

Response to the Twenty-Fourth Report from the
Joint Committee on Human Rights Session 2010-2012:
The Justice and Security Green Paper



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Presented to Parliament by the
Secretary of State for Justice by
Command of Her Majesty
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Foreword



It is a fundamental tenet of democratic society that even the most sensitive parts of the state – such as the security and intelligence agencies – need to be properly accountable for what they do. The Government believes that the UK's intelligence services are the finest in the world, and we are hugely grateful for the sacrifices they make in defending public safety. But it is also right that they are properly scrutinised in Parliament and beyond and - where serious allegations are made against the security and intelligence agencies - that they should be heard and resolved in a court of law.

So no-one can be satisfied with the current situation whereby, in a small number of nonetheless important cases, no judgment is passed on very grave allegations. The problem relates to civil claims against the British Government, with claimants typically seeking significant amounts in damages, but where the facts of the case turn on highly sensitive information. In such circumstances, the security and intelligence agencies have had no way of presenting their evidence in court without putting their methods at risk and their agents in danger. The consequence has been that the Government has had to cease to defend itself, leaving state action unscrutinised, citizens with no independent

judgment on very serious allegations, and the taxpayer liable for settling cases which may have no merit.

Equally troubling has been the separate matter of the so-called 'Norwich Pharmacal' jurisdiction. Originally concerned only with matters of intellectual property law, Norwich Pharmacal allows someone fighting a court case on the other side of the world to apply to a court in London for intelligence information either belonging to the UK, or provided to us by our allies. No other country in the world has such a jurisdiction. Indeed there is not even a parallel jurisdiction in Scotland. No other country allows this kind of legal tourism to happen – for the good reason that it undermines confidence among other countries that might otherwise share vital intelligence with us. In the UK we are already seeing the consequences, with measures in place from some of our allies to regulate or restrict intelligence exchanges.

It was to sort out these problems that last October I brought forward our Justice and Security Green Paper. It set out proposals to equip our courts system to handle sensitive intelligence material better through the introduction of Closed Material Procedures, to protect our intelligence sharing relationship

through the reform of the Norwich Pharmacal jurisdiction, and to improve parliamentary scrutiny of the security and intelligence agencies and wider intelligence community. These are issues of profound significance that go to the heart of the nation's democratic values, and the Government welcomes proper examination of its proposals. I am therefore extremely grateful to the Joint Committee on Human Rights for their report into the Green Paper, to which this document responds in full.

The Committee made the point that Closed Material Procedures are a departure from the tried and tested fundamentals of open justice. I entirely agree with them in principle - no Government proposes measures in this area lightly. But Closed Material Procedures are already available in a number of areas of law, including immigration and employment, for the good reason that where the Courts have recognised that the best option of hearing evidence in open court is simply not available, they do provide a fairer outcome than the alternative: no justice at all.

So I have been particularly grateful for a number of important suggestions which have helped us to properly target our proposals to allow the use of Closed Material Procedures in the small number of civil cases where evidence is currently not being presented at all because it is too sensitive to be heard in open court. As a result of these suggestions we have made the following changes to our proposals:

- The final decision that a Closed Material Procedure could be used will be a judicial one. This will ensure that the decision is made free of political influence, and can only be taken where evidence a Closed Material Procedure is needed on national security grounds is found to be persuasive by an independent judge. The Minister must also consider before making an application for a CMP whether to make a claim for PII instead.

- Application to a very narrow range of evidence. Closed Material Procedures will only be made available for national security material. This puts beyond doubt that material relating to crime or other government responsibilities will not be in scope.
- Application to a very narrow range of cases. Closed Material Procedures will not be available in inquests and will only be extended to civil cases in the Court of Appeal and High Court, and the equivalent courts in Scotland and Northern Ireland. Judicial reviews of decisions about citizenship and exclusion from the UK will be remitted to the Special Immigration Appeals Commission, as recommended by the Joint Committee on Human Rights.

The result is a Bill which I believe is focussed and proportionate. It will ensure that civil cases which are currently not heard, will be heard, whilst also ensuring that no evidence currently heard in open court will be heard in secret in future. As a result of the changes the Bill introduces, allegations made against the Government will be fully investigated and scrutinised by the courts, Government will no longer be forced to resort to settling cases which it believes have no merit for significant sums of taxpayers' money and justice will be done for claimants.



Rt Hon Kenneth Clarke QC MP

Detailed responses to the Committee's conclusions and recommendations are set out below.

1. The delay in the publication of the responses to the Government's public consultation on the Green Paper was both regrettable and avoidable. We recommend that all future Government consultations should be run on the basis that the responses may be published by the Government unless the respondent expressly requests that their response remains confidential. (Paragraph 31)

Due to an administrative oversight on this occasion the Government did not seek prior permission to publish consultation responses. The Government devoted significant time and effort to ensuring that the Committee was able to consider the consultation responses. By 2 March 2012, 84 out of the 90 responses and an anonymised summary of the remaining six had been published on the consultation's website. We then contacted each of the authors of the responses to request their permission to share their response with the Committee. We have noted the Committee's suggestions on this point and will take them into consideration when next reviewing the guidelines.

