



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# The Justice and Security Green Paper

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Twenty-fourth Report of Session  
2010–12

*Report, together with formal minutes and  
written evidence*

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### Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. Oral evidence is published online at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/>. References to written evidence are indicated by the evidence reference number as in 'JS 12'.

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# Conclusions and recommendations

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## Introduction

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)
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)

## Scope of the Green Paper proposals

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)
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)
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)

## Extending Closed Material Procedures to all civil proceedings

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)
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)
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)

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)
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)
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 given by the Independent Reviewer. (Paragraph 111)
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)
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)
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 the determination of a claim without damaging disclosures. (Paragraph 122)

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 procedure 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)

### **Extending Closed Material Procedures to inquests**

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)



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)

### Reforming the courts' Norwich Pharmacal jurisdiction

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)
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)
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)
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

Pharmaceutical 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 Pharmaceutical 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 Pharmaceutical] 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 been made out. (Paragraph 189)
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 Pharmaceutical disclosure. (Paragraph 192)

### The impact on media freedom and democratic accountability

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

# 1 Introduction

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## The Government's case for change

1. The Government's Green Paper on *Justice and Security* was published on 19 October 2011.<sup>1</sup> It contains the Government's proposals to change the way in which "sensitive information" (which includes but is not confined to intelligence information) is treated in civil proceedings.

2. The Government's case for legislative change rests upon two principal concerns, one concerning fairness and accountability and the other concerning national security.

### *The Fairness and Accountability Concern*

3. One of the main concerns behind the Green Paper is that, with the increase in intelligence activity since 9/11, there are increasing numbers of cases challenging Government decisions and actions in the national security context, but, under current rules, the UK justice system is unable to pass judgment on them because they involve sensitive information which cannot be disclosed in a courtroom.<sup>2</sup> The law of "Public Interest Immunity" ("PII") enables sensitive material to be protected from disclosure, but excluding key material in this way means that the issues in the case cannot always be determined. As a result, the Government argues, cases either collapse, or are settled without a judge reaching any conclusion on the facts before them.

4. The Government regards this situation as being wrong in principle. The concerns in play here appear to be a combination of fairness and accountability. We use the term "fairness" here and throughout this Report in the sense of "natural justice" or procedural fairness, which is shorthand for a number of more specific rights which together go to make up the overarching right to a fair hearing in court.<sup>3</sup> The concern about fairness applies to both claimants and defendants in cases which cannot proceed all the way to judgment. Claimants are left without a clear legal judgment on their case and the security and intelligence agencies are left unable to clear their name.<sup>4</sup> The public, too, are left with questions unanswered about serious allegations, which is said to be unsatisfactory from the point of view of democratic accountability.

5. One of the main objectives of the proposals in the Green Paper, therefore, is "to better equip our courts to pass judgment in cases involving sensitive information." They aim to maximise the amount of material available for consideration in civil proceedings and to minimise the number of proceedings that cannot be tried because appropriate procedures do not exist to handle them.

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1 *Justice and Security Green Paper*, Cm 8194 (October 2011).

2 Foreword to the Green Paper by the Rt Hon Kenneth Clarke QC MP.

3 See para. 12 below for a more detailed explanation of the specific rights which are encompassed by the principle of natural justice or fairness.

4 It is noteworthy that in the Secretary of State's Foreword to the Green Paper he is clearly contemplating a narrow category of case against the security and intelligence agencies in the national security context. The mismatch between the Foreword and the scope of the proposals in the Green Paper is considered in Chapter x below.

### **The National Security Concern**

6. One of the other principal objectives of the proposals in the Green Paper is to “protect UK national security by preventing damaging disclosure of genuinely national security sensitive material.”<sup>5</sup> The Government says that one of the “key principles” which has guided the development of the proposals has been the necessity to “protect our sensitive sources, capabilities and techniques and our relationships with international partners, whose co-operation we rely on for our national security.”<sup>6</sup>

7. It goes without saying that protecting national security against possible harm by inappropriate and damaging disclosure of security-sensitive material is not only a legitimate objective of the law in this area but is an important duty resting on all branches of the State: the Executive, the legislature and the judiciary. That duty has been very well performed by each of those branches, including the judiciary, which has been extremely vigilant to ensure that national security is not jeopardised by the disclosure of security-sensitive information in civil or criminal proceedings. The key question for us and for Parliament, however, in scrutinising the case made in the Green Paper by the Government for such a fundamental change from our current arrangements, is whether there is any evidence that current laws and procedures have already put national security at risk by allowing damaging disclosures of security sensitive material, or give rise to a real risk of such harm eventuating—and whether legislative change is required to remove this risk.

8. As the Independent Reviewer of Terrorism Legislation pointed out in his evidence to us, with one exception “the case for change is not principally advanced in the Green Paper on the basis of any risk that secret material could, under the current procedures, be damagingly and wrongly disclosed.”<sup>7</sup> The reason for this is that, apart from in one specific context, the current system of PII does not jeopardise national security, because the refusal of a claim to PII does not result in the Government being ordered to disclose the material which it believes will damage national security. In a case where the Government considers that national security would be jeopardised by disclosure of the material for which PII was claimed but refused, it has the option, as the Independent Reviewer put it, “to press the eject button”, by conceding the issue to which the material relates even if this means abandoning a prosecution or settling a civil claim to which it is a defendant.

9. There is one context, however, in which the case for change made by the Government in the Green Paper does rest on a national security concern, and that is in relation to the courts’ so-called “Norwich Pharmacal” jurisdiction: the power of the courts to order the disclosure of certain documents or material to another party, in order to assist that other party in some other legal proceedings. Here, the Government’s case for change is that the novel application of Norwich Pharmacal principles by the courts in the *Binyam Mohamed* litigation has for the first time put the Government at risk of having to disclose sensitive material to non-UK-security-cleared individuals for use in court proceedings outside the UK.<sup>8</sup> PII applies to Norwich Pharmacal proceedings,<sup>9</sup> so even in a case where the court

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5 *Ibid.*

6 Executive Summary, para. 10, p. 3.

7 Memorandum from David Anderson QC, 26 January 2012, para. 11.

8 Green Paper, para. 1.41, p. 14

9 *Binyam Mohamed* [2008] EWHC 2048 (Admin) at [149].

concludes that the case for Norwich Pharmacal disclosure is made out, the Government can attempt to resist disclosure by claiming PII for the relevant material. If the PII claim is rejected by the court, however, the result is that the material must be disclosed: in this particular type of proceedings, the Government, as the defendants to an action for disclosure, have no “eject button” if they fail to persuade the court not to order disclosure.

10. The Government’s case for change is that this unprecedented application of the Norwich Pharmacal principles threatens national security in two ways. First, it gives rise to the direct risk of the Government being forced to disclose material which the Government considers will harm national security. Second, and less directly, the very fact of this risk gives rise to uncertainty about the ability of the Government to prevent the disclosure of information or material which has been obtained from intelligence partners on the understanding that it will not be disclosed without their permission. That uncertainty, the Government argues, has a disproportionate impact on the UK’s international, diplomatic and intelligence relationships with foreign governments: it undermines the trust and confidence of foreign partners and therefore makes them more reluctant to share intelligence with the UK, which harms national security.

11. We consider below the evidential question of whether the Government has demonstrated, by concrete evidence, that these two concerns, fairness and accountability on the one hand and national security on the other, are both real, practical problems which need urgently to be addressed as the Green Paper suggests.

## The Rights and Principles at stake

12. One of the constant themes in the evidence we have heard has been that the Green Paper seriously underestimates the extent to which its proposals represent a radical departure from the UK’s constitutional tradition of open justice and fairness, or natural justice. As Lord Dyson explained in the Supreme Court, there are a number of strands to the principle of natural justice:

A party has the right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance [...] the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses.<sup>10</sup>

Dinah Rose QC, for example, criticised the Green Paper because it fails to acknowledge that the proposed statutory extension of closed material procedures into civil proceedings is contrary to a fundamental, constitutional common law right, the right to an open and adversarial trial. She is critical of the Green Paper for failing to acknowledge the serious implications of what is proposed, or the importance which the Supreme Court attached to the right of a litigant to know the case against them in the *Al Rawi* litigation. The Green Paper simply says that the issues have recently been considered by the Supreme Court, and that it seeks to “build on” those judgments.

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10 *Al Rawi v The Security Service* [2011 UKSC 34 at [12]–[13]

13. However, when we asked the Secretary of State whether he accepted that the proposals in the Green Paper constitute such a radical departure from the UK’s constitutional tradition and, as such, require the Government to demonstrate a compelling justification for them, we were surprised to hear that he denied it. This denial came during the Secretary of State’s presentation in his oral evidence of the Green Paper as a set of exceptional measures only intended to be of the narrowest possible application. We consider in Chapter 2 below this discrepancy between the Secretary of State’s account of the scope of the proposals and the scope of the Green Paper itself, but even taking the Secretary of State’s account at face value we are troubled by the claim that the proposals in the Green Paper do not constitute a radical departure from our long established traditions of open justice and fairness. In our view it is important that the full significance of the proposals is acknowledged. As Lord Hope said in *Al Rawi*, the law must not weaken its defences “against the usurpation of fundamental rights that proceeds little by little under the cover of rule of procedure.”<sup>11</sup>

### The test to be applied by Parliament

14. In *Al Rawi* the Supreme Court said that “the issues of principle raised by the closed material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so.”<sup>12</sup> It also recognised that in some ways Parliament is better placed to scrutinise the justifications offered by the Government for such a fundamental change:

The proposition that a closed material procedure should only be introduced in ordinary civil litigation if Parliament sees fit to do so [...] is a recognition that the basic question raises such fundamental issues as to where the balance lies between the principles of open justice and of fairness and the demands of national security that it is best left to determination through the democratic process conducted by Parliament, following a process of consultation and the gathering of evidence.<sup>13</sup>

15. Where a legislative proposal would interfere with a fundamental right or principle recognised by the common law, the ECHR or any of the UK’s international human rights obligations, there is a heavy onus on the Government to demonstrate the strict necessity for that interference, and it is Parliament’s duty to subject to rigorous scrutiny the Government’s attempt to demonstrate that necessity. One of our tasks, as Parliament’s human rights committee, is to assist Parliament in the performance of that important scrutiny role by helping to identify the questions that need to be asked and the evidence that needs to be sought, within the general framework of both national and international human rights law. We must also advise Parliament of the view that we have reached as to whether the Government has discharged the burden of justification that it bears.

16. Given the significance of what is proposed in the Green Paper, we have applied the same test as that applied by the Supreme Court in *Al Rawi* when scrutinising the Government’s justification for the proposed reforms: that any radical departures from

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<sup>11</sup> *Al Rawi*.

<sup>12</sup> *Ibid*, at para. [69].

<sup>13</sup> *Ibid*, para. [74] (Lord Hope).

fundamental common law principles or other human rights principles must be justified by clear evidence of their strict necessity.

17. The central question for Parliament, therefore, in its scrutiny of the proposals in the forthcoming Bill, will be whether or not the Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness that are central both to our common law tradition and to the international obligations that have been so influenced by that tradition.

## Our inquiry

18. On publication of the Green Paper we decided that its human rights implications were so significant that we ought to scrutinise it for compatibility with the common law rights to a fair hearing and to open justice and with the UK's international human rights obligations.

19. We wrote to the Lord Chancellor and Secretary of State for Justice on 9 November 2011 asking a number of specific questions and for a full human rights memorandum assessing the compatibility of the proposals in the Green Paper with the relevant common law rights and principles and international human rights obligations.<sup>14</sup>

20. The Lord Chancellor replied on 28 November 2011 enclosing a memorandum responding to our specific questions and welcoming our interest in the Green Paper.<sup>15</sup> He recognised that the Green Paper deals with complex issues that raise important human rights considerations and reiterated the Government's commitment to addressing the challenges identified in the Green Paper in a way that is compatible with all relevant legal obligations, international and domestic, including the Human Rights Act.

21. After considering the Government's response to our questions we decided to hold an inquiry into the Green Paper. We issued a call for evidence on 8 December 2011, inviting submissions by 20 January 2012. To avoid duplication with the Government's own consultation on its Green Paper, we asked for tailored submissions in response to specific questions focusing in particular on the necessity of and justification for proposals with serious implications for the UK's constitutional tradition of open justice and fair hearings and its international human rights obligations in relation to the same. The specific questions in relation to which we sought evidence are set out in our call for evidence.<sup>16</sup>

22. We received 15 written memoranda in total, plus a number of supplementary memoranda. The written evidence we received is published in a separate volume available online.

23. We held five formal evidence sessions:

**24 January 2012:** Dinah Rose QC and Tom Hickman

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14 Gen 99.

15 JS 1.

16 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/governments-justice-and-security-green-paper-call-for-evidence/>.



**31 January 2012:** Angus McCullough QC and Jeremy Johnson QC; David Anderson QC and Lord Carlile of Berriew CBE QC

**7 February 2012:** Joshua Rozenberg and Ian Cobain; Jan Clements and Dr Lawrence McNamara

**28 February 2012:** Liberty, JUSTICE, Amnesty International and Inquest

**6 March 2012:** John Wadham, Equality and Human Rights Commission, and Eric Metcalfe; Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, Home Office

24. We are very grateful to all those who have assisted with our inquiry.

25. We are also grateful to the Government for the assistance it has given to our inquiry. The Ministry of Justice has provided detailed and timely answers to our questions and made ministers available to give oral evidence. This has helped to enable us to report on this Green Paper in time, we hope, for our Report to be properly considered by the Government before it publishes a Bill on this subject. There have been one or two aspects of the process, however, which have been less satisfactory and we comment on those briefly here.

