HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill

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Foreword - by the Rt. Hon. Kenneth Clarke QC MP

There is no doubt that the Justice and Security Bill is absolutely necessary. We find ourselves faced with an ever increasing number of cases which cannot be properly adjudicated by the Courts. It also means the taxpayer is liable for substantial amounts of money in cases which the Government has not been able to defend.

The Government has never claimed that Closed Material Procedures are ideal, but in very difficult and exceptional circumstances where national security is at stake, they offer a means to deliver justice where otherwise there would be none.

The Government holds a heavy burden to protect national security, to protect the lives of agents and sources and the techniques which enable our agencies to protect the public. Sometimes the Government is put in the invidious position of choosing between disclosing secrets and damaging national security or being unable to defend itself against serious allegations.

This Bill is a golden opportunity to improve the accountability of the security and intelligence agencies and actually get to the bottom of these cases properly and in as just a manner as possible.

I am grateful to the Joint Committee for the work they have done in scrutinising the bill. I believe this report, and the amendments we have tabled to the Bill demonstrate that there is nothing between the Committee and the Government on the major principles at issue. The approach we are taking reflects their recommendations on these principles of justice very closely.

Conclusions and recommendations of the JCHR Report

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

As a human rights committee we have always scrutinised bills for compatibility with indigenous human rights recognised by the common law and in our view it is particularly important to do so in relation to this Bill. (Paragraph 16)

The Government is grateful for the important work that the Committee do in this area and for their scrutiny of this Bill. We take the human rights compatibility of any legislation that we bring forward very seriously, which is why we published a detailed human rights memorandum with the Bill, which the Committee welcomed as being in accordance with the good practice that they encourage. This memorandum makes clear that the Bill is indeed in full accordance with all our domestic and international human rights obligations. The proposals in the Bill have been guided by fundamental rights to justice and fairness, including those in the European Convention on Human Rights (ECHR).

Domestic and international courts have upheld CMPs (Closed Material Procedures) as being fair in other contexts, including those where the consequences include restrictions on liberty. It is important in a context where fair trial rights might otherwise be abridged, that we restate the point (as we have in Clause 11(2)(c)), that nothing in sections 6 to 10 and this section (2), is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights convention, notwithstanding the existence of Section 6 of the Human Rights Act.

We believe that the changes the Bill makes will enable the court to consider all the relevant evidence in cases where national security sensitive material is relevant. Cases might otherwise not be heard at all, which would be an injustice. The Committee has highlighted the importance of the judge's role in these sorts of cases and the Government agrees that their role is absolutely critical (this is discussed in more detail below).

The scope of the Bill

We welcome the narrower definition of the scope of Part 2 of the Bill, which is a significant improvement on the much broader proposals in the Green Paper for closed material procedures to be available in cases involving the disclosure of "sensitive material" which could harm a very broadly defined "public interest". (Paragraph 23)

We are pleased that the Committee welcome the reduction in the scope of the Bill following the Green Paper Consultation. CMPs under clauses 6 to 11 of the Bill will be available in this context only for material the court is persuaded would damage the interests of national security if openly disclosed. This is a significant narrowing of the Government's original proposals – all other CMPs in place in other civil litigation contexts are available for material that if released in open court would damage a wider range of public interests, such as international relations and the prevention and detection of crime.

We recognise that a statutory definition of "national security" would be without precedent, and might be unhelpful where that term is used in other statutory contexts. We therefore do not recommend that the Bill be amended to define the interests of national security in this particular context. (Paragraph 24)

We welcome the Committee's conclusion regarding a definition of national security. As you know, it has been the considered policy of successive Governments and the practice of Parliament not to define the term "national security". This is in order to retain the flexibility that is needed to ensure that the use of the term can adapt to changing circumstances. The courts will be the ultimate arbiters of whether or not a persuasive case has been made out that disclosure would damage the interests of "national security" and it is best left to their interpretation.

We recommend that the Government confirm to Parliament that the material which is intended to be protected from disclosure by the provisions in Part 2 of the Bill is confined to the two narrow categories of information identified by the Intelligence and Security Committee:

- **UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use);**
- **and foreign intelligence material, provided by another country on a promise of confidentiality (that is, "control principle" material) (Paragraph 29).**

We acknowledge that there was some concern about the scope of material to be protected at the time of the Green Paper, when the proposals covered material relating to a much wider range of public interests, including international relations and the prevention and detection of crime. The ISC had indicated that Parliament and the public should be reassured that any changes to legal proceedings would be minimal and 'restricted to those situations where the alternative would be damage to our national security and the safety of the British public'. The Bill was subsequently introduced with a significantly reduced scope. The material intended to be admissible to a CMP under the Bill is material that if released would damage the interests of national security only.

The Government agrees with the Committee that a statutory definition of national security could be unhelpful and should not be included in the Bill. For similar reasons, we believe attempts to define the types of material that would damage the interests of national security if disclosed would also be unhelpful. Any attempt at a precise and supposedly exhaustive definition of material said to be damaging to the interests of national security risks leaving a shortfall at some point in the future and would mean that future Governments would, because of excessively narrowly drafted legislation, be unable to protect the national security interests of this country. The language suggested by the ISC illustrates this risk. For example, it would not include material that is sensitive because its disclosure would jeopardise an ongoing national security intelligence operation. The Bill therefore leaves it to the judge to decide whether or not the Minister's assessment that there would be genuine damage to the interests of national security is correct.

We also recommend that the Government confirm to Parliament that clauses 6–11 of the Bill are not intended to cover material the disclosure of which would be damaging to international relations, such as diplomatic exchanges. (Paragraph 30)

CMPs under the Bill will only be available in relation to material that would damage the interests of national security.