2. Where changes are proposed which are so central to the administration of justice, we think it would be desirable for some mechanism to be found whereby representative judicial views can be made available to inform parliamentary scrutiny. In order to maintain public confidence and parliamentary accountability, it is important that any consultations between Government and the judiciary should be carried out in as open and transparent a way as possible (Paragraph 33)

3. The Green Paper redefines the meaning of a "court" for certain purposes, and in our view it would be beneficial to parliamentary scrutiny of such a measure if it could be informed by judicial views on a matter which goes to the very nature of the judicial function. (Paragraph 33)

The process by which the judiciary engage with Parliament and its committees is a matter for the judiciary and Parliament to resolve. The Lord Chief Justice already has the ability to make written representations to Parliament on matters which he believes are of importance for the judiciary or the administration of justice. However, it is critical that we maintain judicial independence. The judiciary should not be asked to comment on the merits of proposed Government policy. Individual judicial office-holders cannot be asked to engage in issues of political controversy, and, in particular, cannot be asked to comment on matters that may require the judge to disqualify himself or herself from subsequent litigation.

4. We welcome the Secretary of State's reassurance about the intended narrowness of the Green Paper's application. However, we note that this is clearly a change of position as there is no doubt that the proposals in the Green Paper are very broad in scope. We recommend that the Government now demonstrate their narrower intentions by confining the scope of its proposals to national security-sensitive material, that is, material the disclosure of which carries a real risk of harm to national security. (Paragraph 45)

We have considered this matter very carefully and listened to the consultation responses and have agreed with the Committee that the provisions contained within the Justice and Security Bill for CMPs

will be applied only to a small number of civil cases where the open disclosure of relevant material could cause harm to national security (or harm to other very limited public interests in exclusion or naturalisation proceedings).

5. The Green Paper should have been more focused on the narrow and specific reasons for legislative change provided by the ministers in their oral evidence, rather than the much broader proposals it contains. (Paragraph 47)

The Government is clear that under the current system, the only method available to civil courts to protect material such as intelligence from disclosure in open court is through Public Interest Immunity (PII). A successful PII application results in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings. A problem arises with this system when it results in the removal of evidence which one side requires if they are to make their case. As David Anderson QC, independent reviewer of terrorism legislation, has made clear:

I am prepared to accept that such cases are likely to exist. If there are cases sufficiently saturated in secret material to require the use of a CMP in other contexts (SIAC, control order/TPIMs), it is logical to suppose that there may be civil cases of which the same can be said. One example given in the Green Paper is the Government's decision to settle the damages claims brought by former Guantanamo inmates (after a CMP was held in one such case, Al-Rawi, not to be available). Faced with a PII exercise that might have taken three years the Government threw in its hand, presumably because it took the view that success in its

PII claims would have left it without the evidence it needed to defend the claims.

This problem is rare but damaging. In 2011 the Government estimated that around 27 cases were posing difficulties. Some of these cases might need to be settled without any judgment being reached because PII would not allow the judge to hear crucial evidence relating to the case. Others might simply be untriable because the case hinged on sensitive information. It is also clear that the number of these cases is increasing: the Guantanamo claims were settled in November 2010 and since then six further civil damages claims against the Government have been launched where sensitive material will be centrally relevant. In addition, the UK Border Agency is currently dealing with in excess of 60 Judicial Reviews challenging decisions to refuse citizenship or naturalisation

It is also clear that in some cases, the absence of CMPs is particularly unfair to the claimant. In a recent naturalisation case (*AHK and Others*) the judge ruled that without any means by which sensitive intelligence can be heard in court, "the Claimant is bound to lose, no matter how weak the grounds against him, there is obvious scope for unfairness towards a Claimant."

6. We reiterate our and our predecessor Committee's recommendations that legislation to provide for the admissibility of intercept as evidence be brought forward as a matter of urgency. (Paragraph 50)

The lawful interception of communications plays a critical role in tackling serious crime and protecting the British public, including by supporting investigations that secure the successful prosecution of terrorists and of

other serious criminals. The Government is committed to, if possible, building on this. The Justice and Security Bill amends section 18 of the Regulation of Investigatory Powers Act 2000 (RIPA), to allow intercept to be adduced in CMPs in certain types of civil cases.

As the Committee recognises there is a distinction to be drawn between civil and criminal proceedings. Previous reviews have demonstrated that introducing intercept material into criminal proceedings would be complex and difficult. Notably, any evidential regime would need to be consistent with the criminal limb of Article 6 European Convention on Human Rights (ECHR) while also being operationally practicable.

Reflecting this, the Government is conducting an extensive and detailed programme of activity in order to assess the benefits, costs and risks involved. Work is being overseen by a cross-party group of Privy Counsellors.

More generally, as the Government's Counter-Terrorism Strategy (CONTEST) makes clear, prosecuting people suspected of terrorism-related activity is our priority. We are committed to finding ways to improve terrorism prosecutions. The Government is introducing post-charge questioning and, as part of the package relating to the new TPIM system, has provided substantial extra resources for the police and Security Service for covert investigation, which may additionally increase the opportunities for the collection of evidence which may be used in a prosecution.