### ***Publication of responses to the Government's consultation***

26. The Government's own consultation on its Green Paper concluded in January. It would have been helpful to our inquiry, and to others engaged in scrutinising the Green Paper, if those consultation responses had been in the public domain as soon as they were received.

27. Both we and the Independent Reviewer of Terrorism Legislation asked the Government to publish the responses to the Government's Green Paper. Both requests were refused. In a letter from the Secretary of State dated 31 January the reason given to us was that "these may have been sent to the Government in confidence" and it would therefore be necessary to check with each of the more than one hundred respondents to the consultation whether they object to their response being published. As a result, the position of potentially significant respondents, such as the police and other agencies, on the Government's proposals were for some time not in the public domain.

28. The Government agreed to write to each respondent to ask their permission to publish their response, and has published them on the Cabinet Office website as permission has been received. All but 6 of the 90 responses have now been published, and we have been provided with a summary of those which have not been published. We welcome the Government's constructive approach once the problem was identified, but it is unsatisfactory that it has taken so long for response to a public consultation to be made public.

29. The problem was caused by the Government's approach that the consent of each respondent had to be individually sought. We do not understand why this approach was taken rather than that usually adopted in Ministry of Justice consultations. We can see no

reason in principle why the opposite presumption should not have been applied which was described by Joshua Rozenberg in his evidence to us:<sup>17</sup>

It is certainly not consistent with current practice [...] Looking back at discussion papers published by the Ministry of Justice, the most recent one is entitled [...] *Getting it Right for Victims and Witnesses*. Under the heading “Confidentiality”, it states: “Information provided in response to this consultation [...] may be published or disclosed in accordance with the access to information regimes [...] If you want the information that you provide to be treated as confidential”, be aware that there is a code of practice, and explain why you want it confidential. “If we receive a request for disclosure [...] we will take full account of your explanation”, but we cannot promise that it will be confidential. That seems to be the standard practice with all consultation papers issued by the Ministry of Justice—and, I dare say, by other government departments. It is a public consultation and unless the parties ask for their response to be confidential, it will be treated as public. I fully accept why certain public bodies such as the security service, in responding to the Green Paper, would not want their response made public, but the default position ought to be that a submission is public unless somebody says otherwise.

30. We can see no reason in principle why the opposite presumption should not have been applied by the MoJ: that a response will be treated as public unless the respondent asks for it to be treated as confidential when it is submitted

**31. 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.**

### *The views of the judiciary*

32. Finally, we wish to comment briefly on the difficult question of how parliamentary scrutiny of proposals of this kind can be informed by the views of the serving judiciary. Because of the nature of what is proposed in the Green Paper, we decided that it would assist our inquiry to hear the views of some judges with experience of operating closed material procedures. Our request was declined on the basis that serving judges cannot give evidence to parliamentary committees in relation to policy proposals in Green Papers which will shortly become Bills. We understand the reasons for this judicial reticence, which is underpinned by a proper regard for the separation of powers in our constitution.

**33. However, 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.** We note that in the past the judges have submitted a collective response to legislative proposals which impinge directly

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<sup>17</sup> Q115.

on the administration of justice, such as the recent Green Paper on Legal Aid. We also note that the European Court of Human Rights recently issued an Opinion on the proposals which are currently being discussed by Governments concerning reform of the Court. We appreciate the sensitivities, but we do not consider them to be insuperable, and there are precedents which may be worth considering. **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.**

### **The scope of our Report**

34. Our Report does not deal with that part of the Green Paper which deals with reform of intelligence oversight. Our predecessor Committee made recommendations on this subject.

35. Our Report also does not consider all of the options for reform put forward by the Green Paper, but focuses on those which we judge to be both the most significant in human rights terms and most likely to be under active consideration by the Government.

## 2 The scope of the Green Paper proposals

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### ‘Sensitive information’ and ‘harm to public interest’

36. The emphasis in the Secretary of State’s Foreword to the Green Paper is almost exclusively on the security and intelligence agencies and national security. The focus is relatively narrow. The proposals in the Green Paper, however, are not confined to contexts concerning intelligence information or other material concerning national security. Rather, they relate to the disclosure of any “sensitive material” the disclosure of which may harm the “public interest”.

37. Both of these terms are very broadly defined in the Green Paper.<sup>18</sup> Sensitive material/information is defined as “any material/information which if publicly disclosed is likely to result in harm to the public interest.” The public interest itself is said to have many different aspects: “defence, national security, international relations, the detection and prevention of crime, and the maintenance of the confidentiality of police informers’ identities, for example.”

38. A number of NGOs were concerned about the potential scope of application of the proposal to make closed material procedures available in civil proceedings generally. They were particularly concerned by the fact that the proposal is not confined to material relating to national security, but would apply wherever there is a chance of damage to the public interest, which is very broadly defined by the Green Paper.

39. Liberty argued that

The remit of what might be ‘damaging to the public interest’ is so broad, it could include civil actions against the police for assault or false imprisonment; personal injury claims brought by ex-servicemen against the Ministry of Defence; inquests into deaths where the State is implicated; and class actions against Government or big business.”

40. Amnesty International in its memorandum to us is also concerned that the breadth of the proposals in the Green Paper goes far wider than material which is genuinely harmful to national security.

41. The Bingham Centre for the Rule of Law response to the Government consultation argues that if there is to be any provision made for the use of closed material procedures in civil proceedings, the circumstances in which they could be used would have to be strictly defined and confined by Parliament. This echoes observations made by the Supreme Court itself in *Al Rawi*, in which Lord Dyson, for example, said:

the issues of principle raised by the closed material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so. No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require

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18 Green Paper, p. 71.

detailed procedural rules to be made (such as CPR Parts 76 and 79) to regulate the procedure.

42. The evidence we have received has demonstrated how far-reaching are the proposals as they currently stand in the Green Paper. It is also clear that the proposals go very much wider than is capable of being justified by the two concerns identified in Chapter 1 above, even assuming that evidence exists to show that those are real and practical concerns.

43. The Secretary of State in his oral evidence to us said that the Green Paper was intended only to deal with what he described as a “narrow problem”:<sup>19</sup>

We are talking about cases where relevant evidence could be given by the intelligence services, our spies, and that the relevant evidence is derived by the service using either sources or technological methods—covert surveillance or interception of various kinds—of which, of course, the parties are quite unaware.

44. The recent reaction to the Green Paper in the press had, he said, been based on a complete misunderstanding of the scope of the proposals.

**45. 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.**

46. The Secretary of State also suggested in evidence that the Green Paper might not have been drafted clearly enough.

It could be that we have not expressed our proposals clearly enough in the Green Paper [...] I hope we have not so carelessly drafted the Green Paper as to give too much ground to all those fears [...] it probably is not set out with the greatest clarity in the Green Paper.<sup>20</sup>

**47. 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.**

## The admissibility of intercept as evidence

48. The Green Paper does not deal with the potential use of intercept as evidence. This, it says, is a separate challenge and a separate Government project. The Green Paper is said not to be the appropriate means for addressing the Government’s commitment to seeking a practical way of adducing intercept evidence in court.<sup>21</sup>

49. Since one of the driving forces behind the Green Paper is said to be the Government’s desire to ensure that, wherever possible, evidence is put before a court rather than excluded

<sup>19</sup> Q190.

<sup>20</sup> Qs 190 and 201.

<sup>21</sup> Green Paper, p. 11.

from its consideration, it does seem surprising that the admissibility of intercept as evidence is not included within the scope of the Green Paper.

50. We accept that the Green Paper is mainly concerned with civil proceedings, and the question of the admissibility of intercept as evidence has tended to focus on its use in criminal prosecutions. However, intercept is also relied on by the Government in a number of other contexts and we find it surprising that the Government is going to such trouble to make sure that evidence can go before a judge when material which sometimes forms a substantial part of the material relied on by the Government will still not be admissible under the proposals in the Green Paper. There is now a very long history of Reports, from this Committee and others, urging legislative reform to enable the admissibility of intercept. In our Report on the TPIMs Bill, we expressed concern about what appeared to be the significant decline in the number of successful prosecutions for terrorism offences over the last few years.<sup>22</sup> We find no reassurance on this score in the latest Home Office Statistical Bulletin which shows 7 people were convicted of terrorism-related offences in the year to September 2011 compared to 23 the previous year.<sup>23</sup> **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.**

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22 Green Paper, p. 11.

23 Sixteenth Report of 2010–12, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill*, HL Paper 180/HC 1432, para. 1.13.

## 3 Extending Closed Material Procedures to all civil proceedings

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### The Green Paper proposal

51. The central proposal in the Green Paper for responding to the fairness and accountability concerns outlined in Chapter 1 above is to legislate to make closed material procedures more widely available in civil proceedings.

52. The Green Paper argues that extending the availability of closed material procedures to civil proceedings generally will enhance procedural fairness, because it will minimise the number of proceedings that cannot be tried because appropriate procedures do not exist to handle them. It is the Government's view that "it is fairer in terms of outcome to seek to include relevant material rather than to exclude it from consideration altogether and that the public interest is best served by enabling as many such cases as possible to be determined by the courts."

53. The main impetus for this part of the Green Paper has been provided by the decisions of the Court of Appeal<sup>24</sup> and Supreme Court<sup>25</sup> in the case of *Al Rawi v The Security Service* that the courts have no power at common law to order a "closed material procedure" in a civil claim for damages. The case arose out of the claims by Binyam Mohamed and others for compensation for their alleged detention, rendition and mistreatment by foreign authorities, in which they alleged the UK authorities, including the intelligence services, had been complicit. The Government wished the court to see security sensitive material in their defence which could not be shown to the claimants, and asked the court to order a closed material procedure to enable it to do so.

54. In short, the Supreme Court held that the use of closed material procedures in civil proceedings, in the absence of express statutory authority, was not permitted by the common law because it was in breach of the well-established principles of open justice and natural justice. Closed material procedures involved a departure from many of the essential features of a common law trial, and while the Supreme Court recognised that departures from those fundamental principles were in principle capable of justification, it was for Parliament to decide whether such departures were justified, as it had already done in certain specific contexts such as deportation. On the same day, in the case of *Tariq*, the Supreme Court held, by a majority of 8–1, that the use of a statutorily authorised closed material procedure in the specific context of security vetting was lawful.

55. The Government, in this Green Paper, now proposes to obtain the statutory authority that the Supreme Court in *Al Rawi* said would be required for the radical departure from the common law principles of open justice and natural justice that would be involved in making closed material procedures available in the full range of civil proceedings.

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24 [2010] EWCA Civ 482.

25 [2011] UKSC 34.

## Evidence of the need for change

56. The Green Paper suggests that there are 27 cases currently before the UK courts to which sensitive information is central, and that 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”.<sup>26</sup>

57. Some witnesses in our inquiry were strongly of the view that the case for change is not made out. In their view, ordinary principles of PII are adequate to ensure that issues can be tried without harmful disclosures. The special advocates, for example, say that their experience both as special advocates and as practitioners conducting civil litigation in a variety of contexts leads them to the view that existing PII procedures are “generally workable.”

58. A number of NGOs also rejected the Government’s argument that extending the availability of CMPs will enhance procedural fairness by ensuring that cases will be tried which otherwise would not be tried. Liberty, for example, believes that the likelihood of future cases being struck out due to the unavailability of CMPs is exaggerated. It points out that the case of *Carnduff v Rock* is the only previous example of such a case that the Government can point to, and in Liberty’s view that case was “arguably wrongly decided, not least because relevant PII case law was not put before the court.” JUSTICE also considers the case of *Carnduff v Rock* to be exceptional and “of dubious authority.” It is unaware of any other case in which a claimant has been denied access to court because their claim has been struck out. Even if hypothetical cases can be envisaged in which the trial could not proceed because too much relevant material attracts public interest immunity, Liberty and JUSTICE both argue that the probability of this risk materialising is too small to justify the far-reaching proposal of making CMPs available across the full spectrum of civil proceedings.

59. JUSTICE rejected the Government’s assertion that PII is not adequate to deal with the protection of sensitive information in judicial proceedings, arguing that there is no significant evidence to show that the current system of PII is failing or has led to the disclosure of sensitive material. It argued that the necessary justification for such a radical departure from the existing practice has not therefore been made out by the Government.

60. Other witnesses, however, were prepared to accept in principle that there may be some cases in which the application of the ordinary law of PII does not produce a fair result, because a fair trial of the claim cannot proceed due to the amount of material which cannot be disclosed on public interest grounds. The Bingham Centre for the Rule of Law, for example, accepts that exceptional resort to a closed material procedure in a civil action could potentially be justified in three types of case, subject to strict compliance with certain guiding principles:

- *Where the conventional PII balancing exercise would result in such material being withheld from disclosure that the case would have to be struck out rather than determined on the available evidence, in order to avoid unfairness to the defendant;*

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<sup>26</sup> Green Paper, Appendix J, para. 11.



- *Where the conventional PII exercise would result in such material being withheld from disclosure that the claimant's claim cannot succeed;*
- *Where both parties consent to a closed material procedure and that course is approved by the court.*

61. **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.** If this theoretical possibility were to materialise, it would mean that some cases (where the withheld material is central to the claim) would be struck out, which is particularly problematic where the claim concerns a serious human rights violation, as it would deprive the individual concerned of an effective remedy and would also prevent the Government from being held accountable. It would also mean that cases (where the withheld material is central to the defence) would have to be settled even though there may be a defence to the claim, which may wrongly undermine public confidence in the public authority concerned.

62. **However, 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.** The difficulty is not simply a question of not having the benefit of access to the material concerned or to the parties to the litigation in which these issues are arising. It is also a matter of lacking a firm evidence base from which to evaluate competing claims by lawyers about how the law of PII works in practice.