Lord Wallace of Tankerness made clear in Parliament on 17 July 2012 that:

"international relations and criminal activity have been considered and rejected for the purposes of closed material procedures in civil cases. The Bill deliberately omits other aspects of the public interest from CMP clauses, such as international relations and the prevention of detection of crime, even though these categories are included in existing statutory CMPs. I hope that that gives the assurance that it is certainly the intention of the Government that there should not be definition creep, as it were."

We recommend that clause 11(2) be deleted from the Bill. (Paragraph 32)

We accept this recommendation. In response to the Committee's report the Government tabled an amendment at Lords Report stage to remove the order-making power completely (by removing what were then clauses 11(2) to (4) of the Bill).

The decision to remove the order-making power was not taken lightly. The order-making power was intended to allow flexibility to add or remove courts or tribunals in the future. Without the order-making power there is no future flexibility to add or remove courts or tribunals from this legislation except through primary legislation.

While the power would not have allowed any Government to add inquests to the definition of relevant civil proceedings, now or in the future, we recognise there was some concern on this point, including from the Delegated Powers and Regulatory Reform Committee. The Government was clear when the Bill was introduced that it would not extend CMPs to inquests. We hope that the removal of the power has put beyond any doubt that inquests are beyond the scope of the Bill.

Extension of Closed Material Procedures to all Civil Proceedings

We are disappointed by the Home Secretary's refusal to allow some special advocates to see the material that had been shown to the Independent Reviewer. In our view, this would have provided the best evidence that could be made available to Parliament as to whether there really exists a practical need for the provisions on closed material procedures in Part 2 of the Bill. (Paragraph 45)

As the Home Secretary explained in her letter to the Committee, she was equally disappointed that this material could not be shared, but there are important reasons for this. Sharing this level of detail with the special advocates would reveal confidential advice and decisions on the Government's litigation strategy in cases in which the Special Advocates act against us, compromising the Government's position in current litigation. While the Government was willing to make a limited waiver of its legal privilege to allow an independent party such as David Anderson QC to see the details of these cases, we have a duty to the public, to taxpayers and to the reputation of our country and our intelligence agencies to defend such cases as effectively as we can. Revealing our strategy to our opponents would be highly irresponsible. If Special Advocates saw this material, they would also be unable to work on any future cases with similar facts. This would be likely to disbar them from a large range of future cases, which could make it difficult for them to continue to operate as Special Advocates.

The Special Advocates play a very important role in CMPs, however the Committee should not lose sight of the fact that they represent the interests of active litigants, by challenging the Government's position in high profile cases.

The Government is keen to find a way to demonstrate the real difficulties in current cases. The Committee will understand why unfortunately it is not possible, (as much as we would like to) to talk in detail about live cases. Cases which 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. Equally, commenting on the precise nature of our intelligence sharing relationships with international partners could result in many of the risks we are seeking to avoid in bringing forward this legislation.

It is for this reason that the Government made the exceptional decision to agree to a limited waiver of legal professional privilege for Government Counsel to share highly sensitive case details with David Anderson QC.

Instead of giving a broad overview to David Anderson of all the cases, (which may not have given him sufficient insight), he was given full access to a smaller illustrative sample of cases, including three civil damages cases (an approach agreed with him in advance). By reference to the detail of these cases, he was given a frank account of the difficulties in litigating these cases, and was given access to advice on the merits of the cases and the Government's litigation options. Following the discussion, David Anderson QC commented that they are "saturated in sensitive material" and that these are cases "in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist". He is particularly well placed to make such a judgment – his role is fully independent and has given him the greatest exposure to national security issues through his work on terrorism legislation and the operation of closed procedures in a practical context. He is also a highly experienced lawyer, who is well able to cast a critical eye over the material shown to him.

It is unclear what additional benefit there would be in showing material on the same terms to Special Advocates, when this would compromise the Government's position in live litigation and could lead to Special Advocates no longer being able to perform their role.

It is unsatisfactory that the Government at the time of agreeing our Report has still not been able to provide us with the data we had requested on the number of civil damages claims pending in which sensitive national security information is centrally relevant. Pending receipt of a response to our latest attempt to clarify the evidential basis for the Government's case for the provisions in Part 2 of the Bill, we remain unpersuaded that the Government has demonstrated by reference to evidence that there exist a significant and growing number of civil cases in which a CMP is "essential", in the sense that the issues in the case cannot be determined at all without a CMP. In our view this test of necessity is the appropriate test to apply to the evidence, not the lower standard of whether there are cases in which it would be "preferable" to have CMP as a procedural option. (Paragraph 45)

The Government regrets not having been in a position to respond within the deadline given by the Committee, however we were anxious not to inadvertently provide the Committee with incorrect information, not least as the Committee sought additional information beyond simple case volumes. It was difficult to complete the consultation required with a significant number of individuals and departments across Government to a sufficient degree of reliability within the very short deadline set by the Committee. The Government has since written to the Committee and has made the latest case figures publicly available. These demonstrate an increasing number of cases.

As of 31 October 2012, there were 20 live civil damages claims (including those stayed and at pre-action stage) in which sensitive national security information was centrally relevant. A number of these cases relate to several individuals. There are also a number of other live cases, including some judicial review challenges in which national security information is also centrally relevant.

The overall figure included seven new civil damages cases (including those at pre-action stage) which were launched against the Government between October 2011 and 31 October 2012. Three civil damages cases were settled during this period.

