from those cases beyond the annual PII certificate application costs. Changing this assumption would significantly alter the results.

Table A4: PII savings per case assumptions			
	Central	**Low**	**High**
HMG counsel	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
Litigant – private	1 QCs and 3 junior barristers	1 QC and 2 barristers	1QC and 4 junior barristers
Litigant – SA	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
Judge review of case	2 day	1 day	3 days
PII applications hearings	7 days	5 days	10 days
PII sensitive case hearings	1 day	1 day	2 days
Cases per annum	15 cases	15 cases	15 cases

Table A5: PII savings per case				
		Saving scenario		
		Central	**Low**	**High**
Pre-trial CMPs	Judiciary	0.02	0.02	0.02
	HMG – counsel	0.02	0.01	0.02
	SA (litigant)	0.02	0.02	0.03
Main CMPs	Judiciary	0.01	0.00	0.01
	HMG – counsel	0.00	0.00	0.02
	SA (litigant)	0.00	0.00	0.00
Total		0.07	0.05	0.09

Table A6: PII savings sensitivity tests (£m)			
	Sensitivity test assumptions		
	Central	**Low**	**High**
Average annual cost (undiscounted)	1.04	0.81	1.41
Spending period: 2013–14 (undiscounted)	2.09	1.61	2.81
Appraisal period: 2013–22 (discounted)	8.38	6.47	11.30

Other considerations

A.23 In any proceedings, the requirement to utilise CMPs may have a financial saving to government from a reduced need to settle cases out of court. Although this financial gain is counted as a benefit to government (and taxpayers), it does not constitute an overall economic benefit in appraisal terms because such an out-of-court settlement would essentially constitute a transfer of benefits from the litigant to government.[10] It is therefore scored both as a cost to the litigant and a benefit to government, which effectively translates

[10] It is assumed that under most damages cases the litigants would be UK residents although not necessarily UK nationals.

as an overall zero impact on society.[11] It should also be noted that there is no certainty that the Government would not still seek to settle even after going through the CMPs, although it would seem a less likely outcome.

Net impact of proposed framework

A.24 The net present value has been assessed over the appraisal period. The proposed framework would lead to a net present value of –£0.6 million, within the range of –£11.9 million and £4.9 million. The overall monetised outcome is therefore likely to be broadly negative due to the volume of pending cases that would immediately utilise the justice system over the appraisal period. Although the savings from PII hearing costs are significant, these are not judged to be significant enough to outweigh the costs of the CMPs over the next decade. Table A7 provides further detail.

Table A7: Discounted costs and benefits of CMPs (£m), 2013–22

Scenario	Benefits	Costs	Net
Central case	8.38	9.29	–0.91
Low cost per case	8.38	3.40	4.98
High cost per case	8.38	20.26	–11.88
Low benefits (PII savings) per case	6.47	9.29	–2.82
High benefits (PII savings) per case	11.30	9.29	2.01

Technical assumptions

A.25 The unit cost assumptions are set out in Table A8. The costs have been adjusted for non-wage labour costs.

Table A8: Unit costs assumptions
(All figures adjusted for non-wage labour costs at 21.2%)

CMP element	Description	Cost per hour (£)
Queen's Counsel	Based on existing market rates	241
Junior barristers	Based on existing market rates	121
Judicial costs	High Court judge's time, which is estimated from the judicial wages and overheads to represent the opportunity cost of time spent hearing the case	345
Court costs	Court administration costs based on appropriate staffing levels as provide from court management systems data	145

A.26 The appraisal modelling assumptions used are: policy appraisal length 2013–22; real discount rate – 3.5%; price base (2010/11); and non-wage labour cost adjustment – 21.2%.

[11] This argument of course does not apply to non-state litigant representation costs because it is assumed that these ultimately fall to government through legal aid and Special Advocate costs.

Annex B: Appraisal of Increased Access to Sensitive Information at Inquests

B.1 The Green Paper seeks public consultation on the best way to ensure that investigations into a death can take account of all relevant information while supporting the involvement of jurors, family members and other properly interested persons (PIPs). The issues are particularly sensitive. This annex details some of the assumptions and other considerations that we have tested in this Impact Assessment with regard to inquests.

Policy proposal

B.2 The Green Paper asks whether it would be feasible to legislate to make closed material procedures (CMPs) available in inquests, and what measures would be required to make CMPs viable within inquests involving sensitive material.

B.3 There is currently no legislative framework for how sensitive information is used in inquests. In instances where such issues have arisen in the past, the Government has had to rely on Public Interest Immunity (PII) or excluding the public from hearings if it is in the interests of national security, relying on Rule 17 of the Coroners Rules 1984.[12] Although the number of inquests where sensitive information is relevant continues to be very small indeed, they are likely to include particularly high-profile cases. The Government sees a potential benefit in enabling as much relevant material, including sensitive material, to be considered by the coroner.

Current framework

B.4 Under the current framework the process is as follows:

- As soon as the coroner is ready to hear the inquest the coroner's office will contact the properly interested persons. In high-profile cases, the coroner is likely to be a senior judicial figure.
- A pre-inquest review (PIR) is then usually held when all PIPs, including family and any legal representatives, will be required to attend court for a formal review hearing. This will be in the form of a public hearing, which in complex cases may last more than two days. During the PIR, the coroner deals with any outstanding matters and gives further directions as necessary to prepare the case for the substantive hearing.
- At the PIR the coroner, in conjunction with the family and legal representatives, will usually decide upon the scope of the inquest, the evidence to be heard and the witnesses to be called. As part of this process, PIPs or the Government may ask the coroner to consider sensitive information from government to aid the proceedings. The Government would then respond. Where the Government wishes to withhold information, the PII application process is initiated.

[12] Rule 17 does not, however, allow jurors and PIPs, including the family of the deceased, to be excluded, only essentially allowing clearing of the public gallery.