63. **In our view, 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.**

64. Whether this is a hypothetical or an actual problem therefore became a central question in our inquiry. In his written evidence to our inquiry, the Independent Reviewer of Terrorism Legislation, David Anderson Q.C., was “prepared to accept” that civil cases in which PII could not produce a fair result and for which CMPs could thus be appropriate are “likely to exist”. He said<sup>27</sup>

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.

65. However, he said that he had been unable to resolve the evidential question about the actual scale of what he acknowledged to be a hypothetically conceivable problem, due to lack of information. In his capacity as Independent Reviewer, he had sought to find out whether each of the 27 cases referred to in the Green Paper could be fairly resolved only by means of a CMP, but was told that this could not be discussed in relation to ongoing claims. In oral evidence to us he therefore said:<sup>28</sup>

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<sup>27</sup> Memorandum of David Anderson QC, 26 January 2012, para. 7.

<sup>28</sup> Evidence of David Anderson QC, 31 January 2012, Q75.

I was not able to ascertain from the Government [...] how many of those cases it could really be said were incapable of being fairly tried without a closed material procedure.

66. So, although he thought it “likely” that a problem does exist, he was unable to assist us with any informed estimate of its size or gravity.

67. In view of the troubling lack of evidence of any actual cases demonstrating the problem which the Green Paper asserts to exist, we pressed the Secretary of State as to what specific evidence the Government is relying on to demonstrate that the current legal framework of PII is inadequate and forcing the Government to settle cases to which it has a substantive defence which it cannot disclose.<sup>29</sup> The only specific example referred to by the Secretary of State were the claims made by the Guantanamo Bay detainees in the *Al Rawi* litigation. Apart from the claims in that case, the Secretary of State said “I am told there are 27 case in the pipeline—I have not seen all these cases—where this could be raised. It is becoming more common.”<sup>30</sup> He did not have a figure for the number of cases which the Government had settled solely because it was unable to disclose the basis of its defence rather than because of the strength of the substantive claim.<sup>31</sup> Nor did he take up the invitation to give us specific evidence from past or existing cases that demonstrate that PII is inadequate.<sup>32</sup>

68. We were surprised by the vagueness of the Government’s evidence on what we regard as the critical factual question at the heart of their case for extending CMP in civil proceedings. The only actual case cited by the Government is the *Al Rawi* litigation itself, and that case simply cannot bear the weight being placed upon it by the Government. The claims to compensation in those cases were settled by the Government before the PII process had been exhausted, and before it had been finally decided whether the court had the power to order a CMP to take place. In our view, the *Al Rawi* cases are clearly not examples of cases which the Government had no choice but to settle because they would have been untriable without a CMP. Rather they appear to be examples of cases in which the Government would have preferred to have a CMP rather than the usual PII process.

69. Apart from *Al Rawi*, no other specific case has been provided by the Government as an example of the problem which the Green Paper asserts to exist. Our direct request to the ministers to identify for us specific cases where PII had been exhausted leaving the issues untriable and the Government no choice but to settle was not answered.<sup>33</sup> The 27 cases referred to by the Green Paper as being in the pipeline turn out on closer inspection not to be cases in which the Government has identified that there is a real risk that the Government will be unable to defend them without a CMP, but a very much broader category of cases “where we could have a situation where sensitive information of relevance to the safety of the public and the state [...] could become relevant.”<sup>34</sup>

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29 Evidence of Rt Hon Kenneth Clarke QC MP, 6 March 2012, Q191.

30 *Ibid.*

31 *Ibid*, Q 193.

32 *Ibid*, Q197.

33 Evidence of James Brokenshire, 6 March 2012, Q194, where Baroness Berridge’s direct request for examples of cases was answered with a description of the difference between PII and CMP which was of no relevance to the question asked.

34 Evidence of Rt Hon Kenneth Clarke QC MP, 6 March 2012, Q193.

70. Being unable to provide any specific examples of cases which the Government had been forced to settle because the law of PII had left the issues incapable of judicial resolution, or to provide any plausible indication of the approximate number of such cases which are about to arise, the ministers in oral evidence shifted their emphasis from the scale of the problem and the number of likely cases to the significance of the impact of disclosure of sensitive information if it were to occur in even a single case.<sup>35</sup> James Brokenshire MP, the Home Office Counter-Terrorism Minister, for example, said that while he understood the desire to focus on the numbers of cases, including the 27 referred to in the Green Paper, the impact of disclosure in even a small number of cases could be quite significant. The Secretary of State said:<sup>36</sup>

It only needs one case to go wrong [...] We think there are 27 cases, but in the worst case scenario one case blowing up our intelligence penetration of a very dangerous group of people would be very, very bad from a national point of view.”

71. We found this a somewhat surprising shift in the Government’s justification for the proposal to extend CMPs because, as the Independent Reviewer pointed out in his evidence, the Government’s case for making CMPs more widely available in civil proceedings is not based on national security arguments, since, other than in Norwich Pharmacal proceedings, the Government cannot be forced to disclose material which it does not wish to disclose, but can instead bring the proceedings to an end.

72. After hearing the ministers’ evidence on this question we were therefore inclined to the view that **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.** If it were, it seemed to us that the Government ought to be able to identify some examples of actual cases in which it could demonstrate, or at the very least plausibly argue, that it had been forced to settle the case because the PII exercise would result in so much material being withheld that it would be impossible for the Government to defend the case. **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,<sup>37</sup> and spurious assertions about the catastrophic consequences of information being wrongly disclosed<sup>38</sup> (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.

73. However, we received further important evidence and argument on this critical factual issue after the ministers gave evidence. They had indicated to us that the Independent Reviewer of Terrorism Legislation “is someone we very much want to reassure and have onside”<sup>39</sup> and that he would be given further access and details in relation to the 27 cases

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35 Evidence of James Brokenshire, 6 March 2012, Q193 and Q200.

36 Evidence of Rt Hon Kenneth Clarke QC MP, 6 March 2012, Q200.

37 Q191.

38 Q193 and Q200.

39 Evidence of Rt Hon Kenneth Clarke QC MP, 6 March 2012, Q227.

mentioned in the Green Paper to be able to examine the issue for himself. In a supplementary memorandum provided to us on 19 March 2012 the Independent Reviewer added to his previous evidence on this question, following a meeting he had on 14 March with representatives of the Government and of all three intelligence services and counsel to try to obtain further information about the precise nature and scale of the problem to which making CMP generally available in civil litigation is said to be the solution. The Independent Reviewer explains that at that meeting he was “talked through” seven of the cases currently before the courts to which sensitive information is central, was given the opportunity to ask questions and was given access to secret material in relation to each case. As a result of his consideration of the cases he was shown at that further meeting, and his consideration of the secret material to which he was given access, the Independent Reviewer is now persuaded 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.”

74. The cases for which the Independent Reviewer is persuaded the option of a CMP is necessary fall into two categories: certain judicial review cases and some damages claims.

75. The judicial review cases seen by the Independent Reviewer in which he is persuaded of the necessity to have a CMP available as an option are challenges to decisions to refuse naturalisation (two cases) and an exclusion decision (one case). In these cases, the challenge is to executive decisions which are based wholly or partly on sensitive information. The Independent Reviewer reports that there are currently over 50 refusal of naturalisation decisions which are based wholly or partly on sensitive information. The Administrative Court has selected four lead cases to determine the appropriate procedure for dealing with them. We consider the substantive question of whether closed material procedures should be made available in such cases below.

76. The three damages claims considered by the Independent Reviewer raise allegations of complicity in detention, rendition and torture by other countries in which, in his view, there is material of central relevance to the issues that “it seems highly unlikely” could ever be deployed other than in a closed hearing. After inspecting the case files and speaking to counsel involved (presumably counsel representing the Government in those cases), the Independent Reviewer has concluded that “under the current law there are liable to be cases that are settled (or the subject of a *Carnduff v Rock* application) which, had a CMP been available, would have been fought to a conclusion.” He considers that this is undesirable and that, in a world of second-best solutions, it is better that the option of a CMP be available than that the case be either struck out or forced to settle.

77. However, we have also received a submission from a number of special advocates, including those who gave oral evidence to us, commenting on the Independent Reviewer’s supplementary memorandum.<sup>40</sup> In this submission, the special advocates expressed concern at the conclusion reached by the Independent Reviewer on the basis of his review of three cases chosen by the Government to present to him. They point out that the Independent Reviewer, when reviewing the cases and material presented to him,

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<sup>40</sup> Note from Special Advocates on the supplementary memorandum of the Independent Reviewer of Terrorism Legislation, 23 March 2012.

has not had the benefit of a countervailing independent but experienced party, such as a special advocate, to test the claims or contentions made by the advocates for the Government's proposals.<sup>41</sup>

78. The special advocates take issue in particular with the Independent Reviewer's view that, in each of the three damages claims he has reviewed, "there is material of central relevance to the issues that it seems highly unlikely could ever be deployed in open."<sup>42</sup> The special advocates point out that this conclusion does not necessarily mean that a CMP is the only means by which such a claim could be tried. It overlooks the fact that a range of mechanisms exist to enable sensitive material to be adduced in evidence without being "deployed in open" and without resort to a CMP. Whether or not such mechanisms would strike a satisfactory balance in relation to the relevant material is precisely the purpose of the PII balancing exercise, which the Independent Reviewer himself has not conducted. The special advocates say that their combined practical experience of handling sensitive material in civil claims indicates that, where there is no alternative (because a CMP is not available), a way can normally be found for the claim to be heard "acceptably fairly, and without unacceptable disclosure of sensitive material." The flexible and imaginative use of ancillary procedures (such as confidentiality rings and "in private" hearings) has meant that to date there is no example of a civil claim involving national security that has proved untriable.

79. We welcome the supplementary evidence of the Independent Reviewer which makes an important contribution to our understanding of a central issue in the Green Paper. It contains the first material we have seen that could be said to constitute evidence in support of the Government's proposal to extend CMPs in civil proceedings. It is clearly the product of a conscientious attempt to obtain further information about the evidence base for the Government's assertions, by an Independent Reviewer who has exhibited a wholly appropriate open-mindedness to the possibility that there is a lack of evidence to support the Government's proposals. When considering his evidence it is important to remember that his function is not a judicial function, but an independent reviewing function which requires him to have unrestricted access both to intelligence material and to key personnel within the Government and the security and intelligence services. Being based on his access to such material to which we and other witnesses to our inquiry do not have access, it is also an assessment of the evidence which must be accorded due weight.

**80. However, 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**

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<sup>41</sup> *Ibid*, para. 7.

<sup>42</sup> Supplementary Memorandum of David Anderson QC.

**fairness concern on which it relies in this part of the Green Paper is in fact a real and practical problem.**

### **The inherent unfairness of Closed Material Procedures**

81. In the special advocates' view, the proposals in this part of the Green Paper are based on an unsound premise: that CMPs in the contexts in which they are already used are both fair and effective. They take issue with the Green Paper's central contention that CMPs have been shown to be capable of delivering procedural fairness and that the effectiveness of the special advocate system has been central to that. The special advocates say that their experience as special advocates leaves them in no doubt that CMPs are "inherently unfair". As Angus McCullough QC put it:<sup>43</sup>

In principle it appears obvious that, if a person is involved in proceedings and they are not told all of the evidence and allegations against them, and they are therefore unable to answer them, that is inherently unfair. You do not need to be a lawyer or, indeed, a special advocate to appreciate that. In addition, the proceedings are contrary to the principle of open justice. Of course open justice is not an inflexible principle, but it is one which requires justification if it is to be breached. Of course, the courts have powers to disapply it, to make anonymity orders, to sit in private, but those incursions require strict justification. Closed proceedings represent the most extreme incursion into that principle because the opacity in relation to the proceedings is total. There is no transparency at all in relation to closed proceedings. As a matter of principle, they are unfair for both of those reasons. A party does not know the case against them, or a significant part of it, and so cannot answer it, and that is contrary to the principle of open justice.

82. The special advocates disagree that they "work effectively" and they do not deliver real procedural fairness. Neither the provision of special advocates, nor the *AF (No.3)* disclosure obligation, where it applies, are capable of making CMPs "fair" by any recognisable common law standards.

83. Almost all of the evidence we received in the course of our inquiry supported the unequivocal view of the special advocates in their evidence, that closed material procedures are inherently unfair. A number of witnesses told us that the inherent unfairness of closed material procedures might be justifiable where the alternative was an even more unfair procedure, but could never be justified to cut down the fairness of an existing procedure.

84. The Government's case, however, is not that the determination of claims in a closed material procedure is necessarily fair, but that it is less unfair for the issues in a case to be determined in that way than for them not to be determined at all. Where PII leads to the withholding of material that is central to a claim, that claim would have to be struck out, and where it leads to the withholding of material that is central to a defence, the defendant would be forced to settle the proceedings. In either case, the Government argues, the law of PII as it currently stands leads to unfairness. The Green Paper therefore proceeds on the premise that it is fairer in terms of outcome to seek to include relevant material, rather than

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43 Q 46.

to exclude it from consideration altogether, even if the other party is unable to see that material.

85. Many witnesses considered that the Government’s argument in this part of the Green Paper had already been cogently rejected by Lord Kerr in *Al Rawi* who said:<sup>44</sup>

The appellants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive—for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.

**86. 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.**

## Closed material procedures and public interest immunity compared

87. The Green Paper contains a short explanation of PII in Appendix B and a longer explanation of CMP in Appendix C. A more detailed description of how PII works in practice is contained in paras 140–151 of Lord Clarke’s judgment in the Supreme Court in *Al Rawi and others v The Security Service and others*.<sup>45</sup>

### **Public Interest Immunity**

88. “Public Interest Immunity” is a set of judge-made principles which represents the common law’s response to the problem of dealing with the disclosure of sensitive information in litigation. The parties to litigation are under an obligation to disclose to the other side all material which is relevant to the fair determination of the issues in the litigation. PII is a common law exception to this general principle, based on the courts’ realistic appreciation that the disclosure of certain material may cause damage to the public interest. The categories of public interest recognised by the law of PII include (but are not confined to) national security, international relations and the prevention or detection of crime.