The number of such cases is small, but the issues they raise are very significant. The majority relate to allegations such as false imprisonment, mistreatment, misfeasance in public office and complicity in rendition. It is vital that the state is not above the rule of law, and it is right that if wrongdoing has occurred, it should be exposed in a court of law.

The absence of Closed Material Procedures could mean that substantial amounts of evidence either in support of the claimant's case, or in support of the Government's defence, are excluded from the courtroom. The case would have to be decided in the absence of this evidence to avoid disclosure that would damage national

security, or the Government being forced into a financial settlement. Neither of these outcomes can be considered to be truly fair.

Settling cases is also not without consequences in addition to the cost to the taxpayer. Although settlements require no admission of liability, they can give rise to the assumption that the UK is only settling because there has been some wrongdoing. That causes significant reputational damage, which affects our intelligence services' ability to protect national security, and can be used to legitimise extremism and terrorism against the UK.

We recommend that the Bill be amended so that the court has the power to make a declaration, whether on the application of either party or of its own motion, that the proceedings are proceedings in which a closed material application may be made to the court. Such an amendment is necessary in order to make the Bill compatible with the requirement of equality of arms, and to make it consistent with the Government's own justification for extending CMPs in civil proceedings, which is to increase the fairness of such proceedings for both parties. (Paragraph 51)

The Government accepts this recommendation. We have been persuaded by the arguments put forward that all parties should be able to apply for a CMP, and that the court should be able to order one of its own motion. We will bring forward technical amendments to ensure that any party (rather than either party) can apply for a CMP, and to deal with circumstances where the Secretary of State is not a party to proceedings but may want to apply for a CMP declaration nonetheless.

We agree with the suggestion of the Independent Reviewer. We recommend that the Bill be amended so as to make the availability of CMP in civil proceedings a matter of genuine judicial discretion. The decision as to whether there should be a CMP should not be the subject of a statutory duty to direct one where there is material that is relevant to the proceedings and that it would be damaging to national security to disclose. Rather it should be the product of a full judicial balancing exercise in which the court weighs the competing public interests before deciding whether there should be a CMP. (Paragraph 60)

The Government has listened to the views expressed on judicial discretion and agrees that the court should have a clear discretion about whether or not to make a declaration that proceedings are those in which a CMP application may be made to the court.

The Minister Without Portfolio therefore announced at Commons Second Reading that the Government will accept the Lords amendment tabled by JCHR Committee

members to alter clause 6(2) from the court "must" make a declaration if the appropriate conditions are met to the court "may" make a declaration.

The Government has given careful and detailed thought to clause 6 of the Bill and has tabled a revised clause. This includes language endorsed by the House of Lords on the recommendation of the Committee – require the court to consider whether or not a CMP would be in the interests of the fair and effective administration of justice in the proceedings. The Government has also introduced additional discretion for the court at another stage by enabling it to revoke the CMP declaration at any point. This will, in particular, allow the court to reconsider its declaration, and therefore whether a CMP is in the interests of the fair and effective administration of justice in the proceedings, after it has examined the relevant material in the case.

When exercising that judicial discretion the court should not be required to ignore the fact that the PII process might result in the material being withheld, and should actively consider whether a claim for PII could have been made in relation to the material. We therefore also recommend that clause 6(3)(a) be deleted and a new sub-clause added to the Bill requiring the court to consider whether a claim for PII could have been made in relation to the material. (Paragraph 61)

The Government has always been clear that PII remains a valuable tool that should remain available either instead of, or alongside, the CMPs introduced by the Bill. Clause 11(2)(b) already makes clear that nothing in the CMP provisions affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings. Indeed, it is now open to the judge to invite the Secretary of State to make a claim for PII as an alternative to granting an application for a CMP declaration, or having considered all of the relevant material, using the new revocation power the court could decide not to proceed with a CMP and invite the Secretary of State to apply for PII instead.

Clause 6(3)(a)

The effect of clause 6(3) was not – as it has often been described – to abolish PII. The purpose of clause 6(3) was solely to assist the court in determining whether the material in question is relevant to the case such that it would normally be required to be disclosed to the other party. The normal disclosure rules require disclosure of any evidence on which a party wants to rely; documents which undermine their or another party's case; and any documents which support another party's case. Clause 6(3) required the court to disregard the possibility that material might not in fact ultimately be disclosed for other reasons: that a PII claim was made; that it was intercept material, disclosure of which is prohibited by RIPA; or because a party

chose not to rely on it (and clause 6(3)(a) of the Bill as amended still retains the previous provision to this effect in respect of intercept material).

The Government accepts that this provision has caused some confusion and that the drafting was not as clear as it should be. We will bring forward an amendment that will make the intention behind this provision clearer.

We recommend that the Bill be amended so as to ensure that a CMP is only ever permitted as a last resort, by making it a precondition of a declaration that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means. (Paragraph 67)

The Government recognises the strength of feeling regarding the wish to ensure that CMPs in civil cases are a last resort. It is our position that in the vast majority of civil claims CMPs have no part to play whatsoever. In the tiny number of cases that hinge on sensitive national security material it is, however, inevitable that without a CMP the case cannot be heard. Our intention in legislating is that CMPs would only be used in the small number of cases where they are necessary in the interests of the fair and effective administration of justice in the proceedings. We therefore agree with the spirit of what the Committee is seeking to achieve.

We are concerned that the amendment passed by the House of Lords would have the effect of requiring the court to exhaustively consider every other option for trying the case before granting a CMP declaration, in particular requiring a full PII exercise to be conducted first in every case. We do not think this the best way of achieving what the Government and the Committee intend, as it reduces the discretion of the judge to decide whether or not a CMP would be in the interests of the fair and effective administration of justice in the proceedings.