- The PII process would broadly follow the procedures laid out at Annex A, with the notable exception that during inquests, the coroner can appoint 'counsel to the inquest'. Counsel to the inquest would work with government to establish which evidence can be allowed under 'gisting' (i.e. summarising the material or producing relevant extracts[13]) and which information must go through a PII application. This is likely to be an iterative process and may involve substantial resources. Once the gisting is complete, government would place the remaining information under PII certificates before the coroner. The PII certificate applications would include submissions from counsel to the inquest; government counsel; and PIPs (in open sessions). PIPs may have legal representation. These procedures can be fairly protracted with anonymity and screen applications, as was the case during the 7 July bombings inquests. In the event that excluded information by government is deemed critical to the proceedings, there may be instances where some elements of the inquest are considered in a public inquiry.
- A public hearing is held after the PIR stage. This would include all witnesses who are deemed relevant to the proceedings. The family of the deceased and all other PIPs have the opportunity to give evidence and to ask questions of the witnesses who are called by the coroner. Section 8 of the Coroners Act 1988 obliges a coroner to summon a jury in specified circumstances. Inquests into deaths where sensitive information is relevant are likelier to meet the test for an inquest with a jury, as jury inquests have to be held for deaths in prison or police custody, or as a result of police action, such as the police shooting of Jean Charles de Menezes or Azelle Rodney.
- The verdict is announced after the coroner has heard all the evidence and reached conclusions about the death (i.e. cause and whether it could have been prevented).

Proposed framework

B.5 The proposed framework would be broadly similar to current practice but with the following key changes:

- During the PIR the requirement for a CMP decision would replace the current PIR process. This means it would no longer be necessary for counsel to the inquest to liaise with government and for specific PII certificate hearings to be held.
- The assessment assumes that these inquests would be heard before an appropriately vetted jury, with the PIPs represented by Special Advocates.

B.6 Under current law and in certain specific, limited circumstances, inquests can be converted into public inquiries. Typically public inquiries are expensive, and the availability of CMPs in inquests might reduce the (already limited) number of instances in which inquests are converted into inquiries. However, judge-conducted inquests which may be high profile or complex can also be costly.

[13] The gisting process involves government counsel advice to aid the process. Government lawyers are also involved.

Costs of proposed framework

B.7 The proposed framework would lead to costs on the coroner system, private litigants and government. The costs would mainly be in terms of hearings and vetting.

Costs of hearings

B.8 For inquests in which CMPs are used rather than PII, the additional cost per inquest, relative to the base case, would depend on the following:

- **The nature of the CMP process.** In particular, the length of hearings to determine whether or not the CMP is needed, if the appropriate Secretary of State's decision is challenged, and how much of the case would involve the CMP process. This is likely to vary depending on the type and complexity of the case. The CMP component of the inquest is likely to mirror the actual length of the open court component.
- **The level of support provided to the non-state litigant for CMP purposes.** It is envisaged that in most inquests there would be two to four Special Advocates. It is assumed that government would not be a party to the inquest, although it may be called as a witness.
- **The costs to the coroner in the form of judicial and administration time.** Judicial time would in most cases not be limited to open court and CMP hearings, but also to examination of wider evidence. The Green Paper consults on whether the coroner in sensitive inquests should be a sitting High Court judge.

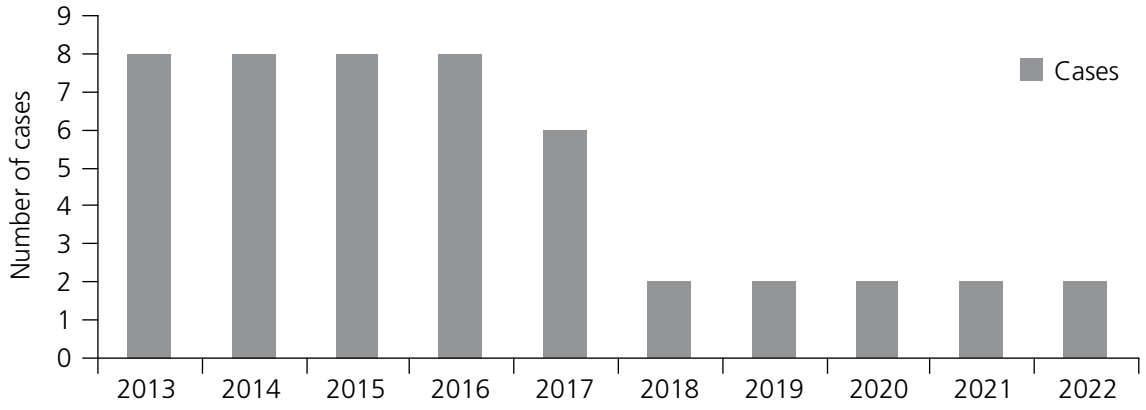
B.9 Assessments of the above factors suggest that CMPs may lead to additional costs per case as set out in Table B1 below. This does not include the reduction in costs from the reduced use of PII, which is examined under the benefits section for each option.

Table B1: Cost per inquest assumptions

	Central	Low	High
Special Advocate support to families	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
CMP application hearings	3 days	1 day	5 days
CMP main hearings	20	15	25
Juror costs	–	–	–
Total cost per inquest (£m)	0.11	0.07	0.15

B.10 Chart B1 sets out the current assumed profile of future volumes of inquests involving sensitive material. This assumes that 'legacy cases' from Northern Ireland are dealt with over the next five years, with cases stabilising to much lower volumes annually.

Chart B1: Annual profile of inquests



B.11 The costs would depend on the volume of inquests that would in the future utilise CMPs. The volume of inquests has been estimated based on the current volume of inquests with elements of sensitive material, and the likely volume shared by legacy cases across the jurisdictions. Table B2 sets out the current assumed profile of cases.

Table B2: Inquest costs sensitivity tests (£m)

	Sensitivity test assumptions		
	Central	**Low**	**High**
Average annual cost (undiscounted)	0.52	0.35	0.71
Spending period: 2013–14 (undiscounted)	1.72	1.18	2.36
Appraisal period: 2013–22 (discounted)	4.37	2.99	6.00

Costs of vetting

B.12 There would be costs associated with vetting jurors at around £4,000 per person. At least 20 individuals would typically be vetted for a case due to the possibility of failed vetting and drop-outs. It is therefore estimated that around £80,000 would be spent on vetting per inquest. Table B3 sets out the costs. We assess that 90% of all sensitive cases would require a jury.