89. Where a party to litigation claims that they are not under an obligation to disclose certain relevant material on grounds of PII, the court must conduct a balancing exercise

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44 *Al Rawi*.

45 [2011] UKSC 34.

between the public interest in the non-disclosure of the material on the one hand, and the public interest in the administration of justice (that is, in the claim being determined fairly and openly) on the other. This judicial balancing exercise is referred to as “the *Wiley* balance” after the case in which the correct approach to the balancing exercise was laid down.<sup>46</sup>

90. The principles which apply where a claim to PII is made are summarised in para. 145 of Lord Clarke’s judgment in *Al Rawi* and can be summarised as follows (with references to case-law removed):

- i) A claim for PII must ordinarily be supported by a certificate signed by the appropriate minister relating to the individual documents in question
- ii) Disclosure of documents which ought otherwise to be disclosed under CPR Part 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice.
- iii) In making that decision, the court may inspect the documents. This must necessarily be done in an *ex parte* process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated.
- iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material. These might include, for example, holding all or part of the hearing in camera; requiring express undertakings of confidentiality from those to whom documents are disclosed; restricting the number of copies of a document that could be taken, or the circumstances in which documents could be inspected (eg requiring the claimant and his legal team to attend at a particular location to read sensitive material); or requiring the unique numbering of any copy of a sensitive document.
- v) Even where a complete document cannot be disclosed it may be possible to produce relevant extracts, or to summarise the relevant effect of the material.
- vi) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must be disclosed unless the party who has possession of the document concedes the issue to which it relates.

91. The result of a successful claim to PII, therefore, is that the material in question is inadmissible: it is excluded from the case altogether, so it cannot be relied upon by either party and plays no part in the court’s determination of the claim.

92. Until the controversy over the use made of PII in the Matrix Churchill prosecutions in the 1990s, “class claims” to PII were possible: that is, documents which fell within a certain class of material were automatically immune from disclosure. Following the Matrix Churchill controversy, the Attorney General made a statement to the House of Commons setting out a new approach to PII, in which ministers would not make “class claims” to PII

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46 *R v Chief Constable of West Midlands Police, ex p. Wiley* [1995] 1 AC 274.



but would only claim PII where the disclosure of the content of the document would cause real damage or harm to the public interest.<sup>47</sup>

### **Closed Material Procedures**

93. A “Closed Material Procedure” was defined in the preliminary issue which was the subject of the decision of the Supreme Court in *Al Rawi* in the following terms:<sup>48</sup>

“Definition of 'closed material procedure'

A 'closed material procedure' means a procedure in which

(a) a party is permitted to

(i) comply with his obligations for disclosure of documents, and

(ii) rely on pleadings and/or written evidence and/or oral evidence

without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'), and

(b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and

(c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.

For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.”

94. In a CMP, the individual is given as much material as possible at the outset, but material which is relevant to the determination of the issues but cannot in the Government’s view be disclosed without harming the public interest is withheld from disclosure as “closed material.” That closed material is placed before the Court and the special advocate who is appointed to represent the interests of the party who is excluded

47 HC Deb 18 December 1996 cols 949–58.

48 *Al Rawi*, above, at para. 1.

from the closed part of the proceedings. The special advocate sees all of the closed material and can make submissions in the closed part of the proceedings that some of the closed material should in fact be disclosed.

95. Whether or not any of the closed material should in fact be open, and therefore disclosed to the other party, is a matter for the judge. However, when deciding whether closed material should be disclosed, the court does not conduct “a *Wiley* balancing exercise” in which it weighs the public interest in the administration of justice against the public interest in non-disclosure. The court’s task in a CMP is to ensure that there is no disclosure of material which would harm the public interest. The administration of justice, in other words, is always subordinated to the protection of the public interest against harm from damaging disclosure.

96. Under the proposals in the Green Paper (para. 2.7), a CMP would be triggered where the Secretary of State decides that relevant sensitive material would cause damage to the public interest if openly disclosed, a decision which would be “reviewable by the trial judge on judicial review principles” if challenged by the other side.

### **Summary of the main differences between PII and CMP**

97. In short, the two most significant differences between PII and CMP are:

- (1) In PII, the court conducts the balancing exercise between the public interest in non-disclosure and the public interest in the administration of justice; in CMP, there is no equivalent balancing exercise by the court: the court’s task is to ensure that material is not disclosed if its disclosure would cause harm to the public interest; and
- (2) in PII, where the judicial balance comes out against disclosure, the material is excluded altogether from the case; in CMP, material which the court agrees should be “closed” is admissible: it is seen by the court and can be relied on by one party.

98. One difference which is sometimes claimed to exist by advocates of extending CMPs is that the PII exercise is much longer and more time-consuming than a CMP, and that this is therefore a reason for preferring CMP over PII. In fact, there is no reason why a CMP should take any less time than a PII exercise. It has been suggested, for example, that one of the reasons for the Government preferring a CMP in the *Al Rawi* litigation was that it would have avoided the need to conduct a PII exercise which would have taken three years. In fact, as Angus McCullough QC, and experienced special advocate, made clear, “it would have taken a long time to have gone through a PII procedure in *Al Rawi*. I do not think it would have taken any less time to go through a closed material procedure.”<sup>49</sup>

### **The importance of judicial balancing**

99. The Green Paper envisages that the decision whether to use a closed material procedure will not be made by the court, but by the Secretary of State, and that this decision of the Secretary of State’s should only be challengeable “on judicial review principles”.

100. Many of our witnesses took issue with this aspect of the Green Paper. Dinah Rose QC, for example, described it as “unprecedented in our law to permit one party to a civil claim to decide unilaterally that a procedure which favours his own case should be adopted for the trial of the claim.” The Bingham Centre’s evidence, which envisaged that there may be some role for closed material procedures in civil proceedings, also states that it must be for the court to decide whether and the extent to which a closed material procedure should be used. The Independent Reviewer describes this aspect of the Government’s proposal as “profoundly wrong in principle”: in his view, the decision whether to order a CMP must be for the court, not the Government.

101. The Secretary of State, in oral evidence, indicated that the Government wanted to bring in the judicial element to the maximum possible extent.<sup>50</sup> He accepted that “you cannot just have the unfettered decision of a Secretary of State” and that the judge has got to have “a proper and sensible role.” However, he was also concerned about upholding the control principle, and for that reason was reluctant to concede that the decision as to whether there should be a CMPs in a particular case should be a judicial decision alone.

102. The Home Office Minister for Counter-Terrorism sought to reassure us that, even if the court’s role is confined to a supervisory role at the point when the Secretary of State decides whether or not there should be a CMP, there is full judicial balancing at the subsequent stage of considering which evidence should be in closed and which in open.<sup>51</sup> In fact, however, this is only the case in a CMP to which the Government accepts that there is an obligation to disclose to the opposing party sufficient material to enable them to give effective instructions to their special advocate (the so called “*AF (No. 3)* disclosure obligation”, sometimes referred to as the “gisting requirement”—the requirement to provide at least the gist of the case against). If that disclosure obligation does not apply (and the Government maintains that it does not necessarily apply in a number of different contexts in which CMPs are used, including SIAC, TPIMs proceedings and challenges to asset freezing orders), there is no balancing of interests for the court to perform, the only question for the court is whether disclosure would harm the public interest.

**103. 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.**

### The *AF (No. 3)* disclosure obligation

104. The “*AF (No. 3)* disclosure obligation” is the obligation to disclose to the opposing party in litigation sufficient material to enable them to give effective instructions to their special advocate who represents their interests in closed material procedures. The obligation applied in the context of control order proceedings, and is likely to apply in TPIM proceedings, although the Government has preserved for itself the possibility of

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<sup>50</sup> Q204.

<sup>51</sup> Q202–203.

arguing that it does not apply in certain cases. The obligation does not apply in SIAC proceedings. As a result, an individual can be deported from the UK for reasons which are never disclosed to them and are referred to only in the closed judgment.

105. The Green Paper proposes legislating to provide that the obligation does not apply in certain categories of case. Most of the evidence we received opposed this proposal, arguing that disclosure of at least the gist of the case against an individual was an essential feature of legal proceedings before a court, and that the *AF (No. 3)* disclosure obligation therefore ought to apply in all contexts. Lord Carlile, for example, said “I believe that AF standards should apply to all proceedings in any event. I can see no respectable argument against gisting in any circumstances.”<sup>52</sup> We agree.

**106. 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.**

## The reform options

### *Option (1): Extend CMPs to all civil proceedings*

107. The Green Paper proposes to legislate to make CMPs available “wherever necessary” in civil proceedings.<sup>53</sup> This means CMPs would be made an option for the parts of any civil proceedings in which sensitive material is relevant. The Green Paper recognises that CMPs represent a departure from the principle of open justice and that any departure should be no more than is “strictly necessary to achieve a proper administration of justice.” The Government accepts that CMPs should therefore only be available in exceptional circumstances, and, where used, every effort should continue to be made to have as much material considered in open court as possible.

108. The trigger mechanism is the key to ensuring that CMPs are only used where absolutely necessary to enable the case to proceed in the interests of justice. The Green Paper proposes an approach which is said to be a “balance” between the role of the Secretary of State, who is said to be best placed to assess the harm that may be caused by disclosing sensitive information, and the role of the judge, who must ensure that the interests of justice are served. The mechanism proposed for triggering a CMP is that the Secretary of State will decide that certain relevant sensitive material would cause damage to the public interest if openly disclosed, and that ministerial decision would be reviewable by the trial judge “on judicial review principles.”

109. For the reasons we have already explained **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.** 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, for all of the reasons given by the Independent Reviewer of Terrorism Legislation in his written and oral evidence to us.

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52 Q89.

53 Green paper paras 2.3–2.8.

First, the reach of the proposal is far too broad, applying as it does to any case involving sensitive material as defined in the Green Paper, rather than being confined to national security-sensitive material. Second, there is insufficient judicial control: instead of the judicial balancing of public interests which takes place under the law of PII, the court's role is confined to judicially reviewing the Secretary of State's decision that there should be a CMP. Third, the Green Paper does not appear to envisage that the *AF (No.3)* disclosure obligation applies to civil proceedings, in which case the evidence of the special advocates is clear that the measure of procedural fairness that can be provided in the CMP for the excluded party is extremely limited.

110. We are also concerned by a further feature of the Green Paper proposal which the Independent Reviewer is not concerned about, and that is the effect of the proposal on PII. The evidence we heard from practitioners with extensive experience of the law on PII, in particular Jeremy Johnson QC and Angus McCullough, was quite unequivocal that, as formulated in the Green Paper, the Government's proposal would replace PII entirely in cases where sensitive information is concerned, because ministers and public authorities would have no incentive to apply for PII rather than a CMP which clearly favours them.<sup>54</sup> In our view this is undesirable because there would no longer be the important judicial balancing stage at which the court holds the ring between the parties in an attempt to maximise the amount of material that can be disclosed in the interests of justice.

111. The Independent Reviewer does not share this concern. He does not consider that the PII process must always be exhausted first before a decision about a CMP is made.<sup>55</sup> He believes that it may be possible in some cases to tell in advance that a PII exercise will be futile because it is already clear at the outset that the case will not be triable at the end of the exercise. We disagree with the Independent Reviewer's assessment on this issue. **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."<sup>56</sup> 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.**

### ***Option (2): CMP as a last resort and with judicial balancing***

112. The Independent Reviewer is in favour of adding a CMP to the procedural armoury of the civil courts, in order to enable the resolution of claims which would otherwise be untriable. He suggests that the appropriate response to the fairness concern is to make

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<sup>54</sup> Q49.

<sup>55</sup> Qs 80–81.

<sup>56</sup> Q49.

closed material procedures available in civil proceedings, but only in a very narrowly circumscribed set of circumstances, and only to be resorted to when there is no other procedural means available for determining the issue: in other words, as a last resort.

113. Other witnesses, however, expressed concerns that the availability of a closed material procedure would in practice distort the way in which the court conducts the PII process, so that even if a statute circumscribed the availability of closed material procedures as narrowly as possible, they would in practice inevitably be resorted to much more frequently. This is partly because the judge conducting the PII exercise might be tempted to think that they can resolve all the issues satisfactorily in a closed hearing.<sup>57</sup> More significantly, if a closed material procedure is available as a longstop this removes the incentive on the public authority claiming PII to disclose as much material as it possibly can. Under PII it has such an incentive in order to avoid the risk that it will have to settle the claim because too much material has been withheld under PII. Lord Kerr explained the practical importance of this aspect of PII in *Al Rawi*:

At the moment with PII, the state faces what might be described as a healthy dilemma. It will want to produce as much material as it can in order to defend the claim and therefore will not be too quick to have resort to PII. Under the closed material procedure, all the material goes before the judge and a claim that all of it involves national security or some other vital public interest will be very tempting to make.

114. The Independent Reviewer's evidence, however, does not address the question of how to ensure that the availability of the option of a CMP, even as an absolutely last resort, will not distort the PII process that, in our view, should always take place first.

115. The special advocates, in their submission commenting on the Independent Reviewer's supplementary memorandum, similarly believe it to be inevitable that, once made available in civil proceedings generally, CMPs will be adopted in cases where fairer common law procedures could have been made to work satisfactorily, or at least less unsatisfactorily than inherently unfair CMPs. The reason for this inevitability is that the Government will have no incentive to devise a way of having the cases heard without a CMP, and every incentive for a CMP to be imposed. The special advocates therefore fear that the provision of a CMP as an option would lead to an irresistible tendency for it to be adopted for cases that could, in practice, be tried more fairly (or less unfairly) using existing procedures. They therefore remain unconvinced that the option of a CMP should be introduced in civil proceedings.

