

# Justice and Security Green Paper

October 2011

 HM Government



# Justice and Security Green Paper

Presented to Parliament by  
the Secretary of State for Justice  
by Command of Her Majesty  
October 2011

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# Contents

Foreword .....	vii
Executive Summary .....	xi
Key principles.....	xii
Areas of consultation.....	xiii
How to respond to the consultation .....	xvi
<b>Chapter 1: Background, recent developments and the case for change.....</b>	<b>3</b>
The twin imperatives of justice and security.....	3
Evolution of the principle of fairness in our justice system.....	5
Evolving role of the courts in national security.....	6
Existing mechanisms for handling sensitive material in civil courts – a summary .....	10
Recent developments – exacerbating the challenge.....	12
Closed material procedures and the Supreme Court: the case of <i>Al Rawi</i> .....	12
Cases struck out by courts .....	12
Providing a summary of the closed material to the excluded party, and the case of <i>Tariq</i> ...	13
Disclosure of sensitive material into foreign jurisdictions .....	14
Inquests involving sensitive material .....	15
Summary and the case for change.....	17
<b>Chapter 2: Sensitive material in civil proceedings: proposals and     consultation questions .....</b>	<b>21</b>
Enhancing procedural fairness .....	21
Proposal to expand CMPs to all civil judicial proceedings.....	21
CMPs and inquests.....	22
Improvements to the Special Advocate system.....	25
Clarifying the requirements for disclosure of damaging summaries of sensitive material: the ‘AF (No.3)’ principle or ‘gisting’.....	27

More active case-management powers for judges.....	28
Specialist court structures.....	29
The Investigatory Powers Tribunal .....	30
Safeguarding material.....	33
Enshrining PII in legislation .....	33
Addressing the challenge of court-ordered disclosure of sensitive material into foreign legal proceedings .....	35
<b>Chapter 3: Non-judicial oversight: proposals and consultation questions .....</b>	<b>39</b>
Ministerial responsibility and oversight .....	40
Independent parliamentary oversight .....	40
Procedural and practical improvements to the ISC .....	42
The Commissioners .....	44
The Inspector-General model .....	46
Ensuring a balanced system .....	47
<b>Appendix A: Secret intelligence, diplomacy and protecting the public .....</b>	<b>49</b>
<b>Appendix B: Public Interest Immunity.....</b>	<b>51</b>
<b>Appendix C: Closed material procedures .....</b>	<b>52</b>
<b>Appendix D: <i>AF (No.3)</i> and the challenges of providing summaries of sensitive material.....</b>	<b>54</b>
<b>Appendix E: Section 2(2) of the Security Services Act 1989 and sections 2(2) and 4(2) of the Intelligence Services Act 1994 ...</b>	<b>55</b>
<b>Appendix F: Further analysis on Special Advocates.....</b>	<b>56</b>
<b>Appendix G: Remit of the Commissioners .....</b>	<b>58</b>
<b>Appendix H: The Intelligence and Security Committee.....</b>	<b>59</b>

Appendix I: Possible model for an Inspector-General.....	60
Appendix J: Use of sensitive information in judicial proceedings: international comparisons .....	61
Appendix K: Equality duties and impact assessments.....	65
Glossary .....	67



## Foreword



The primary role of any government is to keep its citizens safe and free. That means both protecting them from harm and protecting their hard-won liberties. These two priorities should be mutually reinforcing – a safe, stable democracy is an ideal to which nations across the globe aspire.

In every democracy security and intelligence agencies play a central role in safeguarding this safety and stability. We owe an enormous debt of gratitude to these brave men and women who work tirelessly to protect us, particularly in response to the increased security challenges that this country has faced in the years following the attacks of 11 September 2001. They are a vital part of our nation's security and they must be a source of great national pride.

But this increase in intelligence activity has also led to greater scrutiny, including in the civil courts, which have heard increasing numbers of cases challenging Government decisions and actions in the national security sphere.