Table B3: Vetting costs sensitivity tests (£m)

Average annual cost (undiscounted)	0.35
Spending period: 2013–14 (undiscounted)	1.15
Appraisal period: 2013–22 (discounted)	2.92

Full costs

B.13 Table B4 sets out the full costs of inquests associated with hearings and vetting. The total annual undiscounted costs would range between £0.7 million and £1.1 million. The total discounted cost over the ten-year appraisal period would range between £5.9 million and £8.9 million. The central cost is estimated at just over £7.3 million.

Table B4: Inquest costs sensitivity tests (£m)			
	Sensitivity test assumptions		
	Central	Low	High
Average annual cost (undiscounted)	0.87	0.7	1.06
Spending period: 2013–14 (undiscounted)	2.87	2.33	3.51
Appraisal period: 2013–22 (discounted)	7.29	5.91	8.92

Benefits of proposed framework

B.14 The proposed regime would lead to benefits from reduced PII applications. It may also lead to a reduced need for public inquiries, in those very rare cases where withholding information impairs the ability of the coroner to conduct an inquest so they then request government to initiate a public inquiry to establish all the relevant facts.

PII applications savings

B.15 There would be benefits from reducing the costs associated with PII applications by government in order to withhold sensitive information from inquests. The nature of the benefits would stem from the following savings in the current PII process during inquests:

- Reduction in government workload because of the reduced need for the balancing exercise and Ministerial sign-off.
- Reduced burden on the coroner[14] to appoint counsel to the inquest. Counsel to the inquest would usually work with government to establish which evidence can be allowed under gisting and which information must go through a PII application.[15]
- Reduced burden of PII certificate application hearings before the coroner. These disclosure hearings can be fairly protracted. For most of these hearings it is assumed that no Special Advocate is used by the non-state litigant.

B.16 The extent of the benefits would depend on the assumed reduction in PII applications.

[14] Assumed for appraisal purposes to be a High Court judge.

[15] It may well be the case that counsel to the inquest is still needed in some CMP applications. For appraisal purposes we have assumed that this is unlikely to be the case, although this assumption will be kept under review during the consultation period.

B.17 Table B5 sets out the PII savings per inquest assumptions. The volume assumptions are as set out under Chart B1.

Table B5: PII savings per inquest			
	Central	**Low**	**High**
Coroner	3 days	2 days	4 days
Inquest to coroner	1 QC and 1 junior barrister	1 QC and 1 junior barrister	1 QC and 1 junior barrister
HMG counsel	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
PIPs representation	1 QC and 2 junior barristers	1 QC and 1 junior barrister	1 QC and 3 junior barristers
Coroner review of case	2	1	3
Inquest to coroner review	5	3	7
PII application hearings	7	5	10
Jury costs	–	–	–
Total PII savings per inquest (£m)	0.05	0.03	0.08

B.18 Table B6 sets out the full PII savings at inquests. The total annual undiscounted benefits would range between £0.2 million and £0.4 million. The total discounted benefit over the ten-year appraisal period would range between £1.4 million and £3.0 million. The central benefit is estimated at just over £2.0 million.

Table B6: Inquest savings sensitivity tests (£m)			
	Sensitivity test assumptions		
	Central	**Low**	**High**
Average annual cost (undiscounted)	0.24	0.18	0.36
Spending period: 2013–14 (undiscounted)	0.79	0.44	1.19
Appraisal period: 2013–22 (discounted)	2.00	1.43	3.01

Public inquiry savings

B.19 The decision by the Government to utilise CMPs may have the benefit of reducing the need for public inquiries in certain instances. The avoidance benefits are likely to vary from case to case, but are generally thought to be substantial. We estimate that such inquiries would be rare and in most cases would cost around £1.5 million per case.[16] It is assumed that there would be around one such inquest every two years. Table B7 sets out the assumed benefits.

Table B7: PII inquiry avoidance benefits (£m)	
Average annual cost (undiscounted)	0.75
Spending period: 2013–14 (undiscounted)	1.50
Appraisal period: 2013–22 (discounted)	6.13

[16] The current cost of the Azelle Rodney inquiry is estimated at £1.2 million, with the potential to increase to £1.5 million upon completion.

B.20 Table B8 sets out the full benefits of introducing CMPs during inquests. The total annual undiscounted benefits would range between £0.9 million and £1.1 million. The total discounted benefits over the ten-year appraisal period would range between £7.6 million and £9.1 million. The central benefit is estimated at just over £8.2 million.

Table B8: Inquest benefits sensitivity tests (£m)			
	Sensitivity test assumptions		
	Central	Low	High
Average annual cost (undiscounted)	0.99	0.93	1.11
Spending period: 2013–14 (undiscounted)	2.29	1.94	2.69
Appraisal period: 2013–22 (discounted)	8.15	7.56	9.14

Net impact of proposed framework

B.21 The net present value has been assessed over the appraisal period. The proposed framework would lead to net present value of £0.9 million, within the range of –£0.8 million and £2.2 million. The overall monetised outcome is therefore likely to be broadly neutral to negative over the appraisal period. Further detail is given at Table B9.

Table B9: Costs and benefits of CMPs at inquests (£m), 2013–14/15			
Scenario	Benefits	Costs	Net
Central case	8.15	7.29	0.86
Low cost per case	8.15	5.91	2.24
High cost per case	8.15	8.92	-0.77
Low benefits (PII savings) per case	7.56	7.29	0.27
High benefits (PII savings) per case	9.14	7.29	1.85

Appraisal assumptions

B.22 The appraisal assumptions are as set out at Annex A.