We agree with David Anderson QC that this determination can sometimes be made without necessarily requiring a whole PII exercise in every case:

"If the exercise is plainly going to be futile, I do not think legislation should require it to be performed."

The Lords Constitution Committee report on the Bill also stated that "[w]e can see force in the argument that it will sometimes be otiose to push the PII process to its completion before turning to CMP."

It may be obvious in some cases that there is one crucial document which cannot be disclosed in open conditions but without which the case cannot be fairly resolved. Or the case may be one which (in David Anderson's words) is "so saturated" in national security material, that if a PII claim were to be successful, the Government would be

left with no material to put its case forward. The delay caused by going through a full PII process in every case, particularly in cases involving large numbers of documents, could also have extremely detrimental impacts on claimants and other people affected by the issues in the case. Equally, all parties might agree that a CMP is the best way of trying the issues in a case. In such cases we think the judge should have the freedom to make the appropriate decision on whether a CMP should go ahead, without fear of having his decision appealed for having failed to adhere to restrictive process requirements set out in statute.

We are committed to ensuring CMPs are only available in those cases where they are necessary. The introduction of a much clearer discretion for the judge that CMPs should only be used where they are in the interests of the fair and effective administration of justice in the proceedings will go a long way towards achieving that aim.

In addition, we will enhance the court's discretion by giving the court an explicit power to revoke a CMP declaration at any point if he does not believe its continuation to be in the interests of the fair and effective administration of justice in the proceedings. Furthermore we will also require the court to undertake a formal review of its decision to grant a CMP at the end of the detailed document disclosure phase, which takes place before the trial of the actual issues in the case. At this point the court will have had the benefit of scrutinising in detail all of the relevant sensitive material (as well as all the relevant open material) and – with the assistance of Special Advocates – deciding what should be disclosed, whether a summary of any closed material not damaging to national security should be provided, and what is necessary for the proceedings to comply with Article 6 of the ECHR (even if damaging). The judge would be required to revoke the CMP declaration if he considers that it would no longer be in the interests of the fair and effective administration of justice in the proceedings.

If a CMP declaration is revoked, the parties will have to consider other options for handling the proceedings.

We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session. (Paragraph 71)

A degree of balancing already takes place within a CMP. If the judge decides that, notwithstanding damage to national security, Article 6 of the ECHR requires disclosure, he has broad powers to require the Government either to disclose, to provide a gist, or to direct the Government not to rely on that material (in which case

it will be excluded from the proceedings), to require concessions, or take such other steps as the court may specify.

The Wiley balance used in PII claims is for a specific purpose in a specific context. The result of a PII claim is that relevant material is excluded from the court and from consideration completely. A decision to do that must therefore carefully balance national security against the public interest in the fair and open administration of justice.

A balance of fairness and open justice on one side and national security on the other works in PII where the question is about excluding material entirely, and the impact that could have on the proceedings. But CMPs are different – the material within the CMP is fully taken into account: the interests of the individual are represented by Special Advocates, with the judge overseeing the process to ensure proceedings are fair in Article 6 terms.

Where the consequences are the inclusion of the material in the case, there is no precedent for including Wiley balancing. Closed material procedures have operated since 1997 in at least 14 different contexts and none of them involve Wiley balancing. They have been upheld by the courts as being fair and compliant with Article 6. The House of Lords endorsed this position when it voted to reject an amendment giving effect to Wiley balancing at stage two of the process.

We agree with the Special Advocates' recommendation that, if there is to be a power to hold a CMP, there should be a statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. The absence from the Bill of such a disclosure obligation seriously limits the opportunities for special advocates to mitigate the unfairness caused by the Bill's departure from the principles of open and adversarial justice. We recommend that the Bill be amended to impose such a disclosure obligation in all cases in which a CMP is held. (Paragraph 76)

Wherever it is possible and practically feasible to provide gists and summaries of national security sensitive material without causing damage they will be supplied. There is a duty on the court to consider whether a summary, the disclosure of which would not be damaging to national security, should be provided, and there is no doubt the court would require it where necessary in the interests of justice. A real difficulty arises where Article 6 of the ECHR requires the disclosure of a summary or gist that in itself would cause the very damage to national security that the consideration of the detailed material within the CMP is designed to prevent.

In those cases where Article 6 requires gisting of the form required in the AF(No 3) case and advocated by the Special Advocates, the effect of clause 11(2)(c) of the

Bill (formerly 11(5)(c)) is that the court must require such a summary, even when damaging to national security. The Government then has the choice of taking the risk of making that damaging disclosure or choosing not to rely on that material (in which case it will be excluded from the proceedings). The court can require the Government to make concessions or take such other steps as the court may specify.

The JCHR report refers to the importance of judicial discretion in deciding if a CMP is appropriate to deal with the case, yet introducing this obligation would reduce the court's discretion to decide how the material should be treated to ensure fairness and the sensible management of the case.

The Supreme Court has held that there is no requirement to provide a gist of sensitive material in all circumstances. In the case of *Tariq,* the court held that a gist was not required to be provided and that Article 6 does not provide for a uniform gisting requirement in all circumstances. The Supreme Court found that what fairness requires will inevitably vary from case to case. Therefore we do not believe that Parliament should seek to apply such a uniform requirement at this time: in fact it could also be irresponsible to do so. If the law on disclosure changes, there is nothing in the Bill that will prevent the courts applying any new standards.