7. We accept that under the current law it is theoretically possible for there to be some cases in which a fair trial of a civil claim cannot proceed because of the amount of material which cannot be disclosed on Public Interest Immunity grounds. (Paragraph 61)

8. We have found it very hard to reach an evidence-based view as to the

likelihood of this theoretical possibility materialising, and therefore of the scale of the problem to which this part of the Green Paper is said to be a response. (Paragraph 62)

9. The hypothetical possibility of Public Interest Immunity preventing the fair determination of an issue clearly exists, but the critical question is whether evidence shows that this is a real, practical problem at all, or one that exists on the scale suggested in the Green Paper, or on a scale sufficiently significant to warrant legislation. (Paragraph 63)

10. The Government had not demonstrated by reference to evidence that the fairness concern on which it relies in this part of the Green Paper is in fact a real and practical problem. It seemed to us that, in the absence of such specific evidence, the Government had fallen back on vague predictions about the likelihood of more cases being brought in future in which intelligence material will be relevant, and spurious assertions about the catastrophic consequences of information being wrongly disclosed (spurious because outside of the Norwich Pharmacal context there is no risk of such disclosure because the disclosure cannot be ordered by a court). These do not in our view come anywhere close to the sort of compelling evidence required to demonstrate the strict necessity of introducing Closed Material Procedures in civil proceedings in place of Public Interest Immunity. (Paragraph 72)

11. We believe that the special advocates are right to caution against treating the views of the Independent Reviewer, after reviewing the material in

the three damages claims, as evidence that the issues in those cases are incapable of being determined at all without resort to a closed material procedure. In our view, that question can only be reliably answered after a full and proper, judicially conducted Public Interest Immunity exercise, in which the balance between the public interest in the administration of justice and the public interest in avoiding harmful disclosure is struck in relation to each piece of evidence, with the possibility of applying to each piece of material one of the range of options which constitute less than full disclosure. We therefore remain of the view that we reached after hearing evidence from the Ministers that the Government has still not demonstrated by reference to evidence that the fairness concern on which it relies in this part of the Green Paper is in fact a real and practical problem. (Paragraph 80)

In the Green Paper the Government estimated that sensitive information was “central to 27 cases (excluding a significant number of appeals against executive actions) currently before the UK courts, and in many of these cases judges do not have the tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts”. However, the Green Paper did not and could not go into specific details about these cases which are currently *sub judice*. David Anderson QC described the difficulty that this presents to the Government in making its case as follows:

Cases which are said to demonstrate current and anticipated problems in this area are pending in the courts and so, almost by definition, cannot be the subject of specific public comment. It is equally unthinkable that the precise readiness of US and other allies to share their intelligence could be the subject of press

announcements, detailed updates or publicly verifiable examples. This places the Government in a difficult position: it is arguing for a significant change to civil procedure but must do so on the basis of what to the sceptical eye can look like a few well-worn but still controversial examples (the Guantanamo damages settlement; Binyam Mohamed) coupled with mere assertion.

The Government was able to provide David Anderson QC with a briefing at which he was talked through seven of those cases and was given a bundle of top secret material in each case (including both evidence and internal/external advice). This was material that could not have been provided to members of the public or non security-cleared personnel. David Anderson QC was also offered further briefings on other cases. David Anderson’s was a comprehensive independent verification of the evidence base for the existence of cases of this problematic type. He concluded that:

The cases to which I have been introduced persuade me that there is a small but indeterminate category of national security-related claims, both for judicial review of executive decisions and for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist.

The Committee refers to “spurious assertions about the catastrophic consequences of information being wrongly disclosed (spurious because outside of the *Norwich Pharmacal* context there is no risk of such disclosure because the disclosure cannot be ordered by a court).” This summary is factually incorrect: a court can order disclosure after a PII balancing exercise. The Government may choose to withdraw that evidence and cease to rely on it, in order to avoid national security damage by disclosing it. However the Government in

such an instance would have to accept the consequences of weakening its case in so doing – this may mean having to revisit a decision such as refusing to give British nationality to someone intelligence suggests is involved in serious organised crime, or having to cease defending a case and seeking an out of court settlement.

However, this last option is only open to the Government if the other party in the case is prepared to settle. It is perfectly possible that the other party may not agree to a settlement. In such an instance the only outcomes would be for the Government to offer no defence to the allegations or risk damaging national security by continuing to rely on the evidence that the court has ordered must be disclosed.

12. We do not agree with the Government’s claim in its Green Paper that the extension of closed material procedures will enhance procedural fairness. We agree with the evidence of the special advocates that closed material procedures are inherently unfair. We also agree with Lord Kerr in *Al Rawi*, that evidence which has been insulated from challenge may positively mislead the court. (Paragraph 86)

The Government is strongly committed to open and transparent justice. However, there are a small number of cases where the courts have recognised that open justice is not possible – a successful application for PII results in the total exclusion of that material from the court room. It is the Government’s view that in such cases, a CMP may be the best way of ensuring judicial determination of all the issues.

CMPs are by no means unknown in the UK justice system. They are already available through statute in several areas, including immigration, employment, TPIMs, and proscription hearings. They have also been used with the consent of the court in judicial

review proceedings and *Norwich Pharmacal* cases. However, the Supreme Court judgment in the *Al Rawi* case held that it was for Parliament, not the courts, to decide where CMPs should be available, and accordingly the government is bringing forward legislation to put the use of CMPs on a statutory footing.