Title: Justice and Security Green Paper – Chapter 3 proposals **IA No:** MOJ113 **Lead department or agency:** Ministry of Justice **Other departments or agencies:** Home Office, Cabinet Office	Impact Assessment (IA) **Date:** 18/10/2011 **Stage:** Development/Options **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** justiceandsecurity@cabinet-office.x.gsi.gov.uk

Summary: Intervention and Options

Cost of preferred (or more likely) option				
Total net present value	**Business net present value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of one-in, one-out?**	**Measure qualifies as**
£m	£m	£m	Yes/No	In/Out/Zero net cost

What is the problem under consideration? Why is government intervention necessary?

There is a perception that oversight is not effective and that as a result the security and intelligence agencies are not properly held to account. The security and intelligence agencies (the Agencies) need oversight that is demonstrably independent and effective in order to retain the confidence of Ministers, Parliament and the public. Oversight should also be sufficiently high profile that stakeholders are reassured that the Agencies are under proper scrutiny. For these reasons, it is necessary for the Government to review arrangements for the oversight of the Agencies to ensure they are appropriate and up to date, that they are in line with recent developments in the roles of the Agencies and that they also meet the needs of the public.

What are the policy objectives and the intended effects?

Regarding the oversight of the Agencies, the principal objectives of the Green Paper proposals are to: enhance the effectiveness and credibility of the oversight of the Agencies in order to increase public confidence in these Agencies and provide reassurance that their activities are reasonable, proportionate and compliant with legal obligations.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The following options have been assessed against the base case of 'no change' (Option 0):

Option 1: Change the status of the Intelligence and Security Committee

Option 2: Change the remit of the Intellligence and Security Committee

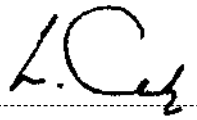
Option 3: Broaden the remit of the Intelligence Services Commissioner

Option 4: Create an Inspector-General for the oversight of the Agencies.

Options 1 and 2 relate to changes in independent parliamentary oversight. Options 3 and 4 examine potential changes to other independent oversight bodies. All the options are treated as independent but are not necessarily mutually exclusive.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** January 2012						
Does implementation go beyond minimum EU requirements?			N/A			
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** No	**< 20** No	**Small** No	**Medium** No	**Large** No	
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A		**Non-traded:** N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible signatory:  Date: 18 October 2011

Summary: Analysis and Evidence

Policy Option 1

Description: Change the status of the Intelligence and Security Committee

FULL ECONOMIC ASSESSMENT

Price base Year	PV base Year	Time period Years	Net benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best estimate:**

COSTS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total cost (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised costs by 'main affected groups'

N/A

Other key non-monetised costs by 'main affected groups'

There would be changes associated with the way in which evidence sessions are carried out. The ISC holds around 20 evidence sessions a year which are all in private. There may be costs associated with introducing additional public evidence sessions in both time and venue costs. Public evidence sessions may also raise the profile of the Committee which may lead to additional media handling costs. The extent to which these would be additional depends on the volume of the public sessions.

BENEFITS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total benefit (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised benefits by 'main affected groups'

N/A

Other key non-monetised benefits by 'main affected groups'

Transforming the ISC into a Committee of Parliament would increase its accountability to the public and increase its connection to Parliament. Changing the appointment system would increase transparency and parliamentary confidence in the Committee and, potentially, lead to greater diversity of members, which would aid the overall effectiveness of the ISC. The introduction of public sessions would raise the ISC's profile and increase transparency and public confidence.

Key assumptions/sensitivities/risks **Discount rate (%)**

There may be new costs associated with premises and additional staff burden which have not been quantified at this stage. The introduction of public sessions may lead to an increase in public interest in the business of the ISC, which may increase the workload of the ISC and supporting staff.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (equivalent annual) £m:			In scope of OIOO?	Measure qualifies as:
Costs:	**Benefits:**	**Net:**	Yes/No	In/Out/Zero net cost

Summary: Analysis and Evidence

Policy Option 2

Description: Change the remit of the Intelligence and Security Committee

FULL ECONOMIC ASSESSMENT

Price base Year	PV base Year	Time period Years	Net benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best estimate:**

COSTS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total cost (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised costs by 'main affected groups'

N/A

Other key non-monetised costs by 'main affected groups'

Expanding the remit of the ISC may also lead to an increase in the wider Government intelligence community staff costs, due to the possibility of additional information requests from the ISC as its remit is formalised. Giving the ISC power to require information may lead the ISC to request more information than it currently does, with the possibility of increasing the burden on the Agencies.

BENEFITS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total benefit (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised benefits by 'main affected groups'

N/A

Other key non-monetised benefits by 'main affected groups'

There would be greater formal oversight by the ISC of the non-Agency bodies' work that relates directly to intelligence material, which may enhance the effectiveness and public perception of the ISC. Increased formal oversight of wider Government intelligence activities would help the ISC to provide more coherent intelligence oversight. New powers to require information may increase the effectiveness and credibility of the ISC.

Key assumptions/sensitivities/risks **Discount rate (%)**

The extent of the increase in staff costs (and associated non-wage and accommodation costs) will depend on the details of the proposal, which have not been defined at this stage.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (equivalent annual) £m:			In scope of OIOO?	Measure qualifies as:
Costs:	**Benefits:**	**Net:**	Yes/No	In/Out/Zero net cost

Summary: Analysis and Evidence

Policy Option 3

Description: Broaden the remit of the Intelligence Services Commissioner

FULL ECONOMIC ASSESSMENT

Price base Year	PV base Year	Time period Years	Net benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best estimate:**

COSTS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total cost (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised costs by 'main affected groups'

N/A

Other key non-monetised costs by 'main affected groups'

A broader remit for the Intelligence Services Commissioner may lead to greater resource demands at the Intelligence Services Commissioner's office and an increase in the costs to the Agencies to comply with additional requests from the Intelligence Services Commissioner.

BENEFITS (£m)	Total transition (Constant price)	Years	Average annual (excl. Transition) (Constant price)	Total benefit (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised benefits by 'main affected groups'

N/A

Other key non-monetised benefits by 'main affected groups'

The expansion of the remit of the Intelligence Services Commissioner is likely to increase the perception of transparency and accountability and to increase the effectiveness of the Intelligence Services Commissioner due to greater scope for more coherent oversight. The proposals may also increase the visibility of the work of the Agencies.