In the context of this Bill and civil damages cases in particular, individual claimants are making allegations against the state. They will therefore be fully aware of the details of the allegations they themselves are making. The issue of gisting and summarisation should be less acute in such cases as the individuals will be extremely well placed to instruct the Special Advocate representing their interests.

As Mr Justice Ouseley's noted in his recent judgement in the AHK (naturalisation Judicial Review) case:

> "I do not think, and I am not alone in this among the judges who hear these types of cases, that the views of the Special Advocates as represented to a specific question put by the Joint Committee for Human Rights, and as recounted by Lord Dyson, at paragraph 37 in Al Rawi, and perhaps qualified to a degree, are a true reflection of the effectiveness they bring. Nor do they properly reflect the ability of an individual to explain what he has been doing and saying, with whom and to whom, even without specific details of allegations against him. He can also provide statements only for the use of the [Special Advocate] in the closed sessions, if the [Special Advocate] considers that advantageous. Nor do those views convey the actual knowledge which individuals' statements and actions show they have or must have of areas of concern which have not been specifically let alone fully detailed to them. "

Reform of the courts' residual disclosure ("*Norwich Pharmacal*") jurisdiction

We remain of the view expressed in our Report on the Green Paper, that legislating to provide an absolute exemption from the *Norwich Pharmacal* jurisdiction for control principle information is not consistent with the Government's commitment to the rule of law. We recommend that the Bill be amended to replace the current absolute exemption for certain types of intelligence information with a system of certification based on the contents of the information and subject to judicial control. (Paragraph 96)

We remain grateful for the Committee's recognition 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. We also note the reference in the report to Sir Daniel Bethlehem QC's evidence being demonstrative of the conscientious attempts within Government to strike the right balance between justice and security in this difficult context.

As you know, the Government reflected on the analysis and comments in the consultation period, and concluded that the best way to provide the clarity required to enable the UK to protect its sensitive information, and thereby to restore the confidence of agents and our intelligence-sharing partners was to legislate for an exemption for the intelligence services' information. Providing that clarity and reassurance is the test the provisions in the Bill need to meet.

This approach is entirely consistent with the Government's commitment to the rule of law. The proposed measures serve to bring this area of the law into line with other legislation governing the disclosure of sensitive information. In the Freedom of information Act 2000 Parliament explicitly ruled out a right to access intelligence material. The effect of the clauses in the Bill would also be to bring *Norwich Pharmacal* jurisdiction more into line with other statutory regimes relating to the courts' ability to order the disclosure of evidence into a foreign jurisdiction (the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Crime (International Co-operation) Act 2003). In areas of both criminal and civil mutual legal assistance, the UK is entitled to refuse to execute a mutual legal assistance request if to do so would prejudice the UK's national security.

The direction in which the common law *Norwich Pharmacal* jurisdiction has recently developed therefore runs contrary to the position Parliament has already recognised as necessary and has enshrined in law in relation to mutual legal assistance and the provision of evidence for overseas proceedings. No other country has seen its equivalent of the *Norwich Pharmacal* jurisdiction used to access material the disclosure of which would damage the interests of national security or international

relations of that country. Therefore we remain of the view that there is clear justification and legal precedent for providing such protection for material held by or originating from the intelligence services.

We need to provide certainty and to reduce the scope for litigation. A certification model with a narrowed definition of what qualifies as sensitive information would allow the uncertainty and potential for damage to remain. Only absolute exemption for intelligence services information and certification for other sensitive information the disclosure of which would be damaging to national security or international relations will provide the clarity required to enable the UK to protect its sensitive information in cases of third party wrongdoing, and to restore the confidence of our intelligence-sharing partners and our own security and intelligence services.

We also draw to Parliament's attention the commitment which has been given by the UK Government to the US Government that the Binyam Mohamed judgment will be addressed by legislation. This is apparent from the Government's response to the Second Report of the House of Lords Constitution Committee on the Bill (where it says that the US reaction to the judgment was tempered by the UK Government's early commitment to do so) and the evidence of the Independent Reviewer. (Paragraph 97)

We appreciate the Committee's recognition in your report on the Green Paper that it was necessary to address US concerns, and that it was a legitimate aim to seek to reassure such partners by providing greater legal certainty. Following the Binyam Mohamed judgment, the Government has committed to legislative reform in this area. The significance of that judgment was that it set a precedent that *Norwich Pharmacal* relief was available in relation to national security-sensitive material, and since then there has been an increasing number of cases brought against the Government for sensitive information the disclosure of which would be damaging to national security. In such cases, if the court orders disclosure, the Government has no recourse other than to disclose.

But as well as honouring our commitment to the US Government that we will address this situation, it is just as important to prevent disclosure of other material the disclosure of which would damage our national security or international relations, such as information gathered and generated by our own intelligence services, or intelligence shared by partners other than the US. The intelligence services have a duty under Article 2 of the ECHR to protect the safety of sources. The lives and safety of intelligence sources and intelligence officers, as well as the effectiveness of the techniques they use to gather information and other aspects of our national security would be jeopardised if such information were disclosed.

We recommend that the scope of any reform of the courts' *Norwich Pharmacal* jurisdiction be confined to the narrower categories of information identified by the Intelligence and Security Committee as information the disclosure of which would really jeopardise the national security of the UK. The amendments to this part of the Bill that we recommend below are based on the ISC's narrower definition of sensitive material the disclosure of which would be damaging to national security. (Paragraph 100)

The Government has continued to rigorously analyse whether it could safely narrow the scope of the provisions. However, the problem we face that is that narrowing the definition would erode the clarity and certainty we are aiming to provide with this legislation and would give scope for additional avenues of satellite litigation which would prove a diversion for our security and intelligence services and continue the concerns of our intelligence sharing partners.