The Committee cites Lord Kerr, but the Government would also point to Lord Clarke’s remarks in the same case where he says, “a closed procedure might also be necessary in a case in which it is the non-state party which wishes to rely upon the material which would otherwise be subject to PII in order to defend itself in some way against the state. In such a case either party might seek an order for such a procedure based on necessity, namely that such a procedure would be necessary in order to permit a fair trial”.

Both the European Court of Human Rights and domestic courts have found that CMPs can operate compatibly with Article 6 (the right to a fair trial) ECHR. David Anderson QC said “We are in a world of second-best solutions: but it does not seem to me that the level of injustice inherent in the use of CMPs in a case of this nature necessarily exceeds either the injustice to the claimant of a case being struck out, or the moral hazard and reputational damage to the intelligence agencies that is caused by settling a case which, had it been possible to adduce all the evidence, would have been fought.”

We do not accept that material used in CMPs cannot be challenged, and indeed neither do the domestic courts. Lord Woolf found in *M v SSHD* that “it is possible by using SAs [special advocates] to ensure that those detained can achieve justice.” Further, Lord Hope said in *Tariq* that, “Special Advocates are experienced independent practitioners, accustomed to act of their own initiative and to take difficult decisions, and able to raise points of doubt or difficulty with

the tribunal or court before which they appear.”

The Security Service provides assessments of the accuracy and reliability of the intelligence on which it is relying. And the court and the special advocate test this evidence; this includes cross-examining a witness provided by the Security Service. Special Advocates have proven time and time again they are able to challenge closed evidence.

The court gives careful consideration to the quality, veracity and reliability of the intelligence. It is a matter for the judge to assess what weight to give to particular types of evidence deployed in the case. And if the court thinks that closed evidence in any case has not been sufficiently tested then it can give it lesser weight or discount it when reaching its conclusions.

The Government has taken a number of steps to ensure that CMPs provide procedural fairness, and that they are available in a narrow, targeted and proportionate range of cases.

- Role of judge: the Secretary of State will need to apply to the courts for a CMP.
- Narrow range of cases: CMPs provided for by the Justice and Security Bill, other than those relating to judicial reviews being remitted to the Special Immigration Appeals Commission (SIAC), will only be available for national security sensitive material, and for hearings in the High Court or Court of Appeal. It will not be available for crime, police or international relations matters, or for inquests.
- PII: will continue to be available for use wherever it is more appropriate than a CMP. Before making an application for a CMP, the Secretary of State will have to consider whether to make a PII application instead.

- Disclosure: the judge will also ensure that only those individual pieces of evidence which are relevant to the case, and which would damage national security if released will be heard in a CMP.
- Article 6 (right to a fair trial): the judge will ensure that the requirements of Article 6 of the ECHR are complied with, where Article 6 applies.
- Judgments: Following the approach in existing statutory CMPs, the courts will be able to produce both open and closed judgments in cases heard using a CMP. Open judgements will contain the legal principles applying to the case as well as the facts which can be disclosed without harming national security in the relevant proceedings.
- Special Advocates: the Government is committed to ensuring the Special Advocate system operates as effectively as possible. A database of closed judgments will be set up, assisting special advocates in accessing relevant judgments; the Government has made undertakings that, once restrictions on communications between the special advocate and claimant are in place in individual cases it will continue to assist in rephrasing questions to be put to the claimant wherever possible; there will be increased training and the budget for the Special Advocate Support Office will be increased.

Special Advocates have successfully challenged the adequacy of disclosure both during the disclosure hearings and the substantive hearings (the Court having a duty to keep disclosure under review throughout the proceedings).

13. In our view, whether or not closed material procedures are introduced into civil proceedings, there should always be full judicial balancing of the public interests in play, both when deciding the

appropriate procedure and when deciding whether a particular piece of evidence should or should not be disclosed. The Government's position in the *Al Rawi* litigation was that it should be for the courts to make the determination and the Green Paper does not explain what has changed the Government's position since that case. (Paragraph 103)

Following the public consultation and the Committee's conclusions the Government has decided that the Minister triggers the process by deciding that a CMP is needed, and applying to the judge who determines whether it goes ahead. The judge will of course also decide whether individual pieces of material should be dealt with in open or closed court.

However, we do not agree with the Committee on the issue of judicial balancing. We believe that the decision as to whether there should be a CMP should be based on whether there is material that is relevant to the proceedings and that it would be damaging to the public interest (as defined for the relevant proceedings) to disclose openly, and the Justice and Security Bill provides for this.

Within the CMP, the proposals envisage full judicial involvement on whether individual documents should remain in closed and the judge will be able to order the disclosure of material if he considers that its disclosure would not be damaging to the public interest. The Bill also ensures that the proceedings must be fair in Article 6 ECHR terms, where Article 6 applies to the proceedings. Article 6 does not apply to immigration proceedings including naturalisation/exclusion. However, we do not agree that this judicial involvement should be based on a PII style balancing test. Rather, the guiding criteria must be whether open disclosure of the material is damaging or not, subject to ECHR requirements. As with other CMPs, the court

would have the power to order the Secretary of State to disclose or summarise material, or otherwise not to rely on it at all, in order to ensure compliance with Article 6.

14. We recommend that the obligation to disclose sufficient material to enable effective instructions to be given to an individual's special advocate should always apply in any proceedings in which closed material procedures are used. (Paragraph 106)

The Government considered legislating on this point but has concluded that this is a complex area which is more suited to treatment by the courts on a case by case basis.