Key assumptions/sensitivities/risks **Discount rate (%)**

The extent of the increase in staff costs (and associated non-wage costs as well as the resulting accommodation costs) will depend on the details of the proposal, which have yet to be refined.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (equivalent annual) £m:			In scope of OIOO?	Measure qualifies as:
Costs:	**Benefits:**	**Net:**	Yes/No	In/Out/Zero net cost

Summary: Analysis and Evidence

Policy Option 4

Description: Create an Inspector-General for the oversight of the Agencies

FULL ECONOMIC ASSESSMENT

Price base Year	PV base Year	Time period Years	Net benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best estimate:**

COSTS (£m)	Total transition (Constant price) Years		Average annual (excl. Transition) (Constant price)	Total cost (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised costs by 'main affected groups'

N/A

Other key non-monetised costs by 'main affected groups'

There may be costs associated with the creation of two Inspectors-General, though the extent to which these may be additional is unclear. In particular, it is possible that under such a scenario the roles of Intelligence Services Commissioner and Interception of Communications Commissioner would disappear. The overall position may therefore be minimal or cost neutral.

BENEFITS (£m)	Total transition (Constant price) Years		Average annual (excl. Transition) (Constant price)	Total benefit (PV)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best estimate				

Description and scale of key monetised benefits by 'main affected groups'

N/A

Other key non-monetised benefits by 'main affected groups'

The benefits would depend on the design and remit of the Inspector(s)-General. These may include the following: greater public reassurance and higher profile of the independent oversight regime.

Key assumptions/sensitivities/risks **Discount rate (%)**

If two Inspectors-General are created, there is a risk that the two bodies may take different approaches to the oversight of interception and interpretation of the law, leading to a divergence of standards and practices of interception within the Agencies and non-Agency bodies. If the remit of the Inspector(s)-General is expanded, this could increase the costs to the Agencies and non-Agency bodies of dealing with the Inspector(s)-General.

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (equivalent annual) £m:			In scope of OIOO?	Measure qualifies as:
Costs:	**Benefits:**	**Net:**	Yes/No	In/Out/Zero net cost

1. Scope of the Impact Assessment

1.1 This Impact Assessment (IA) accompanies the Justice and Security Green Paper (Cm 8194). It assesses the proposals designed to enhance the existing oversight of the security and intelligence agencies (the Agencies). The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the proposed options. It follows the procedures set out in the *Impact Assessment Guidance* and is consistent with the HM Treasury *Green Book*.

Objectives and scope of the proposals

1.2 The objective of the proposals is to enhance the effectiveness and credibility of existing parliamentary and other oversight bodies dealing with intelligence, in order to increase public confidence in the Agencies and the wider intelligence community.

1.3 In order to fulfil this objective, the Government is consulting on:

- changes to independent parliamentary oversight, particularly in relation to the oversight provided by the Intelligence and Security Committee (ISC), e.g. its statutory remit and status
- changes to oversight provided by other independent bodies of the Agencies, particularly in relation to the Intelligence Services Commissioner and the Interception of Communications Commissioner, e.g. broadening the remit of the Intelligence Services Commissioner or creating an Inspector-General.

1.4 These proposals are explored in more detail in Section 3 ('Options Analysis') in order to assess their impacts on society.

Groups and sectors affected by proposals

1.5 The proposals covered in this IA affect all of the UK, with particular impacts on the following groups:

- **the general public** as consumers of justice and beneficiaries of wider security measures. This includes persons investigated by the Agencies and/or the wider intelligence community
- **oversight bodies**, whose roles are being reviewed
- **wider government**, including the Agencies.

Analytical principles

1.6 The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a cost benefit analysis (CBA) of the proposals. A CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and distributional considerations. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.

1.7 The CBA under this IA rests on answering two basic questions:

- What is the problem that the proposals are seeking to address that has led to the relevant market or sector not functioning properly?

- In what way can government intervention help mitigate this problem? What options are available to resolve the resultant problems, and would the available options recommended have the desired impact? To establish a case for government action, an assessment of the possible costs and benefits of government involvement must be made to show that benefits are likely to outweigh the costs.

1.8 In addressing these questions, the IA has focused mainly on key monetised and non-monetised impacts, with the aim of understanding what the net social impact to society might be from improving the effectiveness of existing oversight mechanisms. Where it has not been possible to quantify costs and benefits at this stage, the IA indicates where further analysis might be done over the consultation period to inform the post-consultation IA. This assessment should therefore be treated as tentative.

1.9 An important consideration for any IA is the relevant scope of the assessment. The scope of this IA includes:

- **Impacts that fall within the physical geography of the UK.** This means focusing on assessing the impacts of the proposals on those in the UK, e.g. the UK justice system.
- **Impacts that fall on both present and future generations.** In line with the HM Treasury *Green Book* and *Impact Assessment Guidance*, the appraisal assesses whether any of the options will yield a positive net social benefit to all who may be affected by it. As the Green Paper proposals will continue into the distant future, we have appraised the impacts between 2013 and 2022 (ten years), with a real discount rate of 3.5%.

1.10 This IA does not consider every issue mentioned in the Green Paper but assesses the key proposals set in detail in the Green Paper. Further work will be done after the consultation period to build on issues raised during the process.

2. Rationale for Government Intervention

2.1 This section explains the current problems regarding the oversight of the Agencies and the basic rationale for government intervention.

Background

2.2 Intelligence oversight was established by the Security Service Act 1989, the Intelligence Services Act 1994 (ISA) and the Regulation of Investigatory Powers Act 2000 (RIPA). Oversight is provided through the following bodies.

The Intelligence and Security Committee

2.3 The Intelligence and Security Committee (ISC) is made up of a group of Parliamentarians who provide politically independent oversight of the Agencies' activities. It has a cross-party membership of nine Parliamentarians, drawn from both Houses, appointed by the Prime Minister after consultation with the Leader of the Opposition. The ISC's statutory remit is to examine the 'expenditure, administration and policy' of the Agencies.