By their very nature such cases involve information which, under current rules, cannot be disclosed in a courtroom. This has rendered the UK justice system unable to pass judgment on these vital matters: cases either collapse, or are settled without a judge reaching any conclusion on the facts before them.

The Government is clear that this situation is wrong. It leaves the public with questions unanswered about serious allegations, it leaves the security and intelligence agencies unable to clear their name, and it leaves the claimant without a clear legal judgment on their case.

After over a year of careful consideration, we are bringing forward common-sense proposals which aim to:

- better equip our courts to pass judgment in cases involving sensitive information
- protect UK national security by preventing damaging disclosure of genuinely national security sensitive material
- modernise judicial, independent and parliamentary scrutiny of the security and intelligence agencies to improve public confidence that executive power is held fully to account.

As well as these important changes, the Prime Minister has already announced a package of measures aimed at restoring confidence in our security and intelligence agencies and allowing them to get on with the crucial job of keeping us safe. He announced the establishment of the Detainee Inquiry into whether the UK was involved in or aware of the improper treatment of detainees held by other countries. He published the consolidated guidance issued to intelligence officers and service personnel on engaging with detainees held overseas by third parties. He also announced the intention to reach a mediated settlement of the civil claims brought by former detainees of Guantanamo Bay because those claims could not be properly heard. This was achieved in November 2010. Combined with the proposals in this Paper which aim to improve our courts' ability to handle intelligence and other sensitive material, this represents a comprehensive package to address these difficult issues and to enable our security and intelligence agencies to get on with the vital task of keeping the UK safe.



These are matters of profound importance which go to the heart of our democratic values and our belief in human rights, justice and fairness. Inevitably, they are immensely complex and difficult – but we must not shy away from this debate. The prize is improved executive accountability, a court system equipped to handle sensitive material, and security and intelligence agencies that are able to get on with their job: a safer Britain, a fairer Britain.

A handwritten signature in black ink, appearing to read 'K. Clarke'.

Rt Hon Kenneth Clarke QC MP



# Executive Summary

## The challenge

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

2. Sensitive information can be used to prevent terrorist attacks, to disrupt serious crime networks and to inform decisions such as deportations and asset freezing. Such decisions are often challenged and reliable procedures are needed to allow such cases to be heard fairly, fully and safely in the courts. Some such procedures exist but the Government believes that there is scope to make improvements in response to recent court rulings.

3. Where the Government takes executive action and that action is subsequently challenged in the courts, there is ultimately the option – however damaging to national security – of dropping the action and withdrawing the case if we assess that the sensitive material will not be adequately protected due to disclosure requirements. In recent years, however, the Government has been called on to defend itself in increasing numbers of civil court proceedings initiated by others in which sensitive information is at the heart of the case and where withdrawing from the case without a potentially costly financial settlement is not an option.

4. The existing concept of Public Interest Immunity (PII)<sup>1</sup> enables sensitive material to be excluded from such cases but excluding key material means that the case cannot always be contested fairly for both sides. If too much material is excluded from court the Government may have little choice but to settle cases without a chance to defend itself.

5. In these and other such civil proceedings, judges are having to deliver judgments without being able to take into account key information. This weakens the UK's reputation as a free and fair democracy, respectful of human rights and the rule of law. It also means that security and intelligence agency activity risks not being properly considered through the justice system. Allowing this status quo to continue leaves open the increasing risk that the taxpayer will foot the bill to settle cases that the Government is prevented from defending. For the other parties in such proceedings too, this situation is clearly unsatisfactory. In exceptional cases material currently excluded under PII could benefit their case. And although parties may benefit financially or in other ways when a case is settled, they too – and the public as a whole – are left without a clear, independent ruling on the full facts of the case.

6. This Green Paper aims to respond to the challenges of how sensitive information is treated in the full range of civil proceedings. It will not look at the operation of criminal proceedings, nor the potential use of intercept as evidence.<sup>2</sup>

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<sup>1</sup> A fuller explanation of PII is given at Appendix B.