15. We do not accept that the need to make closed material procedures available in all civil proceedings has been convincingly made out by the Government. Even if we were persuaded of the need, however, we would not be in favour of the model proposed by the Government in the Green Paper. (Paragraph 109)

The Government has given careful consideration to the consultation responses, many of which called for a narrower range of proceedings in which CMPs will be available. As David Anderson QC pointed out in his evidence to the Committee, the nub of the current difficulties is demonstrably civil damages claims and judicial reviews of sensitive executive decisions. Accordingly, the Bill provides for CMPs in these types of proceedings in respect of a small number of civil cases where sensitive national security material (and other sensitive material in exclusion or naturalisation cases) is relevant to the issues. The Bill permits CMPs only in the higher courts.

16. In our view it is most unlikely to be possible to tell in advance of a Public

Interest Immunity exercise whether the outcome will be that the issues in the case are not capable of being determined fairly without the withheld material. The whole purpose of the Public Interest Immunity exercise is painstakingly to look at each piece of evidence to determine how the balance should be struck, and that exercise must be gone through with all the various means of facilitating some form of disclosure in mind. As the special advocate Angus McCullough told us in evidence, “there is an important flexibility in Public Interest Immunity that would be replaced and lost if the proposals in the Green Paper were adopted.” (Paragraph 111)

17. Unless the Public Interest Immunity exercise is gone through first, it will not be possible to tell whether a closed material procedure is the only possible way of ensuring that the issues in the case are judicially determined. We would reject the Green Paper’s proposal for this additional reason, as well as those give by the Independent Reviewer. (Paragraph 111)

The Government does not agree that it is necessary to go through a PII exercise before being able to take a decision as to whether a CMP is appropriate.

First, it would be illogical to go through a potentially lengthy PII exercise in circumstances where it was apparent that if a PII application were to be successful the Government would be left with no material to put its case forward and a CMP would be necessary. A detailed analysis of the material would then need to be repeated in order to establish which material should be dealt with in closed and in open court. The potential resource implications are large and it would considerably delay the delivery of justice in cases that could involve serious allegations about state action. For example, in the Guantanamo civil cases, it was

estimated that it would take three years to consider PII on relevant documents.

Second, the CMP process already includes provisions for painstaking consideration of the material within the CMP to establish what must be disclosed in open court. The judge would then also decide how each individual piece of evidence should be dealt with – whether that be in closed session, or in open session. PII could also be applied for at this stage. If the judge finds that the material should be dealt with in closed session, he or she will then decide how detailed the summary of the evidence made available to the other party (known as the gist) must be for the proceedings to be fair. The judge will also ensure that the proceedings comply with Article 6 of the ECHR where this applies.

The Government notes that in the recent case of *AHK Ouseley J* noted that sometimes a CMP is the only fair way to resolve a case for the claimant. If the court is unable to examine the basis of a decision under challenge it may have to find in favour of the Secretary of State because if it cannot look at the underlying reasoning it will be forced to assume the Secretary of State was right to take that decision. In such a case using PII would materially assist the Government rather than enabling the just resolution of the case. Requiring the court to go through a PII exercise that would disadvantage the claimant before a CMP could even be considered would also be illogical and potentially unfair to the claimant.

However, it was never the intention of Government to prevent PII from being used in cases where it is more appropriate and therefore the Bill sets out a condition which the Secretary of State must fulfil before making an application for a CMP. When considering the options for litigating any civil case where a CMP might be available under the legislation, and where national security material is likely to be relevant, the Secretary

of State must first consider whether to make, or advise another person to make, a claim for PII as an alternative to making an application for a CMP.

18. We share the concerns expressed by a number of witnesses about the difficulty in practice of confining closed material procedures to wholly exceptional cases. In our view, even the Independent Reviewer’s more limited proposal for making closed material procedures available in civil proceedings would in practice lead to the use of closed material procedures in cases which currently go to trial because of courts’ resourcefulness in finding ways of ensuring sufficient disclosure without causing damage to the public interest. Nor do we consider that the case is made out for making closed material procedures generally available as an option in judicial review proceedings. (Paragraph 117)

The Government has taken significant steps to ensure that the proposal to introduce CMPs is targeted and narrow. The Justice and Security Bill proposes that the decision to apply for closed material proceedings is for the Secretary of State, and it is the judge who makes the final decision. For CMPs covered by the Bill, other than the matters being transferred to the jurisdiction of SIAC, this can only apply to national security sensitive material. Only civil cases in the High Court, Court of Appeal, and the equivalent courts in Scotland and Northern Ireland will be covered. Judicial reviews of decisions about citizenship, naturalisation and exclusion from the UK will be remitted to SIAC if they are based on material it would not be in the public interest to disclose. The Bill also proposes that, in certain civil proceedings under CMP, intercept material will be admissible.

19. We recommend that the jurisdiction of the Special Immigration Appeals Commission be amended so as to include challenges to decisions to refuse naturalisation and exclusion decisions. As we recommended above, the statutory framework should also be amended to make clear that the *AF (No. 3)* disclosure obligation applies in such proceedings. (Paragraph 117)

The Government has considered this issue further, and agrees with the Committee’s recommendation that the jurisdiction of SIAC should be extended to include judicial reviews of naturalisation and exclusion decisions. Provision to this effect is included in the Justice and Security Bill.