The Committee's proposal for a system of ministerial certification would only apply to categories of information defined as:

- UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology they use);

- Foreign intelligence material provided by another country on a strict promise of confidentiality.

The ISC's Annual Report 2011-12, from which this definition of information warranting protection is taken, stated that the proposals in the Green Paper as to the scope of material which could be protected by CMPs was too broad and proposed two categories of information which warranted protection. (These narrower categories of information therefore related to CMPs, rather than *Norwich Pharmacal* cases.) The ISC argued – and the Government agreed – that CMPs should only be available where disclosure would damage the interests of national security. That has been reflected in the Bill.

In the *Norwich Pharmacal* context, however - where the sole objective of proceedings is disclosure - the ISC report states that the Committee was concerned that the Green Paper proposals did not go far enough in terms of our ability to protect foreign intelligence material. The ISC therefore proposed there should be a statutory presumption against disclosure of intelligence material.

There are two fundamental problems with applying the narrower definitions of sensitive material to the *Norwich Pharmacal* context.

First, this narrow definition would leave no statutory protection for sensitive information which falls outside these two categories. However, there is much information falling outside these categories which does need such protection. For example, this might include information about operations and investigations, as well as threat assessments in relation to sabotage, espionage and terrorism, assessments of vulnerabilities of critical national infrastructure or systems, military plans, weapons systems and information on the development or proliferation of nuclear weapons overseas. It could also include material relating to national security policy and intelligence policy issues and funding.

Second, such a narrow definition also creates scope for litigation about what does and does not fall within the definition – for example there could be litigation over what is meant by the "capability" of intelligence officers and whether the information in question would reveal this or not.

The material sought by *Norwich Pharmacal* applicants from the intelligence services is material the disclosure of which would damage the interests of national security or international relations. Applicants in such cases are not seeking unclassified material from the Government. The information we are seeking to protect is information which, for example, is derived from sensitive sources, information which might reveal sensitive techniques and capabilities, or information shared by a foreign intelligence partner. Disclosure of any material in these categories would cause damage to the UK's national security and/or international relations.

So we do not believe this proposal would take us any further forward than we are today, with uncertainty remaining over what information might be disclosed, and with possibly more avenues for satellite litigation which would divert our security and intelligence services from their frontline duties of protecting the public. If we do not legislate in a way which provides sufficient clarity, our intelligence-sharing relationships stand at risk of deteriorating well beyond the point of the restrictions that have been placed on us since 2008.

We recommend deleting the absolute exemption from disclosure for intelligence service information (including control principle information), but leaving in place the proposed system for ministerial certification, narrowed down to apply solely to the narrower categories of information identified by the ISC (thereby tailoring the certification provision more closely to its avowed objective). (Paragraph 102)

We therefore recommend that the blanket and unreviewable exemption from disclosure for intelligence service information should be removed by deleting clause 13(3)(a)–(d) (Paragraph 104)

The Government has considered the merits of the certification system for intelligence services material but concluded that it would not be sufficiently robust. We agree with the evidence given to the Committee by Sir Daniel Bethlehem**:** "A highly problematical aspect of the Binyam Mohamed case that is often overlooked, and indeed of which many seem simply to be unaware, is that the Divisional Court ultimately rejected the Foreign Secretary's 3rd PII certificate...and substituted its own view of the balance of the public interest. The consequence of this was to throw into doubt the stability and reliability of the PII mechanism as a means of safeguarding national interest. The legislation that is now proposed reflects this systemic concern. [...] The fact of the matter is that intelligence and similar relationships that hinge fundamentally on trust and reliability require greater certainty than the courts are now able to provide. [...] The substitution by the court of its view of the balance of the public interest for that of the Foreign Secretary has understandably given rise to a good deal of disquiet in the intelligence and diplomatic communities."

The very fact that this route has been opened to allow access to other nations' information shared in confidence is affecting our intelligence-sharing relationships and our diplomatic relationships. Now we are also starting to see our own agents express concerns about information they share with the agencies in confidence being disclosed in court. As the Independent Reviewer noted in his evidence to the Committee: "the reality is that, if you start giving away secrets that you promised to keep to yourself, it is inevitable that people are not going to give you those secrets to the same extent that they have before". The fact that this jurisdiction can be used in a national security context is critically impeding the UK's ability to protect our national security.

A certificate-only approach would only partially address the concerns of intelligence partners and of our own agents that sensitive information is at risk of disclosure under the *Norwich Pharmacal* jurisdiction. It would leave them with the fear that a certificate might not be upheld and that their material might ultimately have to be disclosed. This would not mitigate the adverse effect the availability of *Norwich Pharmacal* relief in relation to sensitive material is currently having on the activities of our intelligence services and our intelligence-sharing relationships. An absolute

exemption provides a clearer and neater protection for this material and more certainty for both our partners and our own intelligence services. Moving to a certificate-only model would neither provide us with sufficiently robust means of protecting sensitive information nor reassure our international partners.

We also recommend that the grounds on which the ministerial certificate can be judicially reviewed (applying judicial review principles) are expanded beyond the very narrow (and difficult to meet) ground in the current clause 14(2), to include the ground that any harm to national security caused by disclosure is outweighed by the need to ensure that effective remedies are available for serious human rights violations. (Paragraph 105)

In all *Norwich Pharmacal* proceedings, the applicant alleges that a third party has wronged them in some way and the applicant is involved, or potentially involved in legal proceedings against that third party. In all the cases to date relating to sensitive material, those legal proceedings have been overseas and the third party, in some cases, has been a foreign government. It is not for the UK courts to second guess or prejudice the outcome of legal proceedings in other jurisdictions by judging whether that third party has committed "serious human rights violations". This would be a serious violation of the principle of comity and could cause enormous offence and disruption to our relations with the foreign government.