<sup>2</sup> The Government is reviewing separately the use of intercept as evidence.

It seeks to find solutions that improve the current arrangements while upholding the Government's commitment to the rule of law. We urgently need a framework which will enable the courts to consider material which is too sensitive to be disclosed in open court, but which will also protect the fundamental elements that make up a fair hearing. These issues have recently been considered by the Supreme Court,<sup>3</sup> and this Green Paper seeks to build on these judgments.

7. At the same time, it is more important than ever that the public has confidence that the Government's national security work is robustly scrutinised, and that the bodies that undertake this work are as credible and effective as possible. So alongside the challenges arising in the courts, the Government has also taken this opportunity to examine the independent oversight arrangements for our security and intelligence agencies. A committee of Parliamentarians, two independent Commissioners and a specialist tribunal already exist and do a huge amount to ensure that the security and intelligence agencies are properly scrutinised and held to account. Yet the Government believes more can be done to modernise these arrangements and ensure that the oversight system as a whole is fit for the future role that is required.

8. Through this Green Paper, the Government wants to gather the best possible picture of the public's views on these issues in order to inform development of policies and legislative proposals.

9. The proposals outlined in this Paper apply across the UK in those policy areas where the UK Government's responsibilities extend across England, Northern Ireland, Scotland and Wales. Aspects of policy highlighted in the document will interact with matters which are devolved. The UK Government and the devolved administrations will continue to work closely together to ensure that the critically important objectives of the Green Paper are met. Respecting the judicial systems in Scotland and Northern Ireland, the

UK Government will use the period during the consultation to work with the devolved administrations on how best to effect changes in each jurisdiction.

### Key principles

10. In developing proposals to address these challenges we have been guided by the following key principles; that:

- rights to justice and fairness must be protected
- even in sensitive matters of national security, the Government is committed to transparency – and to demonstrating that we have no fear of scrutiny of even the most contentious public issues – and that it is in the public interest that such matters are fully scrutinised
- we must protect our sensitive sources, capabilities and techniques and our relationships with international partners, whose co-operation we rely on for our national security
- as much relevant material as possible should be considered by the courts in order that judgments are based on a complete picture and that justice is done more fully by reducing the number of actions that have to be settled or dropped
- Parliament should assist the courts by ensuring that appropriate mechanisms are available for handling these challenging cases and by clarifying when and how they can best be used
- reforms drawn from existing, tried and tested procedures will be easier to implement and more likely to succeed
- any proposals contain the necessary flexibility to be valid in any context or circumstance in which they may be required in the future
- effectiveness and credibility should be key considerations when considering possible improvements to the oversight arrangements of the security and intelligence agencies.

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3 See *Al Rawi v the Security Service* [2011] UKSC 34 and *Tariq v Home Office* [2011] UKSC 35

## Areas of consultation

11. In considering the possible range of responses to these challenges, we have divided our proposals into three broad areas:

- Enhancing procedural fairness
- Safeguarding material
- Reform of intelligence oversight.

### Enhancing procedural fairness

12. Proposals in this section seek to **maximise** the amount of relevant material available for consideration in civil proceedings, while at the same time ensuring that sensitive material is afforded appropriate protection. The Government's objective is to ensure that proceedings are fair **and** full and to minimise the number of proceedings that cannot be tried because appropriate procedures do not exist to handle them.

### Closed material procedures

13. There are already a number of specific legal contexts in which procedures are provided for in legislation so that sensitive material can be handled by the courts, most notably in the Special Immigration Appeals Commission. Such procedures have been shown to deliver procedural fairness and work effectively, and similar mechanisms are used internationally.