However, the Government does not agree that the legislation should make clear that the *AF (No. 3)* disclosure requirement applies to these proceedings. We believe that these matters are better dealt with on a case by case basis by the Courts.

20. We recommend statutory clarification of the law on Public Interest Immunity as it applies in national security cases, including introducing statutory presumptions against disclosure of, for example, intelligence material or foreign intelligence material, rebuttable only by compelling reasons; express factors to which the court must have regard when balancing the competing public interests to determine the disclosure question; and a requirement that the court must give consideration to a non-exhaustive list of the sorts of devices (ranging from redactions, through confidentiality rings, to holding “in private” hearings and making orders to restrict publication of security-sensitive information) to which the courts may have resort in order to enable

This issue was considered in the Green Paper. The Government concluded in the Green Paper that the current system of PII is well understood. Placing it on a statutory footing with rebuttable presumptions of the kind the Committee has described would provide little advance on the current system in terms of providing stability and certainty for the UK Government and its international partners, and could create significant uncertainty until the new arrangements settled down. The Government has not seen or heard anything to change that view.

21. We note that, notwithstanding the decision of the Supreme Court in *Al Rawi*, closed material procedures continue to be used in civil proceedings by the consent of the parties. Whether there is power to hold a closed material procedures where the parties agree to it was left open in *Al Rawi*, although some members of the Court had reservations about whether such consent could be said to be freely given under threat that their claim would otherwise be struck out. (Paragraph 123)

22. Concerns were also expressed by witnesses in our inquiry that if closed material procedures were available by consent, this may lead to them being resorted to quite frequently in practice which would have the effect of keeping out of the public domain material that would otherwise become public because disclosed in litigation. In our view, whether closed material procedures should be possible where the parties consent to them is an issue which requires further attention. (Paragraph 123)

We are grateful to the Committee for raising this issue. We agree that the Supreme Court in *Al Rawi* left open the power to hold a CMP where the parties agree to it. There are current examples of such cases, though not

in civil damages cases where we do not think it is likely that both sides would consent to a CMP. However, the key conclusion of the Supreme Court was that the issues were so significant that it should be for Parliament to consider whether to legislate for CMPs in civil proceedings. The proposals in the Justice and Security Bill set out the Government's view of the circumstances in which a CMP should be held, and how this is triggered. We believe that this process negates the need for CMPs by consent. We hope this helps mitigate the concerns that the Committee has regarding the potential proliferation of CMPs through a process of consent.

In any event, we do not agree that a necessary consequence of CMPs is that more material will be put out of the public domain. As noted above, in every CMP, there is an extensive process of review to consider whether particular pieces of material should be disclosed into open court or left in closed. Where CMPs are not available this sensitive material is protected by PII, which excludes the material from consideration by the courts.

23. We do not consider that the Government has produced any evidence to demonstrate the need to introduce fundamental changes to the way in which inquests are conducted. There is no evidence of cases in which a coroner's investigation has been less thorough and effective because sensitive material has had to be excluded, and there appears to be only one case in which a coroner has been unable to conclude the investigation, and that appears to have been due to the inadmissibility of intercept evidence. In our view, the burden of the evidence is clear that coroners have proved resourceful in devising ways of ensuring that full and effective investigations can take place notwithstanding the relevance of

sensitive material to central issues in the case. (Paragraph 138)

24. To the extent that the evidence shows that inquests may not be able to be completed because of the inadmissibility of intercept, and that there is scope to produce greater consistency of practice between different inquests, there may be a case for some much less fundamental reform of inquests than that proposed in the Green Paper. (Paragraph 139)

25. We do not accept that the Government has made out the case for extending closed material procedures to inquests, for the reasons given above. We have serious doubts about whether such a change could be introduced compatibly with the positive obligations on the State in Article 2 ECHR, in particular the requirements that the family will be sufficiently involved and that there be sufficient public scrutiny. Such a fundamental departure from the way in which inquests are currently conducted requires compelling justification. Yet the Government has not produced any evidence to substantiate its claims in the Green Paper that in some cases coroners have concluded that the exclusion of material has left them unable to complete their investigation. (Paragraph 144)

Following careful consideration of the consultation responses and the report provided by the Committee, the Government will not be bringing forward legislation to extend CMPs to inquests.

26. We endorse the suggestions made to us by INQUEST and the INQUEST Lawyers Group as measures falling short of the introduction of closed material procedures into inquests which would address some of the Government's

concerns in the Green Paper. (Paragraph 150)

These are matters for the Chief Coroner to consider. The Committee's views will be put to him when he is in post.