The Government is deeply concerned about human rights violations and takes measures to ensure that there are effective remedies available. The Government works both in the UK and overseas to promote and uphold human rights, devotes significant resources overseas to combating torture, and stands firmly against torture, and cruel, inhuman and degrading treatment or punishment. We do not condone it, nor do we ask others to do it on our behalf. We work on human rights around the world through bilateral contacts, membership of international organisations and development aid and assistance, and in partnership with civil society. This work is often done behind the scenes, but there is much work done in providing consular assistance, in lobbying governments, and in capacity-building projects, to mention but a few lines of engagement. These are just some examples of the work the Government does overseas to combat torture, as part of its broader work to raise human rights standards.

The provisions in the Bill do not remove any legal right to bring a claim against the Government: if someone has evidence that the UK Government or intelligence services have been directly involved in wrongdoing, they can still bring a claim against the Government. If someone believes their Convention rights have been infringed, they can still seek to enforce them. However, in the *Norwich Pharmacal* context, where the disclosure of sensitive information involves third party wrongdoing, and where the disclosure would damage national security or international relations, the Government believes that such disclosure is not the most

effective solution to the problem. Disclosure of sensitive information in a single case can have far-reaching long-term effects on the UK's national security and international relations, reaching well beyond the issues of that particular case.

As David Anderson QC noted in his evidence to the JCHR, though there may arguably be merit in the short term of disclosing information if it assists in the fight against torture, the longer term effect of such disclosure against the will of the country that supplied it to you is that the information flow is likely to decrease. This means that we would no longer be in a position to assist in the fight against torture in the future, because we would be unsighted. It also has the effect that we might be deprived of information that is important for the defence of national security.

We therefore remain of the view that it should not be possible for the courts to order disclosure of information, to a person who may well have no connection to the UK and who is thinking about proceedings involving a party which is not the UK Government, where that disclosure would harm our vital interests of national security or international relations. This decision has already been adopted by Parliament in relation to the regimes for mutual legal assistance and the provision of evidence for overseas proceedings – and indeed this position reflects the international agreements underlying those statutory regimes.

There is a widespread consensus amongst States that there should be grounds upon which to refuse a Mutual Legal Assistance (MLA) request. Provisions found in various international agreements and the UK's own bilateral MLA treaties commonly contemplate the refusal of assistance on the grounds of public order, human rights, national security, politically motivated requests and sovereignty. The 1975 Act was passed to implement the terms of the Hague Evidence Convention which was ratified by the UK in 1976 (http://www.hcch.net/index_en.php?act=conventions.text&cid=82). Article 12 states that a request for evidence can be refused if "the State addressed considers that its sovereignty or security would be prejudiced thereby." Article 2 of the Council of Europe's European Convention on Mutual Assistance in Criminal Matters 1959, provides that the requested party may refuse assistance if it considers that complying with the request "is likely to prejudice the sovereignty, security, public order or any other essential interests of its country".

Norwich Pharmacal proceedings involving sensitive material affect only a very small number of individuals. But these cases are having a disproportionate affect on our national security and international relations, making it harder for the UK to act as a positive influence on human rights worldwide. The changes proposed in the Bill are essential to provide the protection of sensitive information the disclosure of which would be damaging to the UK's national security or international relations, as well as reassuring our intelligence-sharing partners that we can safeguard the sensitive material they share with us on a confidential basis.

Freedom of the media and public trust in the judiciary

We recommend that the Bill be amended to require rules of court to provide that the media be notified of any application for closed material procedures to be used, to ensure an opportunity for the media to make representations on that question, and to provide a mechanism for a party to apply for a closed judgment to become an open judgment. (Paragraph 108)

The Government has amended the Bill to make clear that all parties to the case must be informed that an application for a CMP has been made, and of the outcome of that application. These facts will generally be a matter of public record, as with other court decisions, and the media will be able to report them as they do in any other case.

Even where a successful application has been made for a CMP to be held in a case, there will also be open sessions in that case. Sensitive national security material will be heard in closed sessions, excluding the media and members of the public. But all other evidence will be heard in open session and there is nothing in the Bill which would prevent the media being able to report on it. This is the position in other contexts where CMPs are available, and the media report extensively on such cases, including the findings and the issues involved.

Unless they are a direct party to the proceedings, the Government does not believe that the media would have sufficient standing to make representations about whether there should be a CMP in a case. While the media plays a vital role in informing the public of current affairs, including important litigation, we do not think the media should be given a position equivalent to that of the parties in the proceedings, nor do we think that the views of the press should necessarily take precedence over those of the parties in the litigation.

<u>Closed Judgments</u>

Most court judgments can be reported openly and are published in full. In cases involving a closed material procedure the judge is under a duty to put as much of his judgment into open court as possible without damaging national security, including statements of legal principle with cross-case relevance. However, there is sometimes a need for this to be supplemented by a ‘closed’ judgment. These are largely factual and rarely include points of law. Where points of law are included they are specific to aspects of cases involving sensitive material; summaries of such closed judgments are searchable on the closed judgment database (see below), enabling Special Advocates and HMG counsel to identify potentially relevant closed judgments.