**116. 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.**

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57 See evidence of EHRC.

117. **Nor do we consider that the case is made out for making closed material procedures generally available as an option in judicial review proceedings.** The only evidence of the need for a CMP in judicial review proceedings is in the Independent Reviewer’s supplementary memorandum and it relates solely to decisions to refuse naturalisation and decisions to exclude from entry to the UK. Those are both immigration decisions which are closely comparable to decisions which are currently within the jurisdiction of the Special Immigration Appeals Commission (SIAC). It seems anomalous to us that decisions to deport on national security grounds and decisions to deprive of UK citizenship individuals of dual or multiple citizenship on national security grounds are dealt with in SIAC but decisions to refuse naturalisation or to exclude on national security grounds are not and therefore have to be challenged by way of judicial review. We can see no reason of practice or principle why these sorts of cases should not be within SIAC’s jurisdiction. **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.**

### ***Option (3): Statutory amendment/clarification of PII in the national security context***

118. Although, for the reasons given above, we do not accept that the Government has made out the case for extending CMP in civil proceedings generally, we have during the course of our inquiry become increasingly persuaded that there is a case for statutory amendment and clarification of the way in which the principles of PII operate in the context of national security. Indeed, in our view it is the lack of clarity and certainty about the way in which PII applies in relation to national security sensitive material that has arguably made PII vulnerable to replacement by CMPs in this particular context.

119. Many witnesses in our inquiry considered that the law on PII is already sufficiently flexible to enable courts to find a way of ensuring that claims can be determined without risking disclosures which are damaging to national security. We agree but we think there is considerable scope for clarifying and improving the way in which the legal framework works in relation national security sensitive material.

120. The Green Paper itself considers the option of legislating for PII.<sup>58</sup> It acknowledges that it would be possible for Parliament to provide the courts with clearer guidance in statute on the application of PII in more difficult areas, by including for example statutory presumptions against disclosure of sensitive material and defining in detail the test to be applied by the court when balancing the competing interests. However, the Green Paper rejects this option on the basis that it would offer little advance over the existing practice of the courts being deferential towards the Executive on national security arguments.

121. It appears that the main reason for the Green Paper’s rejection of some statutory amendment of the law on PII is that it would not provide a sufficiently strong “guarantee” to satisfy intelligence partners concerned about disclosure of information provided by them in the course of court proceedings in breach of the so-called “Control Principle”.

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58 Green Paper, paras. 2.74–2.82.

However, for reasons we explain in Chapter 5 below, we do not accept that an absolute guarantee of such confidentiality is compatible with a democratic society's commitment to the rule of law and we therefore do not consider this to be an obstacle to statutory amendment and clarification of the law on PII.

**122. 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 the determination of a claim without damaging disclosures.**

**123. 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.<sup>59</sup> 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.**

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<sup>59</sup> See e.g. Lord Kerr in *Al Rawi* at para. [98].



## 4 Extending Closed Material Procedures to inquests

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### The Green Paper proposals

125. The Green Paper is consulting on whether closed material procedures should be extended to inquests.<sup>60</sup> It proposes that CMPs should be available in inquests on the basis that there have been cases in which coroners have been unable to conclude their investigation, or their investigation has been less thorough and effective, because sensitive material has had to be excluded.

### The case for change

126. The case for change is said to be that in recent years there have been a number of inquests in which sensitive material has been relevant. Although the number of such inquests is acknowledged to be “small” or “very small”,<sup>61</sup> and in most of them it has proved possible to deal with the challenges of handling sensitive information by *ad hoc* solutions, it is said that in some cases coroners have concluded that the exclusion of material means that they have been unable to complete their investigation. It is also said that it is “conceivable” that in future inquests it might not be possible to investigate a death properly. PII is accepted to have been effective in the vast majority of inquests in protecting sensitive material of marginal relevance, but it is claimed by the Government that “in exceptional cases inquests are unable to proceed at all if highly relevant material is excluded because of its public interest sensitivity.”<sup>62</sup> Although the numbers of such cases are accepted to be small, it is said that they are likely to include particularly high profile cases. Reform of inquests is therefore said to be warranted “in order to enable more full and comprehensive conclusions.”

127. One of the recent inquests involving sensitive material which the Government has in mind in its Green Paper is the inquest into the London bombings on 7 July 2005. The coroner in that case, Lady Justice Hallett, ruled that she could not hold a closed material procedure. PII applications were used to protect some of the sensitive material, and the coroner therefore could not take account of some of that material. The Green Paper says that the coroner was able to reach a verdict in that case and deliver a comprehensive ‘Rule 43 Report’, but it comments on the fact that “the Security Service was unable to put all the material before the coroner, and while this did not prevent this inquest reaching its conclusion, the situation may be more challenging in future inquests.”

128. Similar proposals to those contained in the Green Paper with regard to inquests were brought forward by the previous Government, first in the Counter Terrorism Bill in 2008 and then again in the Coroners and Justice Bill in 2009 but were not adopted by Parliament.

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60 Green Paper, paras 1.47–1.50 and 2.10–2.19.

61 Para. 2.10.

62 Para. 2.10.

## Is there evidence of the need for change?

129. The evidence of a number of witnesses challenged the assertion in the Green Paper that there is any need for change to the current system.

130. INQUEST and the INQUEST Lawyers Group, for example, recognised that there is a need to achieve a proportionate balance between the need for openness and transparency on the one hand and concerns over sensitive material on the other. However, they argued that the Government has not demonstrated the necessity for change, and that the current legal framework for inquests has, with one narrow exception, proved itself sufficient for dealing with issues of sensitive material. Coroners have found “pragmatic solutions” that properly strike the balance between the need to protect sensitive material and the need to ensure openness and transparency. INQUEST and the INQUEST Lawyers Group provide nine case studies where inquests have involved sensitive material, in which coroners have reconciled concerns over sensitive evidence with transparency. These examples, they argue, demonstrate that the current inquest system already can, and does, cope with even the most sensitive and highly classified material without the need for closed material procedures. They have also compiled a comprehensive list of some 19 practical measures adopted by coroners in practice in order to enable them to deal with sensitive information.

131. Liberty and JUSTICE also argued strongly that the Government’s fears that inquests may be unable to continue because certain sensitive material cannot be disclosed, which was the justification for the previous Government’s ill-fated proposals for secret inquests, have proved to be ill-founded in practice. They referred to the inquests into the death of Jean Charles de Menezes and the 7/7 bombings as examples of the success of the coronial system in dealing with sensitive material.

132. INQUEST’s evidence seriously challenges the premise of this part of the Green Paper. It was not aware of a single inquest which had been less thorough and effective because sensitive material had been protected from disclosure by PII. On the contrary, it drew attention to many examples of high profile inquests that have raised highly sensitive issues, in which, thanks to the pragmatic approach taken by the bereaved families and the coroners, a way has been found within the existing legal framework to enable the inquest to perform its function of establishing the truth about how somebody died without any damaging disclosures of sensitive material.<sup>63</sup>

133. As for whether there have been cases in which coroners have been unable to complete their investigation because of the necessary exclusion of sensitive material, as far as INQUEST was aware, there has only ever been one case which could not be concluded, the Azelle Rodney case in 2005, and that was because of the inadmissibility of intercept evidence. Moreover, even in that case an alternative way forward has been found, in the form of an inquiry under the Inquiries Act 2005, which is due to start in September.

134. INQUEST’s evidence, in summary, was that under the current inquest system coroners can, and do, cope with even the most sensitive and highly classified material without the need for closed material procedures. It therefore could not see any evidence of the need for change and felt that the case for change had not been made out by the Government in the Green Paper.

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63 Evidence of Helen Shaw, INQUEST, Q163.

135. The Coroners' Society of England and Wales, on the other hand, in its response to the Green Paper, accepted the Government's prediction that security issues are likely to arise more frequently in inquests in the future and generally supported the idea of enabling CMPs to be used for part or all of an inquest. INQUEST, however expressed surprise that this was the view of the Coroners' Society.<sup>64</sup> It was not consistent with the conversations INQUEST has had with coroners about these issues, including when the previous proposals for secret inquests were brought forward. Coroners have proved resourceful and pragmatic in the huge range of measures that they have developed so that sensitive material can be dealt with in inquests to the satisfaction of all concerned, and INQUEST therefore doubted whether the view expressed by the Coroners' Society of England and Wales was representative of coroners generally. In a supplementary memorandum INQUEST reported that a number of coroners have expressed surprise that any response was made by the Coroners Society as they do not respond as independent judicial officers to policy consultations, and there has been no formal internal consultation about the matter amongst members of the Coroners Society.

136. When we put to the Secretary of State INQUEST's evidence that, under the current system, coroners both can and do cope with even the most sensitive and highly classified material without the need for closed material procedures, he did not appear to contest it.<sup>65</sup> He agreed that it is usually the case that they do, and he praised the way in which all the parties in the 7/7 inquest had managed to agree a way in which they could proceed to everybody's satisfaction. He agreed that such common sense agreement is optimal in every case. He acknowledged that "in some of the most difficult cases, such as those involving service personnel and families, it is normally possible to establish a perfectly good process by which the rights of everybody are respected, a proper inquest is held, but, again military intelligence or secure information is not compromised." When we pressed him to give some actual examples where coroners have not been able to overcome the problems posed by sensitive materials, he referred tentatively<sup>66</sup> to there being "quite a lot of inquests that have been adjourned for many years" in Northern Ireland, but rested his case mainly on the possibility of such a case arising in the future:

Sooner or later there will be a case that tests this [...] We have to consider whether or not we are going to anticipate whether a case might arise sooner or later where we have the same difficulty.

137. The most the Secretary of State was able to say was that, under the current system, there can be "no guarantee" that a proper investigation can be held without compromising sensitive information. The Government therefore appears now to accept that so far there has not been a case in which the coroner has been unable to deal satisfactorily with the problems which have arisen as a result of the involvement of sensitive material.

**138. 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**

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64 Evidence of Helen Shaw, INQUEST, Q167.

65 Evidence of Rt Hon Kenneth Clarke QC MP, Q214.

66 "I speak in ignorance, so do not give great weight to this evidence."

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.

139. 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.

## The reform options

### *Option (1): Extending CMPs to inquests*

140. The Green Paper puts forward as one option for change an amendment to the Coroners Rules to allow the coroner to have a closed material procedure for part or all of an inquest, and to provide for families to receive ‘gists’ of sensitive material and be represented by Special Advocates when sensitive material is presented to the inquest.<sup>67</sup>

141. The Green Paper acknowledges that inquests must satisfy the minimum requirements imposed by Article 2 ECHR in relation to any death in which it appears that agents of the state are or may be in some way implicated, including, for example, deaths in custody, or where a person has been killed by a state agent. Where Article 2 ECHR applies, it requires the involvement of the deceased’s next of kin and a greater degree of public scrutiny.

142. INQUEST and the INQUEST Lawyers Group were opposed to the use of CMPs in inquests because of the particular importance of openness and transparency in inquests: they would effectively exclude bereaved families from participating in inquests and would therefore run contrary to the need for openness and transparency which is recognised in the case-law on the right to life in Article 2 ECHR. That case-law imposes a positive obligation on states to ensure that investigations into certain deaths, including deaths in custody or involving state agents, meet certain minimum standards: the investigation must be and be seen to be independent and effective, the next of kin need to be involved and that there must be a sufficient element of public scrutiny. In INQUEST’s view, introducing CMPs into inquests would make it impossible to meet those requirements because the family would be excluded.<sup>68</sup> It would also be highly damaging to public confidence in the inquest process, which would undermine its important function of allaying suspicion that there has been wrongdoing that has been covered up.<sup>69</sup> Liberty and JUSTICE similarly believe that CMPs are entirely unsuitable for inquests, for similar reasons.

143. The proposal to extend CMPs to inquests also runs counter to the current trend towards greater openness and transparency in relation to inquests, in keeping with the requirements of Article 2 ECHR. The Green Paper does not mention the fact that during the recent 7/7 inquests the Government challenged the coroner’s decision that she did not

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<sup>67</sup> Green Paper, para. 2.15.

<sup>68</sup> Evidence of Helen Shaw, INQUEST, Q165.

<sup>69</sup> *Ibid*, Q 166.

have the power to hold a closed material procedure, but the High Court held that there is no power in the Coroners Rules to hold closed hearings, nor do coroners have an inherent jurisdiction to do so.<sup>70</sup>

**144. 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.**

145. In fact, it seems that with only one exception concerning the admissibility of intercept material, coroners have reached full and comprehensive conclusions without resorting to CMP. Indeed, it is hard to imagine an inquest raising more sensitive issues than the 7/7 inquest, in which one of the issues was whether the intelligence services had failed to take adequate action to prevent the attacks. Yet the coroner in that case succeeded in finding a way to conduct and complete a full, thorough and effective investigation, without a closed material procedure, in a way that is acknowledged to have been satisfactory to all parties. As the Secretary of State himself acknowledged, the Government was satisfied that national security was not going to be compromised and all the parties involved were able to have a proper hearing of sufficient of the issues for everybody to feel it had been handled properly.<sup>71</sup>

146. The Secretary of State in evidence argued that the 7/7 inquest could not be treated as typical, because the only families involved in the process were the families of the victims not the families of the perpetrators, which, he implies, made reaching agreement between the parties much easier because of the reasonableness of everybody involved.<sup>72</sup> In other cases, he argued, the families of the bereaved may be hostile to the authorities and the Government less prepared to risk disclosure to them of sensitive material. We do not find this to be a persuasive argument. As INQUEST's evidence demonstrates, many inquests take place in the context of public suspicion and mistrust about what has actually incurred in relation to a contentious death (inquests into deaths in custody or "friendly fire" deaths are obvious examples), yet the Government has not been able to identify any actual examples of inquests in which the coroner has been unable to overcome the problems posed by sensitive material.