27. At the same time as believing it to be necessary to address the US misperception, we also accept that there is a case for legislating to provide greater legal certainty about the application of the Norwich Pharmacal principles to national security sensitive material. Although the courts' power to order disclosure of material by a party mixed up in another's wrongdoing is long established, we accept that its exercise in the context of security-sensitive information in the possession of the Government in Binyam Mohamed represents a novel application of the jurisdiction. We also accept that Norwich Pharmacal applications constitute a special category of civil claim in which the very purpose of the application is to obtain an order of disclosure against the opposing party, and that such claims therefore could carry a heightened risk of disclosure of material which is damaging to national security. (Paragraph 157)

28. We therefore accept that the Government's aim in seeking to amend the law to provide reassurance to its intelligence partners is a legitimate aim, and the question is what would be a proportionate way to achieve that aim. We suggest below that a proportionate response would be for legislation to provide an improved and clearer legal framework for addressing the application of the courts' Norwich Pharmacal jurisdiction to national security sensitive information. (Paragraph 158)

The Government has carefully analysed the viability of legislating to clarify the

parameters of the *Norwich Pharmacal* jurisdiction, including by way of rebuttable presumptions against disclosure, as suggested by the Committee. However, we assess that any such ‘rebuttable presumption’ would make little or no change to the current system. This would give no additional reassurance to foreign partners. The approach adopted in the Bill will provide that *Norwich Pharmacal* relief is not to be available in respect of intelligence service material. It will also provide that it will not be available for material the disclosure of which would be damaging to the interests of national security or international relations, although the Secretary of State’s decision to certify such material as damaging will be open to challenge on judicial review principles.

29. The Government says in the Green Paper that it “seeks to find solutions that improve the current arrangements while upholding the Government’s commitment to the rule of law.” In our view, a proposal to legislate to make the control principle absolute is not consistent with that commitment. (Paragraph 165)

The Justice and Security Bill does not seek to make the control principle absolute. In relation to civil proceedings where there is a CMP, the court will be able to order that control principle material must be gisted or disclosed where this is required for article 6 fairness – or if the Secretary of State elects not to make that disclosure, the court will require the Secretary of State to make appropriate concessions. The *Norwich Pharmacal* jurisdiction arose under the common law, enabling someone to seek information in order to be able to enforce intellectual property rights. It has now developed so that an individual with proceedings or potential proceedings against a third party overseas can apply to a court in England or Wales - there is not even a parallel jurisdiction in Scotland -for access to

intelligence information held by the British Government on behalf of our allies (as well as other intelligence information). Where any person claims that the Government, or the security and intelligence agencies, have been directly involved in wrongdoing they will be able – as now – to bring a direct claim. As now, if a person has a Convention right based claim for information, it would be open to them to assert that right, whether or not in free standing proceedings, or as part of a wider ECHR claim. However, in the *Norwich Pharmacal* situation, where information is sought in connection with wrongdoing on the part of a third party, it is right that when issues of national security are at stake the Government should retain the discretion to decide what the best way of providing assistance should be. Therefore the Government intends to make the following changes:

- For agency held material: The Government intends to legislate to exempt material held by, relating to or originating from one of the intelligence services from disclosure under a *Norwich Pharmacal* application.
- For national security or international relations material: The Government also intends to legislate to allow a Minister to sign a certificate to protect non-agency material which would cause damage to national security or international relations if disclosed. That certificate can be judicially reviewed.

30. We welcome the Government’s rigorous proportionality analysis in relation to the option of removing the courts’ jurisdiction to order *Norwich Pharmacal* disclosure against all public bodies. We agree with both the conclusion of the Government that it would be a disproportionate response to the problem of preventing inappropriate disclosure of national security-sensitive

material in Norwich Pharmacal claims, and that of the Independent Reviewer of Terrorism Legislation who considers that such a legislative response “would appear manifestly disproportionate”. (Paragraph 171)

31. In our view, however, removing the courts’ Norwich Pharmacal jurisdiction in cases where disclosure would harm the public interest would still be a disproportionate response to the problem it is sought to address, (Paragraph 177)

There is clear justification and legal precedent¹ for an exemption for material held by or originating from the intelligence services (the agencies and those parts of the armed forces or Ministry of Defence which engage in intelligence activities). The kind of material sought in these cases will by its very nature be security-sensitive – it invariably relates to the discharge by the agencies of their national security functions and it will in consequence inevitably involve material, for example, relating to counter-terrorist investigations, agent-recruitment operations and engagement / communications with foreign intelligence services. It is axiomatic that disclosure of any material in these categories will cause damage to the operational effectiveness of the agencies and, in consequence, to national security or international relations. It is therefore possible to justify an absolute exemption for all intelligence service related information from the scope of the Norwich Pharmacal jurisdiction.

These measures have no impact on the ability of people to bring claims that the Government, or the security and intelligence agencies, have been directly involved in wrongdoing, nor do they prevent someone enforcing their Convention rights.

- There will be no change to the established statutory framework for handling requests for mutual legal assistance, and requests for information.
- As now, if a person has a Convention right based claim for information, it would be open to them to assert that right, whether or not in free standing proceedings, or as part of a wider ECHR claim.

32. We consider that placing the Norwich Pharmacal jurisdiction on a statutory footing, with a detailed statutory definition of the test to be satisfied, would serve to increase legal certainty for both courts exercising the jurisdiction and intelligence partners. It would therefore serve the legitimate objective of reducing the risk of disclosures which are damaging to national security and providing reassurance on that score for nervous international partners. In our view, however, redefining the entire Norwich Pharmacal jurisdiction in this way would also be a disproportionate response to the specific problem which has arisen concerning its application to national security sensitive information. Any legislative response to that problem should be specifically targeted at the way in which courts exercise their Norwich Pharmacal power to order disclosure in cases where the material is such that its disclosure might cause harm to national security. (Paragraph 186)

33. We agree with the Government’s preference “to legislate to clarify how [the Norwich Pharmacal] principles should apply in the national security context.” We also agree with that narrow formulation of the legitimate objective: it should seek to provide clarification in relation to the national security context only. The case for going further has not

¹ Section 1 of the Official Secrets Act, section 23 of the Freedom of Information Act, and sections 2(2) and 4(2) of the Security Services and Intelligence Services Acts.

been made out. (Paragraph 189)

The Justice and Security Bill seeks to reform the *Norwich Pharmacal* jurisdiction only as it relates to applications for disclosure of information the disclosure of which would be damaging to national security or international relations. There is no intention to reform or in any way alter the operation of the jurisdiction in other contexts.