The information in a closed judgment contains highly sensitive intelligence material. If the material were not sensitive it would be included in the open judgment. The judge must be satisfied that any material in the closed (rather than open) judgment would be damaging to national security so could not be released. Special Advocates can also make submissions to the judge about moving material from the closed judgment to the open judgment. If the court is persuaded that there would be no harm to national security the material could then be moved to the open judgment. The final decision to release a closed judgment in whole or in part rests with the court.

During the Bills passage through the House of Lords, Peers asked the Government for more for details on how closed judgments from CMP contexts are currently reviewed and Ministers agreed to report their findings. Government records are subject to the Public Records Act 1958 and those which are, because of their importance, selected for permanent preservation are usually required to be transferred to The National Archives when they are 30 years old. This deadline will be reduced to 20 years (subject to a 10 year period in which transitional arrangements will apply) following the coming into force of section 45 of the Constitutional Reform and Governance Act 2010. However, if the Lord Chancellor agrees, records can be retained within departments after this point if, for example, their transfer would prejudice national security. Ordinarily, records are reviewed at an appropriate point before the obligation to transfer kicks in, in order to asses whether they are suitable for transfer or retention. As the Bill stands, these arrangements would apply to closed judgments. However, because the final decision to release a closed judgment rests with the court, any decision to transfer a closed judgment to the National Archives without permission from the court would be considered to be a contempt of court. The final decision to release a closed judgment rests with the court. It is open to any person to approach the court to ask them to open up a closed judgment in whole or in part.

The Government believes it is important to ensure that those that are entitled to access closed judgments are able to do so efficiently and effectively. For this reason, the Government has created a searchable database containing summaries of closed judgments which will allow special advocates and HMG counsel to identify potentially relevant closed judgments. It is not a database containing the full version of closed judgments handed down by the courts.

If a Special Advocate or counsel for HMG thinks that it is necessary to read the full closed judgment because it is relevant to the case on which he is instructed, he will be able to request a copy from SASO or TSol. The database is held and managed by the Home Office and will be updated three times a year, during the Easter, summer and Christmas court recess. Summaries of legal principles in particularly sensitive judgments will be added on a less routine basis to reduce the risk of the summary being linked to a particular case, but they will be included. Summaries of

all future closed judgments including those resulting from the Bill will be entered into the database.

Reporting, review and renewal

In view of the significance of what is being provided for in the Bill, and its radical departure from fundamental common law traditions, we recommend that the Bill be amended to require the Secretary of State to report regularly to Parliament about the use of the exceptional procedures contained in the Bill, and providing for both independent review by the Independent Reviewer and for annual renewal. (Paragraph 111)

Any Act of Parliament has always been liable to some form of post-legislative review, but since March 2008 an additional and more systematic process has been put in place in which the relevant Commons Select Committee reviews how the Act is working in practice 3-5 years after Royal Assent. The Justice and Security Bill will be no exception and will be reviewed in the usual way.

The Government recognises that legislation such as the Terrorist Asset-Freezing Act 2010 and the TPIMs Act 2011 report to Parliament on a quarterly basis and are reviewed by the Independent Reviewer, David Anderson QC. However we do not believe the reasons behind such regular reporting in respect of the use of these powers read across to CMPs in civil litigation. These Acts place restrictions on individuals and it is therefore appropriate that regular review is conducted into the powers used including restrictions on liberty. In contrast, CMPs will affect court procedures. Each CMP will have to be applied for and authorised by, or ordered by, a court so there is an in-built accountability mechanism in their use.

We note the recommendation that there should also be independent review of use of CMPs. The Independent Reviewer of Terrorism Legislation has a relatively wide remit and can choose what he wishes to examine during a reporting year. As we have seen, where they have thought it appropriate to do so, reviewers have conducted ad hoc reviews of particular operations. These have included examination of whether the arrest power in section 41 of the Terrorism Act 2000, the detention powers in Schedule 2 to the Act and the relevant code of practice issued under the Police & Criminal Evidence Act 1984, have been complied with. David Anderson QC has made a valuable contribution to the debate around the need for CMPs. There is nothing preventing him, or any future post holder, being asked to undertake ad hoc reports into issues of wider national security relevance or to be invited by Parliament to give his opinions. It is, of course, important that any such ad hoc report would not seek to provide oversight or review of the judiciary's decisions on individual cases. That would not be appropriate.

With regard to CMPs, it is also important that claimants have the continued ability to bring claims against the Government and that matters are scrutinised by the courts rather than returning to the current system where in some circumstances justice is not possible. In the case of challenges to the Home Secretary's decision to refuse someone British citizenship or to exclude them from the UK, we are dealing with a category of cases where the court has found that it is potentially fairer to the claimant for there to be a CMP available. The expiry of those clauses would reduce fairness by removing the ability to effectively challenge those decisions.

With regard to the *Norwich Pharmacal* jurisdiction, the primary problem we are seeking to address is how we provide reassurance to our allies and agents that we can protect sensitive information shared with us in confidence. Annual renewal would mean we could only guarantee it would be kept safe for up to 12 months and after that time the information may be disclosed, this would not be an effective solution. A time-limited protection would simply not provide enough reassurance. It would cause our agents and our allies to continue to doubt our ability to keep material safe from disclosure. This reform has been brought forward as a permanent solution to the problematic issue that has arisen, which can not be resolved with short term measures.

The Constitution Committee did not recommend a sunset clause, but instead said that the House may wish to consider the Bill being independently reviewed five years after it comes into force. Bills are subject to review normally 3-5 years after Royal Assent. The Select Committee responsible will then decide whether it wishes to conduct a fuller post-legislative inquiry into the Act. We continue to believe it is right we should leave it to the Select Committee to decide the form of independent post legislative scrutiny.

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