2.4 The ISC handles highly classified material, which means the Committee has a different status from and operates under different safeguards than analogous departmental select committees. It reports annually to the Prime Minister on its work. These annual reports (redacted where required) are then laid before both Houses of Parliament, together with the Government's response, and debated. The Committee also produces ad hoc reports, such as its *Could 7/7 Have Been Prevented? Review of the Intelligence on the London Terrorist Attacks on 7 July 2005* report, which was published in May 2006.

The Intelligence Services Commissioner and the Interception of Communications Commissioner

2.5 The Intelligence Services Commissioner and the Interception of Communications Commissioner (the Commissioners) provide scrutiny of the Agencies' performance of their statutory duties. The two Commissioners are appointed under RIPA. They are required to hold, or have held, high judicial office. They must, by law, be given access to whatever documents and information they need and at the end of each reporting year they submit reports to the Prime Minister. Redacted versions of these reports are subsequently laid before Parliament and published.

2.6 The Commissioners' existing statutory remits cover monitoring compliance by the Agencies with legal requirements in the exercise of their intrusive powers. The Government has occasionally asked the Commissioners to take on additional duties outside that remit. These have typically required an ongoing role in monitoring compliance with new policies or an intensive health check on a particular work area.

The Investigatory Powers Tribunal

2.7 The Investigatory Powers Tribunal (IPT) investigates complaints by individuals about the use made by the Agencies and other public bodies of investigative techniques against them or about allegations that their human rights have been breached by the Agencies. The IPT is made up of senior members of the legal profession or judiciary.

Current problems

Credibility

2.8 **The current arrangements lack credibility. They are criticised for being too close to government and therefore for being unable to provide effective scrutiny.** The criticisms stem from the ISC's separate arrangements compared with other parliamentary committees. Members of the ISC are appointed by the Prime Minister and the ISC answers to the Prime Minister and not to Parliament; the processes by which the ISC is appointed, operates and reports are perceived to be insufficiently transparent. These issues make the ISC appear not sufficiently independent of government and are contained in a quote from an article by Lord Macdonald: '*How could [the ISC] have any [credibility] when that same chairman is, in effect, appointed by the Prime Minister? Or when it conducts its meetings in secret and failed to uncover the very documents that led the Court of Appeal to criticise the security services?*'[17]

2.9 Public criticism of the ISC's credibility has led to further challenges of its work. For example, Parliamentarians have criticised the Committee's ability to scrutinise the Agencies effectively and, more recently, the Coroner for the inquiry into the 7 July 2005 bombings levelled a charge that the ISC's report into the events contained some inaccuracies, while others have claimed it lacked penetrating criticism. This undermines the ISC and has led to scepticism about the Committee's findings.

2.10 The 2007 *Governance of Britain* Green Paper acknowledged that there were concerns about the status of the ISC, how it operates, how it is constituted and how it reports.

Relevance

2.11 **Current oversight arrangements are outdated in terms of the Agencies' activities and budgets.** Since the legislation was enacted there have been significant changes in the context in which the Agencies work. The profile of their work has changed substantially. There has been a series of events (e.g. the Omagh bombings of 15 August 1998, the terrorist attacks of 11 September 2001, the armed conflicts in Afghanistan and Iraq, and the London bombings on 7 July 2005) which have had far-reaching consequences and proved profoundly challenging for our foreign and security policies. Following these events, the Agencies have had a more public role, and therefore have had greater pressures put on them to justify their actions than was the case in the past. For these reasons public and parliamentary expectations of how the work of the Agencies is overseen have changed.

2.12 There have been significant changes in information technology and the way people communicate; and the level of terrorism threat has risen. As a result, the Agencies' budget has increased substantially since the 1990s. There is, therefore, a requirement to modernise oversight to make sure it is appropriate for the current role and budget of the Agencies.

2.13 There are specific areas where the nature of the Agencies' work has changed substantially and therefore where there is a lack of statutory locus for oversight of new techniques or areas. To illustrate, the ISC takes evidence from the wider intelligence community (including the Office for Security and Counter-Terrorism, Defence Intelligence and the central government intelligence machinery in Cabinet Office) but this is not reflected in statute. The Intelligence Services Commissioner has been given a number of extra ad hoc duties not reflected in

[17] www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article7043140.ece

legislation, such as monitoring compliance with the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*.

2.14 The Commissioners' mandates are limited and, for example, do not include intelligence gathered by the Agencies other than by use of covert techniques authorised under RIPA and ISA. Also, their offices have limited resources (the Commissioners work part-time). This necessarily constrains the extent of their work.

Public profile

2.15 **The Commissioners currently have a very low public profile and therefore do little to increase public confidence in the Agencies.** The Commissioners provide assurance to Ministers on the legality and proper discharge of the activities of the Agencies. However, the Commissioners themselves and the work that they undertake have a very low public profile. This means that they play a lesser role in providing assurance to the general public that the activities of the Agencies are reasonable, proportionate, necessary and compliant with legal obligations. While they are well respected and generally perceived to provide effective scrutiny, this is not well recognised in public debates about the accountability of the Agencies. It is therefore necessary to consider whether further reforms can be introduced to increase the visibility of the Commissioners.

Policy rationale

2.16 The Agencies need oversight that is demonstratively independent and effective in order to retain the confidence of Ministers, Parliament and the public. Oversight should also have a sufficiently high profile that stakeholders are reassured that the Agencies are under proper scrutiny. For these reasons, it is necessary for the Government to review arrangements for the oversight of the Agencies to ensure that they are appropriate and up to date, that they are in line with recent developments in the roles of the Agencies and that they also meet the needs of the public.

3. Options Analysis

3.1 This section sets out the costs and benefits of the options, the associated assumptions and sensitivities, and the risks associated with each option. It is not practically feasible to undertake a forensic assessment of each of the oversight proposals. As such, the options analysis has restricted itself to impacts which may have substantial social and economic impacts on the UK and which are likely to be of interest to the public. The assessment does not explore options which are not central to the Government's proposals.