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70 *R (on the application of the Secretary of State for the Home Department and The Security Service) v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin).

71 *Ibid.* Qs 216 and 218.

72 *Ibid* Qs 194, 214 and 216.

***Option (2): Making intercept admissible in inquests***

147. The exception acknowledged by Inquest is where RIPA material has been directly relevant to the circumstances of a death. It concludes that the only real problem that needs addressing is the admissibility of intercept in inquests.<sup>73</sup>

***Option (3): Clarification of the application of PII to national security-sensitive material in inquests***

148. INQUEST and the INQUEST Lawyers Group have very usefully gathered together a comprehensive list of the different practical measures that coroners have adopted in order to allow their investigation to continue in cases where national security-sensitive material is relevant to the issues.

149. They suggest that there be a co-ordinated national effort to collate information about the practical measures developed by coroners under the current legislative framework and publicise them to all coroners so that best practice can be shared. They suggest that the Chief Coroner (when appointed) could use his or her powers to issue guidance to coroners about the ways in which interested parties are able to participate in investigations which involve sensitive material, and that some of these practical arrangements could even possibly be codified in new Coroners Rules.

**150. 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.**

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73 Evidence of Helen Shaw, INQUEST, Q168.

## 5 Reforming the courts' Norwich Pharmaceutical jurisdiction

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### Evidence of the need for change

151. The Green Paper says that in the aftermath of the court-ordered disclosure in the *Binyam Mohamed* case, the Government has received “clear signals” that, if it is unable to safeguard material shared by foreign partners, it can expect the depth and breadth of sensitive material shared with it to reduce significantly.<sup>74</sup> It also asserts that, although there is no suggestion that key ‘threat to life’ information would not be shared, there is already evidence that the flow of sensitive material has been affected.

152. It is extremely difficult for a parliamentary committee such as ours to subject to meaningful scrutiny such assertions about the impact of particular court cases on the flow of intelligence. Without access to the relevant personnel or intelligence information, there is no way of testing what is said. We find ourselves wholly dependent in this respect on the Independent Reviewer of Terrorism Legislation, who does enjoy such access and who has given evidence to us about the answers he has received to the questions he has put in order to test the Government’s assertions. He is broadly satisfied that the Green Paper accurately sets out the position in this respect, “at least where the US is concerned.” He reports that, having questioned people in a number of departments and agencies, some of them in direct contact with counterparts in the US, he is in “no doubt” that the suggestion in the Green Paper is correct.<sup>75</sup> In his supplementary memorandum, he reports the results of further inquiries that he has made of the Government and the Intelligence Agencies on this question, following the expression of scepticism about the Government’s claims.

153. The results of the Independent Reviewer’s further inquiries confirmed him in his view that there has been an actual reduction in the flow of intelligence from the US as a result of the *Binyam Mohamed* case. He reports specific examples of operational impact on the flow of intelligence and a genuine concern that the UK was ‘on probation’ as far as its ability to safeguard secret information is concerned.

The realisation that secret US material could *in principle* be ordered to be disclosed by an English court, notwithstanding the control principle, and that the Government had no power to prevent this from happening, appears to have come as a genuine shock to many influential people in America.<sup>76</sup>

154. The only evidence available to us on the question of whether the national security concern is a real and practical concern is that of the Independent Reviewer on the question of whether the national security concern is a real and practical concern. We therefore proceed on the basis that there exists a clear perception, on the part of the US authorities at least, that the *Binyam Mohamed* litigation calls into question the ability of the UK Government to prevent the disclosure of sensitive material provided by its intelligence

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74 Green Paper, para. 1.22.

75 Memorandum of David Anderson QC.

76 Supplementary Memorandum of David Anderson QC..

partners, and that this has caused a reduction in the amount of intelligence information that is shared with the UK.

155. Whether this evidence justifies changing the law, however, depends on the answer to a further question: is the perception of the US authorities a misperception, and, if so, should the law be changed in order to address a misperception on the part of a powerful ally? Both the Government and the Independent Reviewer are clear in their answer to this question. The Secretary of State said in evidence.<sup>77</sup>

I am not going to enter into the controversy about *Binyam Mohamed*. Those who defend the decision point to the court as having given as its reason that this was already in the public domain in the United States. My understanding [...] is the Americans do not agree with that [...] We cannot control them. No Minister can get the Americans to come off that [...] *Binyam Mohamed* has unsettled them. It is too late to go back on the merits of that case; that is all water under the bridge, but since the *Binyam Mohamed* case, there is real concern about whether we are going to have the full-hearted co-operation with the Americans we do need to provide proper security to our population and to our interests.

The Independent Reviewer takes a similar approach: in his view, however well-founded the arguments that the US perception is a misperception,

they are in a sense beside the point [...] The wish for a species of guarantee as the price of intelligence-sharing is a wholly understandable one. In such a world, perception counts for a great deal—and justly or otherwise, *Binyam Mohamed* has in some US agencies created a perception of enhanced legal risk associated with the sharing of intelligence.<sup>78</sup>

156. Others are less prepared to accept that addressing the perceptions of the Americans can be a legitimate objective for legislation. The former Director of Public Prosecutions, Lord Macdonald of River Glaven QC, for example, said on the Today Programme on BBC Radio 4: “I don’t think we should allow foreign intelligence agencies to dictate how we organise our justice system.” Having recently examined in some detail the unfortunate history of the US-UK extradition treaty, and the legislation designed to give it effect,<sup>79</sup> we have some sympathy with the view that the UK ought not to be too hasty to legislate at the behest of its more powerful ally, especially where the pressure to act is rooted in a misunderstanding of the legal position. To the extent that the position of the US authorities is based on a misperception about the current legal position in the UK, we do not consider this to be “beside the point”, or “water under the bridge”, we believe that the misperception should be directly and actively addressed. To this end we remind Parliament of the ways in which the UK courts in practice give due deference to national security claims by the Executive<sup>80</sup> and ensure that sensitive material is not disclosed in a way which damages national security or which underestimates the importance of the

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77 Q 195.

78 Supplementary Memorandum of David Anderson QC.

79 Ref Extradition Report.

80 See eg *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 and *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898.



control principle.<sup>81</sup> We also draw attention to the fact that, contrary to some perceptions, the US doctrine of State Secret Privilege is not an absolute principle and the US itself may therefore be unable to guarantee the confidentiality of intelligence it receives from our own agencies.<sup>82</sup>

157. For many witnesses to our inquiry, it is this strong record of our courts in ensuring that information is not disclosed which damages national security that makes reform of the Norwich Pharmacal jurisdiction unnecessary. They argued that there is no need to introduce any restrictions on that jurisdiction, because the courts will always be extremely deferential to claims by the Government that disclosure will damage national security, as the *Binyam Mohamed* case itself demonstrates.<sup>83</sup> This is not, however, our view. **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.**

158. For these reasons, we agree with the Independent Reviewer that it is understandable that the *Binyam Mohamed* case has caused nervousness on the part of international partners who share intelligence with the UK about the ability of the Government to prevent its further disclosure.<sup>84</sup> The apparent perception of the US authorities that UK courts cannot be relied upon to prevent disclosures of intelligence shared with the UK by US intelligence, however ill-founded, is evidence of the existence of uncertainty on the part of the UK's most significant intelligence partner. **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.**

159. We emphasise the importance of rigour in scrutinising the evidential basis for the Government's assertions about the need for the proposals. In relation to the proposed reform of the Norwich Pharmacal jurisdiction, for example, there are hints in Government statements that unless action is taken now the existence of the unreformed Norwich Pharmacal jurisdiction will attract applications from people overseas which are really no more than fishing expeditions for evidence to support a possible claim. At one point, for

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81 *Binyam Mohamed v Foreign Secretary* [2010] EWCA Civ 65.

82 See the written evidence of Sarah Cleveland, Professor of Human and Constitutional Rights, Columbia University Law School

83 Dinah Rose QC; EHRG; JUSTICE; Liberty.

84 Memorandum of David Anderson QC

example, the Green Paper states that without legislation to reform the Norwich Pharmacal jurisdiction “the UK courts will remain a forum of choice for speculative applicants.”<sup>85</sup> The Home Office Minister for Security and Counter Terrorism, James Brokenshire MP, similarly implied in oral evidence that “there is some sort of forum shopping that may be taking place” since the *Binyam Mohamed* judgment, and that there is a need to take action to guard against this. We have been furnished with no evidence by the Government that as a result of the *Binyam Mohamed* case UK courts have become a forum of choice for speculative applicants, nor have we been directed to any case that is considered by the Government to be an example of forum shopping. Indeed, in the recent cases of which we are aware in which Norwich Pharmacal applications for disclosure have been made, permission has been granted to apply for judicial review of the Government’s refusal to disclose the material sought, suggesting that there is at least an arguable case that the UK has in some way, whether innocently or not, become mixed up in wrongdoing of a serious kind.<sup>86</sup>

160. The Government says that its aim in this area is to develop an improved legal framework that fits coherently with the procedures for managing sensitive information in cases heard in our own courts and with the established common law principles of PII and, above all, that avoids the development of new routes of disclosure that could fundamentally undermine the UK’s national security co-operation with key partners.<sup>87</sup> We consider in detail below what legislative responses are in our view capable of being justified by the evidence we have considered above.

### No absolute protection for the control principle

161. An absolute exemption, resulting in the automatic ouster of the court’s jurisdiction to order disclosure, cannot in our view be considered to be consistent with the rule of law. The Government acknowledges in its Green Paper that “the cases in which these issues have arisen have often occurred in circumstances where individuals are facing severe consequences for their liberty.”<sup>88</sup> In fact, often the individuals seeking the disclosure are fighting not only for their liberty but for their life. *Binyam Mohamed* himself was facing the possibility of the death penalty in the US when he first sought disclosure of the material in the possession of the UK Government which would help him to contest the charge. Similarly, in two of the recent cases in which Norwich Pharmacal applications for disclosure have been made it has been by individuals facing the possibility of the death penalty in Uganda.<sup>89</sup>

162. In our view, this fact alone means that an absolute statutory exemption from disclosure for material of a certain class can never be proportionate. It would mean that our legal framework admits of the possibility of individuals facing the death penalty being unable to obtain disclosure of material which is central to their defence, without any judicial balancing of the gravity of the harm likely to be done to the individual on the one

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85 Green Paper, para. 2.96.

86 Omar, Habib.

87 Green Paper, paras 1.46, and 2.84.

88 Green Paper, para, 2.97.

89 *R (on the application of Omar) v Foreign Secretary* [2011] EWCA Civ 1587 and *R (on the application of Habib Suleiman Ngoroje) v Foreign Secretary* [2012] EWHC 681 (Admin).

hand and the degree of risk to national security on the other. We do not think our legal framework should countenance that possibility. This aspect of the Government's proposal in relation to the courts' Norwich Pharmacal jurisdiction appears to be motivated by a desire to be able to give a cast-iron guarantee to the Americans that any intelligence shared with the UK will never be disclosed without the Americans' consent. As the Secretary of State said to us in evidence:<sup>90</sup>

I would like—or not me, because I am not directly involved—but those who protect this country's safety would like to be able to tell the Americans that they can be absolutely assured that this material would not get into the public domain by either judicial process or any other process.

163. The Foreign Secretary showed a similar understanding of the control principle in his speech about the role of secret intelligence in foreign policy, *Securing our future*, on 16 November 2011 in which he described the control principle as “a strict rule of intelligence sharing whereby any further use or disclosure of intelligence requires the agreement of the Agency that provided it in the first place. If we cannot uphold the control principle and others do not share information with us, the very real risk is that our security will be jeopardised.”<sup>91</sup> In other words, the Government appears to be proceeding on the basis that the control principle is absolute and that nothing short of giving that absolute principle legal effect in the UK will satisfy the Americans.

164. In fact, the control principle can never be absolute in a legal system committed to the rule of law and this much was acknowledged by both the UK and the US Governments during the *Binyam Mohamed* litigation. As the Master of the Rolls, Lord Neuberger, pointed out in his judgment in the Court of Appeal in that case, neither the UK Foreign Secretary nor the US Secretary of State had in fact proceeded on the erroneous assumption that the principle of control of intelligence was inviolable. He said:<sup>92</sup>

in the first certificate, the Foreign Secretary made it clear that he may well have been prepared to order the release of the 42 documents to Mr Mohamed's US lawyers, if the threatened charges were brought and the US authorities did not supply them with the documents [...] More importantly, it does not seem to me realistic to think that either the Foreign Secretary or the Secretary of State can conceivably have believed that there was an absolute rule that shared intelligence could never, in any circumstances, be revealed without the consent of the State which supplied it. As stated in Mr Mohamed's submissions on this appeal, “the US Government is well aware that independent courts can and will in appropriate cases disclose foreign intelligence material where it is in the public interest [...] to do so”, and this is demonstrated by a number of cases in the US and other courts. In other words, the court's view, that the Secretary of State and the Foreign Secretary misunderstood the control principle, is wrong; I believe that the view was based on an over-literalistic interpretation of what the Foreign Secretary said in one or two places in the certificates and what the Secretary of State is recorded as saying on 12th March 2009.

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90 Q196.

91 *Securing our future*, Speech by Foreign Secretary Rt Hon William Hague MP at the Foreign and Commonwealth Office, London, 16 November 2011.

92 *Binyam Mohamed*.