34. Statutory amendments to the law of Public Interest Immunity (a rebuttable statutory presumption against the disclosure of national security-sensitive information; a tightly defined test for when the presumption can be rebutted; and a non-exhaustive list of factors to be taken into account by the court when conducting the balancing exercise to determine whether the presumption is rebutted) also meet the Government's legitimate objective of providing greater certainty in the legal framework governing Norwich Pharmacal disclosure. (Paragraph 192)

As noted above, the Government concluded in the Green Paper that placing PII on a statutory footing in the way described would provide little advance on the current system in terms of providing stability and certainty for the UK Government and its international partners, and could create significant uncertainty. The Government has not seen or heard anything to change that view.

35. We recommend that the Government brings forward proposals to deal with the important questions we raise which relate to closed judgments. (Paragraph 209)

The Government does not believe that closed judgments are as problematic as the Committee suggests. The legal issues in a case, in other words those issues that have legal precedent value, are usually contained

within the open judgment and are a matter of public record. Closed judgments contain highly sensitive factual material and so cannot be published in the same way that open judgments are. However, judges are under a duty to include in an open, published judgment as much as possible, including statements of principle. In practice, closed judgments are usually handed down in tandem with an open judgment. Special advocates can make submissions about moving material from the closed judgment to the open judgment and the court will do so if it is persuaded that it would not harm the public interest to do so.

That said, the Government agrees with the Committee that it is important to ensure that those that are entitled to access closed judgments are able to do so efficiently and effectively. That is why the Green Paper recorded that the Home Office is taking forward work to develop a closed database of head notes for closed judgments which summarise the broad subject of the judgment and include key words for search purposes, in order to assist Special Advocates in accessing relevant judgments. The special advocates welcomed this proposal in their consultation response to the Green Paper. We have consulted with the Special Advocate Support Office on the creation, storage and dissemination of the head notes and are in the process of finalising arrangements. We anticipate that the database will be populated with all historic closed judgments by the end of the summer.

36. We welcome the Government's recognition in the Green Paper that one of the guiding principles of reform in this area is that, even in sensitive matters of national security, the Government is committed to transparency, and that it is in the public interest that such matters are fully scrutinised. (Paragraph 214)

37. We also welcome the Government's avowed desire to improve executive accountability. We are concerned, however, about the potential impact of the proposals on public trust and confidence not only in the Government but in the courts. As Lord Kerr said in *Al Rawi*, "the public interest in maintaining confidence in the administration of justice [...] is an extremely important consideration and one which ought not to be overlooked. (Paragraph 214)

38. We recommend that in the statutory amendment and clarification of the law on Public Interest Immunity that we have recommended, consideration is given to including open justice as an express criterion to be taken into account and given due weight by the court when conducting the judicial balancing exercise. (Paragraph 216)

39. It is regrettable that the Green Paper overlooks the very considerable impact of its proposals on the freedom and ability of the media to report on matters of public interest and concern. This is a serious omission. The role of the media in holding the Government to account and upholding the rule of law is a vital aspect of the principle of open justice, as has been amply demonstrated in the decade since 9/11. We are also concerned about the impact of the proposals on public trust and confidence in the courts. We recommend that the Government expressly recognises these considerations in its framework of "key principles" guiding the development of policy in this area. We also expect the human rights memorandum accompanying the forthcoming Bill to include a thorough assessment of its impact on media freedom and on continuing public confidence in the administration of justice. (Paragraph 217)

We are grateful for the Committee's recognition that the Government is committed to effective scrutiny of its actions, and those of the security and intelligence agencies, including on sensitive matters of national security.

We are grateful to the Committee for emphasising transparency and public trust in the system. We believe that the proposals will enhance transparency and public trust, not undermine it. In the current system, sensitive material is either entirely excluded from the court or the Government is forced to bring the proceedings to a close, regardless of the merits of the underlying case, to prevent the disclosure of damaging material. This is profoundly untransparent and undermines public trust. We believe the public would prefer to know that relevant material could be seen and taken into account by a judge rather than excluded from proceedings altogether. We also believe that the public would prefer that the Government is able to defend itself and allow cases to continue to judgment rather than be settled, potentially at great expense to the public purse, because of the unacceptable risks arising from the process that did not permit the protection of sensitive material. Nothing in the proposals in the Justice and Security Bill will prevent the media reporting allegations made about Government action, or the detail of proceedings held in open court. By putting additional material before the court, the media can be expected to have increased opportunities to report on substantive findings in cases that raise matters of significant public interest, rather than the current unsatisfactory position where cases may be settled with no findings on the facts at all or are struck out.



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