3.2 The assessment of 'do something' has focused on two classes of options. Options 1 and 2 relate to changes in independent parliamentary oversight. Options 3 and 4 examine potential changes to oversight provided by other independent bodies. All the options are treated as independent but are not necessarily mutually exclusive.

Base case (Option 0)

General description

3.3 The *Impact Assessment Guidance* requires that all options are assessed against a common base case or 'do nothing' option. The base case for this IA is that there will be no changes to the oversight regime in the UK. This would mean that the current problems set out in Section 2 would continue to persist. As the do nothing option compares against itself, its net present value is zero. As the base case compares against itself, the net present value is zero.

Option 1: Change the status of the Intelligence and Security Committee

General description

3.4 Currently, the ISC is not a Committee of Parliament. This option is about changing the status of the ISC to that of a statutory Committee of Parliament: the ISC would report formally to Parliament while also maintaining its existing reporting arrangements to the Prime Minister. Under this option, the Government may also consider making changes to the following:

- **Appointment system:** Currently, members of the ISC are appointed by the Prime Minister. It is proposed that appointments should be made by the 'usual channels' (the names of proposed members of the committee are put on the Order Paper but the House of Commons can reject them if it so wishes until it is satisfied as to the final membership) or by election (ISC member nominees would be elected by secret ballot from within party groups; the Chair would be held by a member of the majority party and would be elected by a secret ballot of the whole House of Commons with a process for the Prime Minister to pre-approve any individuals wishing to stand).
- **Staff status:** At present, ISC staff are departmental civil servants. It is proposed that they have the status of parliamentary staff.
- **Staff accommodation:** Currently the Committee is accommodated in premises on the government estate. The proposal is to move the accommodations to suitably secure premises on the parliamentary estate.
- **Funding:** It is proposed to change the funding of the ISC from the Cabinet Office's departmental budget to funding from parliamentary appropriation.
- **Evidence sessions:** The ISC may be able to provide public evidence sessions as well as its customary private evidence sessions; these sessions would have to be arranged so as not to compromise national security.

Costs of Option 1

3.5 The main costs of this option would be incurred by changes associated with the way evidence sessions are held. The ISC holds around 20 evidence sessions a year (currently and historically, always held in private). These sessions are attended by all nine members of the Committee, some members of the Secretariat and the person(s) giving evidence as well as a number of officials, and take place in secure premises. If the Committee were to hold public sessions, these would take place less frequently because most of the evidence sessions would still have to be held in private. There would be scope for condensing the material for the public sessions. A larger venue would be necessary to accommodate interested members of the public. For illustration, renting a special venue for the occasion could cost up to £10,000 for one day; assuming a public session would mobilise all the ISC staff, this would cost around £2,000 for one day. In total, two public sessions per year would cost around £24,000 p.a.

3.6 The costs associated with changes in staff status, funding arrangements and accommodation are currently regarded as cost neutral and are therefore not included in the assessment. Changes in staff status and funding represent transfers from one department to another. Changes to accommodation are not included because the Committee will be moving from their current premises, independently of the proposals in the Green Paper.

Benefits of Option 1

3.7 Option 1 would lead to the following benefits:

- to make the ISC a Committee of Parliament would clearly demonstrate the ISC's accountability to Parliament
- to make the ISC a Committee of Parliament would strengthen the ISC's actual and symbolic connection to Parliament
- to change the appointment system would increase transparency and parliamentary confidence in how the Committee is constituted
- to change the appointment system would possibly lead to a greater diversity of members of the ISC, which in turn may improve the effectiveness of the ISC
- public evidence sessions would raise the ISC's profile and increase transparency.

Assumptions, sensitivities and risks

3.8 The assessment has identified the following sensitivities:

- the running costs of secure premises on the parliamentary estate may be higher (or lower) than the current ones on the government estate
- the burden on the ISC's staff may increase as the ISC reports to both Parliament and the Prime Minister
- there is a potentially heightened risk of security breaches as the link to Parliament is strengthened
- there is a risk that the public sessions are redacted to such a degree in order to protect the public interest that the public sees it as a meaningless exercise
- public sessions may lead to an increase in public interest in the business of the ISC, thereby increasing the amount of work for the ISC.

Option 2: Change the remit of the Intelligence and Security Committee

General description

3.9 Currently, the ISC takes evidence from bodies beyond the Agencies which are part of the wider intelligence community within government (e.g. Defence Intelligence in the Ministry of Defence, the Office for Security and Counter-Terrorism in the Home Office and the central government intelligence machinery in the Cabinet Office). It has also, in its annual reports, made recommendations relating to those bodies which are part of larger departments and are also overseen by the appropriate departmental select committees.

3.10 However, in the areas of these bodies' work that relate directly to intelligence material, the relevant departmental select committees are not able to provide oversight because of the sensitivity of the material. The Government proposes to recognise the wider role the ISC should play in overseeing government intelligence activities by taking evidence from any department or body in the wider intelligence community about intelligence-related activity where to do so would help the ISC to provide coherent intelligence oversight. Also being considered is giving the ISC power to require information from the Agencies. Currently, the ISC can only request information from the Agencies. This would be subject to a veto exercised only by the relevant Secretary of State. The Heads of Agencies would lose their current right to veto the passing of information to the ISC in certain circumstances. In practice, the Agencies have rarely refused an ISC request for information.

Costs of Option 2

3.11 At the moment the ISC makes recommendations and takes evidence from the wider intelligence community; formalising the current remit will entail providing formal oversight and may lead the ISC to devote more resources to this area. At this stage we cannot provide firm estimates but, to illustrate, if we assume that the non-Agency bodies are currently responsible for 25% of the evidence taken by the ISC, and as a result ISC's wage costs increase by 25%, this would represent an additional cost of £0.12 million p.a. (based on the ISC's current wage costs of £0.5 million p.a.).