165. **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.”<sup>93</sup> In our view, a proposal to legislate to make the control principle absolute is not consistent with that commitment.**

### The reform options

166. We accepted above that the Government had made the case for some legislative reform of the Norwich Pharmacal jurisdiction. We now consider the range of possible legislative responses and test each of them for their proportionality to the legitimate objective which we accept has been shown to exist.

167. The Independent Reviewer also accepts that the Government has made out a case for restricting the novel application of the Norwich Pharmacal jurisdiction in the national security context. He supports restricting the courts’ jurisdiction but points out that any such restriction should however be proportionate, that is, no more extensive than is necessary for its legitimate purpose. He does not, however, suggest what such a proportionate limitation on the Norwich Pharmacal principle might look like.

168. The Green Paper considers four options in relation to the courts’ Norwich Pharmacal jurisdiction. We consider each of these in turn before suggesting what we consider to be the legislative response most clearly justified by the evidence.

#### ***Option (1): Remove the jurisdiction in cases against public bodies***

169. The most radical option considered by the Green Paper is legislating to remove altogether the courts’ jurisdiction to hear Norwich Pharmacal applications for disclosure against any public body, including Government departments, and leave individuals to their statutory rights of access to information held by public authorities under the Data Protection Act 1998 and the Freedom of Information Act 2000 (both of which include exemptions for national security material).<sup>94</sup>

170. While this option would meet the Government’s objective of protecting sensitive Government material from disclosure, the Government itself in the Green Paper accepts that abolishing the courts’ Norwich Pharmacal jurisdiction in cases against public bodies would be a disproportionate response to the problem it is sought to address. It would go too far because it would prevent Norwich Pharmacal applications against public bodies in cases in which the material it is sought to have disclosed is not sensitive. As the Government acknowledges, there are situations in which the operation of the Norwich Pharmacal regime against a public authority raises no real sensitive issues.

**171. 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**

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<sup>93</sup> Green Paper, Executive Summary, p. xii para. 6.

<sup>94</sup> Green Paper, para. 2.90.

that of the Independent Reviewer of Terrorism Legislation who considers that such a legislative response “would appear manifestly disproportionate”.<sup>95</sup>

***Option (2): Remove the jurisdiction in cases where disclosure harms the public interest***

172. The second option considered in the Green Paper is to legislate to remove the jurisdiction of the courts to hear Norwich Pharmacal applications where disclosure of the material in question would cause damage to the public interest.<sup>96</sup>

173. This option could take a number of different forms. As proposed in the Green Paper, it is envisaged that it would work by a combination of an absolute statutory exemption from disclosure and an exemption based on a ministerial certificate which could be challenged by way of judicial review.

174. The absolute statutory exemption from disclosure, it is proposed, would apply to “material held by or originated from one of the Agencies”. The effect would be that any Norwich Pharmacal application would be dismissed by the court if the Government invoked the statutory exemption on the basis that the material in question is “Agency-held or originated”.

175. The exemption from disclosure based on ministerial certificates, it is proposed, would apply to non-Agency government material where disclosure would cause damage to the public interest. The effect of a ministerial certificate saying that disclosure of the material in question would cause damage to the public interest would be to exempt the material from disclosure and so bring the Norwich Pharmacal proceedings to an end, unless the claimant sought to challenge the Secretary of State’s decision to certify, which they would be able to do “on judicial review principles.”

176. This second option, it appears from the Green Paper, is the Government’s preferred option.<sup>97</sup> It regards it as more proportionate than the first option because it is more focused, being tailored to problematic Norwich Pharmacal applications where disclosure would cause damage to national security or another public interest, leaving the rest of the Norwich Pharmacal jurisdiction unaffected.

177. It is true that this option would leave the courts’ Norwich Pharmacal jurisdiction untouched in relation to other applications against public bodies which do not give rise to the risk of disclosure of material damaging to national security, and in that sense it would be a more targeted legislative response than the first option considered above. **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,** for a number of reasons.

178. First, an absolute statutory exemption for all material held by or originating from one of the Agencies, without reference to its sensitivity, is an extraordinarily broad class exemption from disclosure. It appears to assume that the disclosure of any Agency

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95 Memorandum of David Anderson QC.

96 Green Paper, paras 2.91–2.93.

97 Green Paper, para. 2.93: “The Government sees clear benefits to a proposal along these lines.”

material is inherently damaging to national security. We agree with the Independent Reviewer when he describes such a blanket exclusion for all material held by or originating from one of the Agencies, regardless of its sensitivity, as “manifestly disproportionate.”<sup>98</sup>

179. Second, even if the absolute statutory exemption from disclosure were confined to “sensitive material” held by or originated from one of the Agencies, or even “national security-sensitive material”, an absolute exemption, resulting in the automatic ouster of the court’s jurisdiction to order disclosure, cannot in our view be considered to be consistent with the rule of law for the reasons we have set out above.

180. Third, a system of exemptions from disclosure based on ministerial certificates which could be challenged only “on judicial review principles” is also problematic. Unlike an application by a minister to a court for exemption from disclosure on PII grounds, the balancing decision, taking into account all the relevant public interests when deciding whether or not there should be disclosure, would not be a matter for the court itself, but a matter for the Secretary of State subject to the court’s much narrower supervisory review.<sup>99</sup>

181. Fourth, providing for exemptions from Norwich Pharmacal disclosure when it would cause harm to “the public interest” is disproportionate because it goes further than necessary to achieve the Government’s legitimate objective, which is to reduce the risk of disclosures which damage national security and to provide greater legal certainty to intelligence partners who share national security-sensitive material. To be proportionate to this objective, any legislation should be confined to clarifying the application of Norwich Pharmacal principles to such national security-sensitive material.

### ***Option (3): Put Norwich Pharmacal test on a statutory footing***

182. The third option for reforming the Norwich Pharmacal jurisdiction which is considered in the Green Paper is to legislate to provide a more detailed statutory definition of what is required to satisfy the test for an application for Norwich Pharmacal disclosure.<sup>100</sup>

183. The Norwich Pharmacal jurisdiction is a judicial creation and the test which a claimant for disclosure must satisfy to succeed in their claim has to be distilled from the case-law. It comprises five main elements:

- There must be arguable wrong doing on the part of a third party
- The defendant must be “mixed up” in that arguable wrongdoing, however innocently
- There must be no other route by which the claimant can obtain the information
- The application should not be used for wide-ranging disclosure or evidence-gathering and must be strictly confined to necessary information

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98 Memorandum of David Anderson QC.

99 See *Tinnelly and McElduff v UK*.

100 Green Paper, para. 2.94.

- The court must be satisfied that it should exercise discretion to make the order sought.

184. According to the Green Paper, the Government sees benefit in providing the court with “a tighter framework” when considering the various elements of the Norwich Pharmacal test, and considers that defining the test in legislation should lead to greater certainty about the scope of the jurisdiction.

185. The Independent Reviewer regards this option of providing a statutory definition of the Norwich Pharmacal test as unobjectionable but finds it difficult to see how it would meet the objective of reassuring intelligence partners.<sup>101</sup>

**186. 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.**

#### ***Option (4): No legislation but introduce statutory CMPs into Norwich Pharmacal applications***

187. The Green Paper considers and rejects a fourth option, which is not to legislate at all in relation to Norwich Pharmacal, but to continue to defend such applications on a case by case basis.<sup>102</sup> The Government says that it would have more confidence in its ability to defend such applications if CMPs were statutorily available in Norwich Pharmacal applications for disclosure. In fact it appears that CMPs are often used anyway in Norwich Pharmacal applications, by consent of the parties, probably because of the urgency of obtaining disclosure.<sup>103</sup>

188. On balance, however, the Government is not in favour of this option of not legislating, because continuing to have to defend Norwich Pharmacal applications for sensitive material will reinforce the concern of foreign intelligence partners that the UK Government cannot be trusted to safeguard sensitive material, and will therefore continue to have a disproportionate impact on national security.

**189. For the reasons we have given above, 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**

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<sup>101</sup> Memorandum of David Anderson QC.

<sup>102</sup> Green Paper, para. 2.95.

<sup>103</sup> See e.g. Binyam Mohamed, Omar, Habib.

**legitimate objective: it should seek to provide clarification in relation to the national security context only. The case for going further has not been made out.**

***Another way forward: Clarify application of PII to national security-sensitive material***

190. We now turn to consider how best to provide that narrow legislative clarification. In our view, there is a relatively straightforward way of clarifying, in a closely targeted way, how courts should approach their task in the exercise of their Norwich Pharmacal jurisdiction when the material in question relates to national security. Moreover, this solution fits coherently not only with the established common law principles of PII but with the suggested statutory amendments to the law of PII to meet the fairness concern which we recommended in chapter 3 above.

191. As the court made clear in the *Binyam Mohamed* case, PII applies to Norwich Pharmacal cases. This means that even where a court has decided that Norwich Pharmacal disclosure ought to be ordered, it is still open to the Government to claim PII for the material in question and so avoid disclosure.

192. In our view, the **statutory amendments to the law of Public Interest Immunity recommended in Chapter 3 above (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.



## 6 The impact on media freedom and democratic accountability

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### The missing issue in the Green Paper

193. As we indicated in Chapter 1, the proposals in the Green Paper have significant implications for the freedom of the media to report matters of public interest and concern. Yet this important right does not feature in the Green Paper. It is not mentioned in the “Key Principles” outlined in the Executive Summary, which the Government says have guided the development of the proposals, nor is there any systematic assessment of the impact of the proposals on this fundamental democratic right.

194. A number of the submissions we received in response to our call for evidence have emphasised that the proposals in the Green Paper engage the principle of open justice, which concerns the basic proposition that trials should, as a general rule, be conducted in public and judgments should also be given in public. Responses to the Government’s own consultation have also raised similar concerns. The Guardian News and Media Ltd., for example, says in its response to the Green Paper that the proposals amount to “an unnecessary and unjustifiable restriction on the media’s role as a public watchdog”. The starting point, according to Dr Lawrence McNamara, is that the media are “the eyes and ears of the public”.<sup>104</sup>

195. We have also received submissions specifically concerning the impact of the Green Paper proposals on the media from Dr. Lawrence McNamara and Index on Censorship. A number of other submissions also include comment on this aspect, including those from Justice, Liberty, Amnesty International, Redress and Big Brother Watch. We took oral evidence on this question from an investigative reporter, a legal journalist, a media lawyer and an academic lawyer with relevant expertise.

### The principle of open justice

196. The status of the open justice principle as both a foundational common law principle and an important human rights obligation is not in doubt. In *Al Rawi*, for example, Lord Dyson said:

There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public. The importance of the open justice principle has been emphasised many times [...] The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as “constituting a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.” Lord Haldane LC (p 438) said that any judge faced with a demand

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<sup>104</sup> See Lord Bingham in *Turkington v Times Newspapers Limited (Northern Ireland)* [2000] [UKHL 57 at [4], describing press representatives as “the eyes and ears of the public to whom they report.”

to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity".

197. The importance of the role played by the media in exposing to scrutiny matters of public interest and concern, and making publicly available to a wide audience the information necessary to hold governments to account, is also an acknowledged feature of the principle of open justice and, correspondingly of the case-law of the European Court of Human Rights under Article 10 of the ECHR, the right to freedom of expression. That right has been regarded by the Strasbourg Court as being of particular importance to the healthy functioning of democratic accountability, and has been interpreted broadly to give effect to both the right of the media to impart information and the right of the public to receive it. It has also been the subject of ringing judicial endorsement in recent years. The importance of open justice as a fundamental principle was the subject of Lord Neuberger's 2011 Judicial Studies Board lecture, *Open Justice Unbound?*, in which he explicitly linked the importance of open justice to the rule of law:<sup>105</sup>

Public scrutiny of the courts is an essential means by which we ensure that judges do justice according to law, and thereby secure public confidence in the courts and the law".

198. Many of our witnesses invoked what is rapidly becoming the classic statement of the interrelationship between freedom of expression, democratic accountability and the rule of law in the judgment of the Court of Appeal in the *Binyam Mohamed* litigation, in which the Lord Chief Justice distilled a number of principles from the relevant legal authorities. The significance of the statement warrants its quotation at length:

*37. Quite apart from Mr Mohamed's personal interest in seeing the full and complete reasoning of the court, there was considerable discussion about the principle of open justice generally, and as it might affect the media. This developed along familiar lines. From time to time judges of the highest distinction have identified the reasons which underpin this principle, naturally enough, in the overall context of the possible application of the principle to the individual case. For present purposes I derive the following principles from the authorities.*

*38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.*

*39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "[...] first freedom, freedom of speech and expression". In litigation, particularly litigation between the*

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<sup>105</sup> Lord Neuberger of Abbotsbury, MR, Judicial Studies Board annual lecture 2011, para. 4.

*executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.*

*40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report. One element would report those matters which reflect its distinctive social or political stance, and a different section of the media will report on different matters, reflecting a different, distinctive position. This may very well happen with this judgment, reflecting the diversity of the media, and symbolising its independence. In short, the public interest may support continuing redaction, or it may not. If it does not, each element of the media will decide for itself what, if anything, to publish. In the context of two further features of the evidence I should add that the investigative role of the media exists independently of the principle of open justice, and that the right of the media to enlist the assistance of legislation like the Freedom of Information Act to acquire access to information is similarly distinct. Neither diminishes the principle of open justice.*

*41. Although expressed in wide and general terms—and perhaps inevitably so expressed—in my judgment the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question. They do not enable the media to require parties to litigation to continue it if they do not wish to do so in order for the media to have a better story, or permit the media to study material which has been made subject to non-disclosure on well established PII principles, or to report proceedings where, in the interests of justice, by operation of law, such reporting is prohibited. It is, of course, elementary that the courts do not function in order to provide the media with copy, or to provide ammunition for the media, or for that matter private individuals, to berate the government or the opposition of the day, or for that matter to berate or laud anyone else. They function to enable justice to be done between parties. However where litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances.*

*42. The open justice principle (by which I include the ordinary right of all the parties to litigation to know the reasons for the decision of the court) is undiminished either by the possible exercise by the Intelligence and Security Committee of its responsibilities to inquire into possible wrongdoing by the intelligence services or by the responsibility of the Attorney General to authorise criminal proceedings against any member of the services who may have committed a criminal offence. These are distinct elements of our arrangements which serve to ensure that the rule of law is observed, but they do not impinge on the principles of open justice.*

## The effect on investigative journalism

199. We took evidence from an investigative journalist about the difficulties the proposals in the Green Paper are likely to cause him in his reporting on matters of public interest and concern. Ian Cobain, an investigative reporter on *The Guardian* who has been responsible for a lot of award-winning investigative journalism in recent years concerning matters such as complicity in torture and extraordinary rendition, told us that material disclosed in legal proceedings has been “vitaly important” as a source of information for journalists.<sup>106</sup> He said that journalists such as him were “heavily reliant on documents that have been disclosed in court”, which were often crucial either to corroborate allegations of wrongdoing which had been heard elsewhere, or to contradict assurances or denials.

200. Two cases in particular, *Al Rawi* and *Binyam Mohamed*, had resulted in the disclosure of evidence and documentation which had enabled journalists to build up a true picture of the Government’s involvement in certain actions since 9/11. In *Al Rawi*, for example, Mr. Cobain told us that Government ministers gave assurances that any suggestion of British involvement in rendition was a conspiracy theory, and it was only through the court proceedings that the documentation was disclosed showing that a decision had in fact been taken by the Government that British nationals detained in Afghanistan could be sent to Guantanamo.

201. According to Mr. Cobain, the proposals in the Green Paper will prevent the sort of investigative reporting he has done on complicity in torture and rendition from happening again.<sup>107</sup> Once allegations of wrongdoing against the Government disappear into a closed court, he said, the media will not be able to see how the allegations are tested in open court, and they may not even find out at the end of the process if the relevant part of the case is in a closed judgment.<sup>108</sup> In the *Binyam Mohamed* case, for example, had the proceedings been closed the media would not have been able to find out what the truth of the matter was about the Security Service’s awareness of the treatment Mr. Mohamed had received before he was interrogated by UK officials. Mr. Cobain’s message was plain and simple: “we would not learn these matters if the proposals were adopted.”<sup>109</sup>

## The overall effect on the media

202. The evidence of Dr. Lawrence McNamara, an academic lawyer who has carried out research into the effect of counter-terrorism laws on media freedom, was that making closed material procedures generally available in all civil proceedings would have a “significant detrimental impact on the ability of the press to access and report information” and would constitute a “major retreat from open justice traditions.” He makes a similar point to Mr. Cobain about why courts are so important to the media: “information comes out in court; it is where detail comes out and where the parties cannot craft or spin the information.”<sup>110</sup> His research shows that journalists regard courts as “vitaly important avenues for information to be exposed.” He was concerned about “the normalisation of

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106 Q101.

107 Q102.

108 Q104.

109 Q103.

110 Q118.

justice occurring behind closed doors”<sup>111</sup> and about CMPs becoming routine because the parties may have an interest in agreeing to them taking place, which would prevent material coming into the public domain which might be important in holding the state to account.<sup>112</sup>

203. Joshua Rozenberg, the well-known legal correspondent and broadcaster, pointed out another reason why court material and court proceedings have a great advantage for the media in terms of the ability to inform the public of what is going on: reports of them enjoy the protection of privilege, which means that journalists cannot be sued for libel if they publish a fair and accurate account of what is said in court.<sup>113</sup>

204. A number of witnesses who gave evidence about the impact of the Green Paper on media freedom were particularly concerned about the potentially wide scope of application of the proposals for closed material procedures. Dr. McNamara for example, was concerned that “we will end up with whole categories of activities and scrutiny that will become less and less visible.” Joshua Rozenberg, asked how the proposals in the Green Paper will affect his ability to report legal proceedings, said:<sup>114</sup>

We do not know because, we do not know how widely they will go if they go as far as the Government is proposing. As I see it, they would cover international relations, crime prevention, police informers’ identities and perhaps even commercially sensitive information in which the Government has no direct interest. If all those were to be subject to these closed material proceedings, it would very much limit our ability to cover a wide range of cases [...] If that were inhibited to the extent envisaged in the Green Paper, I think that the public would be very much the poorer.

205. The representatives of the media from whom we heard were also very clear that the current law on PII not only works reasonably well in practice as far as the media are concerned, but also adequately accommodates the right to freedom of expression when deciding whether certain material should not be disclosed. The main reason for this is that, under the current law of PII, there is a judicial balancing exercise in which the court, rather than the executive, balances the rights and interests in play, including the importance of the public’s right to know the particular information in question. Jan Clements, a specialist media lawyer from Editorial Legal Services at *The Guardian*, pointed out that the courts already have considerable powers to manage difficult and sensitive cases in a way which enables the media to “at least get access to some of the key information.”<sup>115</sup> She pointed to the careful judicial balancing of the various interests, including national security, in the *Binyam Mohamed* litigation.<sup>116</sup> Her fear was that, under the proposals in the Green Paper, the arguments that were played out in court in that case and considered very carefully would not take place: the whole thing would take place under a CMP and “the court would be deprived of the very important role of balancing those interests.”

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111 Ibid

112 Q132. We also have a concern about the media freedom of CMPs taking place by consent: see para 113

113 Q110.

114 Q110. See, to similar effect, the evidence of Jan Clements, Q130.

115 Q121.

116 Q120 and 128.

206. Joshua Rozenberg similarly said that under the current law, “at least we have the feeling that the court has carried out a balancing exercise and perhaps has even heard from the press making an application on whether material of a certain sort ought to be covered by public interest immunity.”<sup>117</sup> Under the proposals for CMPs, however, “[t]he fear is that we would not have any rights to make an application to the court before it went into closed session, not least because we would not know why it was going into closed session.”

### The effect on court reporting

207. A number of concerns were expressed to us about the impact of the proposals in the Green Paper on court reporting in particular, and the implications of this for the legal certainty and the accessibility of legal precedents which, particularly in a common law legal system, is vital to the preservation of the rule of law.

208. The inaccessibility of closed judgments is particularly problematic in this respect. As Joshua Rozenberg put it, “the problem with closed judgments is that we do not know what they contain.”<sup>118</sup> The particular nature of a court judgment makes this especially problematic. It contains the court’s reasons for determining an issue in litigation a particular way. Both the parties and the public have a strong interest in knowing what those reasons are, whether they relate to the facts or the law.

209. There appears to have been little thinking so far about how to address the many problems to which closed judgments give rise. How can they be made accessible to those, such as special advocates, who are both entitled to access them and require to do so in order to perform their function of representing the interests of parties to litigation who are excluded from closed material procedures? If closed judgments have legal precedent value, as the special advocates told us they sometimes do, how can that content be extracted and made publicly accessible as the rule of law requires it to be? How long will judgments remain closed for? What should be the mechanism for closed judgments becoming open? **We recommend that the Government brings forward proposals to deal with the important questions we raise which relate to closed judgments.**

210. It was also pointed out to us that the current trend, throughout the court system, is towards greater openness and transparency: in family courts, the Court of Protection, coroners’ inquests and the Supreme Court, for example.<sup>119</sup> The Green Paper, however, is directly at odds with this trend.

### The impact on public trust and confidence in the Government and the Courts

211. The Secretary of State in his Foreword to the Green Paper refers to “improved executive accountability” as one of the prizes of getting reform right.<sup>120</sup> Both he and the Foreign Secretary have spoken of the need to restore the public’s trust and confidence that

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117 Q113.

118 Q112.

119 Q111.

120 Green Paper, Foreword, p. viii.

the intelligence and security agencies and the Government are acting in accordance with the law.

212. With the exception of the ministers, not a single witness in our inquiry suggested that the proposals in the Green Paper will improve the accountability of the executive. On the contrary, a great deal of evidence has expressed concern that the proposals will greatly reduce the accountability of the executive. Dr McNamara described the “culture of closure and caution” that he found in Australia where, since the introduction of the National Security Information (Criminal and Civil Proceedings) Act 2004, “the default position became to used closed proceedings where possible.”<sup>121</sup> Dinah Rose QC thought it “inevitable” that there is the possibility of wrong decisions being made in CMPs without any kind of accountability, “because the people you are asking to make the decisions are people who are not neutral but have an interest in the outcome. With the best will in the world, however professional they are, they cannot look at it in the same way that a judge would look at it.”<sup>122</sup>

213. Moreover, a number of witnesses have expressed the distinct but no less important concern that extending closed material procedures into civil proceedings will undermine public confidence in the courts because it may give the appearance that the judiciary has been co-opted by the Government and the security and intelligence agencies. Jan Clements, for example, observed that secrecy undermines public confidence, and pointed to the risk that under the Green Paper’s proposals the public may perceive the court as simply going along with the Government’s decision that a matter should be heard in private, which would result in the courts as well as the Government being mistrusted.<sup>123</sup>

**214. 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.<sup>124</sup> 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.”<sup>125</sup>**

## Possible safeguards for open justice

215. Dr. McNamara said in his submission that there is “a strong need for mechanisms which counter the pressures towards normalising closed proceedings”. He points out that the Australian Law Reform Commission recommended that open justice be an express consideration in national security law, but the Australian statute did not follow this advice. He recommends a number of safeguards which he says could be inserted into any legislative regime in order to ensure that open justice is not only taken into account as a

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121 Q123

122 Q 34

123 Q138.

124 Green Paper, Executive Summary, p. xii, para. 10.

125 *Al Rawi*. See also Lord Neuberger MR in the Court of Appeal in the same case.

relevant consideration but is given appropriate weight by the courts. We see some virtue in this suggestion, in the context of the amendment and clarification of the law on PII as it applies to national security-sensitive material that we have recommended in Chapters 3 and 5 above.

**216. 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.**

## **Conclusion**

**217. 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.**



# Formal Minutes

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**Tuesday 27 March 2012**

Members present:

Dr Hywel Francis, in the Chair

Baroness Berridge	Rehman Chishti
Lord Bowness	Mike Crockart
Lord Dubs	Dominic Raab
Lord Lester of Herne Hill	Virendra Sharma
Lord Morris of Handsworth	

Draft Report (The Justice and Security Green Paper), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 217 read and agreed to.

*Resolved*, That the Report be the Twenty-fourth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House of Commons and that Lord Lester of Herne Hill make the Report to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 24 January, 31 January, 7 February, 28 February, 6 March, 13 March and 27 March 2012 was ordered to be reported to the House.

[Adjourned till Tuesday 24 April at 2.00 pm]

## Declaration of Lords' Interests

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**Baroness Berridge:**

Non-practising barrister

**Lord Bowness:**

Practising solicitor.

**Lord Dubs:**

Former Chair of Liberty

**Lord Lester of Herne Hill:**

Practising barrister; acted in the *al-Rawi* case

Member of the Council of JUSTICE

Member of the Expert Counsel Panel of Liberty

A full list of members' interests can be found in the Register of Lords' Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

## Witnesses

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### Tuesday 24 January 2012

**Dinah Rose QC** and **Tom Hickman**

### Tuesday 31 January 2012

**Angus McCullough QC** and **Jeremy Johnson QC**

**David Anderson QC** and **Lord Carlile of Berriew CBE QC**

### Tuesday 7 February 2012

**Joshua Rozenberg**, legal correspondent and broadcaster, and **Ian Cobain** investigative report, The Guardian

**Jan Clements**, Editorial Legal Services, The Guardian, and **Dr Lawrence McNamara**, University of Reading

### Tuesday 28 February 2012

**Isabella Sankey**, Liberty, **Angela Patrick**, JUSTICE, **Alice Wyss**, Amnesty International, and **Helen Shaw**, Inquest

### Tuesday 6 March 2012

**John Wadham**, Equality and Human Rights Commission, and **Eric Metcalfe**

**Rt Hon Kenneth Clarke QC MP**, Lord Chancellor and Secretary of State for Justice, and **James Brokenshire MP**, Parliamentary Under Secretary for Crime and Security, Home Office

## List of written evidence

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1	Letter from the Chair, to Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice	GEN 99
2	Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice	JS 1
3	Memorandum submitted by the Ministry of Justice	JS 1
4	Equality and Human Rights Commission	JS 5
5	INQUEST	JS 6
6	INQUEST	JS 6A
7	Campaign Against Criminalising Communities (CAMPACC)	JS 7
8	Dr Lawrence McNamara, University of Reading	JS 8
9	Amnesty International	JS 9

10	Dinah Rose QC	JS 10
11	David Anderson QC, Independent Reviewer of Terrorism Legislation	JS 12
12	David Anderson QC, Independent Reviewer of Terrorism Legislation	JS 12A
13	Letter to the Chair, to Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice	JS 13
14	Justice	JS 15
15	Index on Censorship	JS 16
16	Professor Clive Walker, University of Leeds	JS 17
17	Dr Lawrence McNamara, University of Reading	JS 19
18	Letter from the Chair, to Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice	JS 21
19	Reprieve	JS 22
20	Liberty	JS 26
21	Angus McCullough QC, Martin Chamberlain, Jeremy Johnson QC, Tom de la Mare, Charlie Cory-Wright QC, and Martin Goudie, Special Advocates, on the supplementary memorandum from the Independent Reviewer of Terrorism Legislation	JS 27
22	Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for justice	JS 28
23	Sara H. Cleveland, Columbia Law School	JS 29

# List of Reports from the Committee during the current Parliament

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## Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074