3.12 Increasing the remit of the ISC may also lead to an increase in the wider government intelligence community staff costs (we would expect additional information requests from the ISC as its remit is formalised). If we assume that the ISC makes a sufficient number of requests to warrant the hiring of five additional people, this would cost an additional £0.2 million p.a.

3.13 Regarding giving the ISC power to require information, we expect this proposal to lead the ISC to demand more information than it currently does, thereby increasing the burden on the Agencies. At the moment the Agencies' wage costs associated with complying with the ISC's requests are estimated to be around £0.4 million p.a. To illustrate, if the proposal leads to an increase in wage costs of 20%, it would represent an additional £0.1 million p.a.

Benefits of Option 2

3.14 Option 2 would lead to the following benefits :

- formal oversight would be provided by the ISC to the non-Agency bodies for their work relating directly to intelligence material, which may enhance the image of the ISC
- formal oversight of wider government intelligence activities would help the ISC to provide more coherent intelligence oversight
- giving power to require information may increase the effectiveness and credibility of the ISC.

Assumptions, sensitivities and risks

3.15 The extent of the increase in staff costs (and associated non-wage and accommodation costs) will depend on the details of the proposal, which have not been defined at this stage.

Option 3: Broaden the remit of the Intelligence Services Commissioner

General description

3.16 The Interception of Communications and the Intelligence Services Commissioners' existing statutory remits cover monitoring compliance by the Agencies with legal requirements in the exercise of their intrusive powers. The Government has occasionally asked the Commissioners to take on additional duties outside that remit. These have typically required an ongoing role in monitoring compliance with new policies or an intensive health check on a particular work area. The proposal is to add a general responsibility for monitoring compliance with, and commenting on, the effectiveness of operational policy to the statutory remit of the Intelligence Services Commissioner. The specific areas on which the Intelligence Services Commissioner focuses at any one time would need to be agreed, on an ongoing basis, with the appropriate Secretary of State.

Costs of Option 3

3.17 It is not possible to quantify the costs of the proposal until the new remit has been agreed. Moreover, the Intelligence Services Commissioner and their office are already undertaking duties that are proposed to be placed on a statutory footing. However, if the remit is increased, this may require an increase in the resources of the Intelligence Services Commissioner's office. At the moment, the Office of the Intelligence Services Commissioner's wage costs are approximately £25,000 p.a. To illustrate, if the broadening of the remit entails an increase of 50% in wage costs, this would represent an additional cost of £12,500 p.a.

3.18 An increase in the remit may lead to an increase in the costs to the Agencies to comply with additional requests from the Intelligence Services Commissioner. Currently, the Agencies' wage costs associated with dealing with the Commissioners (not just the Intelligence Services Commissioner) are approximately £0.1 million p.a. To illustrate, assuming (a) the Agencies spend an equal amount of resources between the Interception of Communications Commissioner and the Intelligence Services Commissioner and (b) an increase in the remit of the Intelligence Services Commissioner leads to a comparable increase in Agencies' resources to that of the Intelligence Services Commissioner's office (i.e. an increase of 50% in wage costs), we could expect an additional wage cost of approximately £20,000 p.a.

Benefits of Option 3

3.19 Option 3 would lead to the following benefits:

- the proposal would increase the perception of transparency and accountability
- the proposal may increase effectiveness as the remit is broadened and more coherent oversight is provided
- the proposal may also increase the visibility of the work of the Agencies.

Assumptions, sensitivities and risks

3.20 The extent of the increase in staff costs (and associated non-wage costs as well as resulting accommodation costs) will depend on the details of the proposal, which have yet to be refined.

Option 4: Create an Inspector-General for the oversight of the Agencies

General description

3.21 In the Green Paper, the Government considers the creation of an Inspector-General responsible for the oversight of all the Agencies' covert investigatory techniques, effectively subsuming the current roles of the Intelligence Services Commissioner and of the Interception of Communications Commissioner where they concern the Agencies. Potentially, other functions not currently undertaken by either Commissioner could also be added to the remit, for example, the ability to oversee the operational work of the Agencies.

3.22 The creation of an Inspector-General responsible for Agency interception may lead to the de facto creation of an Inspector-General responsible for non-Agency interception. An alternative would be that all interception is overseen by one Inspector-General.

Costs of Option 4

3.23 If the proposal leads to the creation of two Inspectors-General, then the roles of the Intelligence Services Commissioner and Interception of Communications Commissioner would disappear. Assuming an Inspector-General would be paid the same as a Justice of the Supreme Court, then two Inspectors-General would cost around £0.4 million p.a. Currently, the Commissioners' wage costs are approximately £0.35 million p.a. If the proposal leads to the creation of one Inspector-General responsible for all interception, we may expect their wage costs to be between £0.2 and £0.3 million p.a. Therefore, there could be a relatively small benefit or the proposal may be cost neutral.

3.24 Although it may be possible to merge certain functions (e.g. secretarial duties), if other duties are added to the remit of the new Inspector(s)-General, we would expect an increase in the number of staff, not quantifiable at this stage.

Benefits of Option 4

3.25 Depending on the design and remit of the Inspector(s)-General, the following benefits may be realised:

- greater public reassurance
- greater profile of the independent oversight regime.

Assumptions, sensitivities and risks

3.26 The following risks/sensitivities have been identified :

- If two Inspectors-General are created, there is a risk that the two bodies may take different approaches to the oversight of interception and interpretation of the law, in the context of complex and rapidly evolving communications technology, and so the standards and practices of interception relating to the Agencies and non-Agency bodies may diverge. An alternative approach, therefore, would be for an Inspector-General to have responsibility for oversight of all interception, including by non-Agency bodies.
- There is a lot of uncertainty surrounding the quantifiable costs and benefits; we would expect the uncertainty to diminish as the proposal is refined.
- If the remit of the Inspector(s)-General is expanded, this could increase the costs to the Agencies and non-Agency bodies of dealing with the Inspector(s)-General.
- The Inspector(s)-General may develop a more political relationship with the Government and as a result may provide less value in the provision of independent advice than the Commissioners currently do.

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