**The Government proposes introducing legislation to make closed material procedures (CMPs) more widely available in civil proceedings for use in rare instances in which sensitive material is relevant to the case.**

*Question: How can we best ensure that closed material procedures support and enhance fairness for all parties?*

### Closed material procedures in inquests

14. Extending CMPs for inquests involves particular challenges, because of the distinct nature of inquests from other civil proceedings, including the fact that inquests are conducted by a coroner

and sometimes with juries. **The Government seeks the views of the public on the applicability of CMPs to inquests.**

*Question: What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other properly interested persons?*

15. Inquests in Northern Ireland operate under a different framework.

*Question: Should any of the proposals for handling of sensitive inquests be applied to inquests in Northern Ireland?*

### Special Advocates

16. The role of Special Advocates, who act in the interests of the party affected by the CMP, will be critical to the success of the proposed expansion of CMPs. The Government considers that there are some improvements that could be made and will ensure that further training and support are provided to Special Advocates. One area under particular consideration is the communication between the Special Advocate and the individual concerned after sensitive material is served (which requires the court's permission). The Government is giving consideration to reforms in this area to encourage Special Advocates to make use of existing procedures. An option could be for a 'Chinese wall' mechanism between government counsel and those clearing communications within an agency. The Government does not propose involving a separate judge in this process.

*Question: What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?*

## Gisting

17. This section considers the disclosure requirements developed in recent case law to provide the party affected by the CMP with a summary of some of the closed material, even where that is damaging to national security, and the merits of legislating to clarify the contexts in which provision of such a summary is and is not required (the so-called ‘AF (No.3)’<sup>4</sup> or ‘gisting’ requirement).

*Question: If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the ‘AF (No.3)’ ‘gisting’ requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No.3) does not apply?*

## Other proposals regarding procedures for handling sensitive material in civil proceedings

18. Consideration is given to:

- providing judges with more active case management powers in the pre-hearing phase to replicate best practice from more ‘inquisitorial’-type proceedings (where proceedings are controlled and directed by the judge rather than the parties)
- establishing a ‘specialist’ court with appropriate safeguards to hear civil proceedings where sensitive material is relevant
- prospects for reform of the Investigatory Powers Tribunal (IPT).

*Question: At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?*

*Question: The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?*

## Safeguarding material

19. Another approach to resolving the challenges outlined above would be to reinforce existing mechanisms to prevent harmful disclosure of sensitive information.

## Enshrining Public Interest Immunity (PII) in legislation

20. Consideration is given to enshrining the common law principle of PII in legislation and to include a presumption against the disclosure of categories of sensitive material, such as that held by the Government but owned and originated by an international partner. However, in order to conform with our domestic and European obligations, any statutory presumption would likely have to be rebuttable, so there would be little advance on the current system. If the reforms to extend CMPs are introduced, PII would have a reduced role, in any case. **The Government does not propose to pursue this option.**

*Question: In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?*

## Court-ordered disclosure where the Government is not a primary party

21. This relates to a special category of civil claim – where a claimant seeks disclosure of sensitive material to assist them in another set of proceedings, usually abroad. A CMP is not

4 *Secretary of State for the Home Department v AF* [2009] UKHL 28

sufficient to protect the material, because it is actual disclosure of that sensitive material that is sought. **The Government proposes to limit the role of the courts in cases in which individuals are seeking disclosure of sensitive material, where the Government is not otherwise a party, particularly into foreign legal proceedings over which we have no control (via so-called ‘Norwich Pharmacal’ applications).** This section considers several options to reduce the potentially harmful impact of such court-ordered disclosure, including introducing legislation to clarify that Norwich Pharmacal principles should not apply where disclosure of the material in question would cause damage to the public interest.

*Question: What role should UK courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?*

## Reform of intelligence oversight

22. Proposals in this section examine ways in which the existing independent and parliamentary oversight bodies may be made more effective, and be seen to be more effective, thus increasing public confidence. The Government is keen to hear views on the appropriate balance between independent and parliamentary oversight. The key overarching consultation questions on oversight reform are as follows.

*Question: What combination of existing or reformed arrangements can best ensure credible, effective and flexible independent oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?*

*Question: With the aim of achieving the right balance in the intelligence oversight system overall, what is the right emphasis between reform of parliamentary oversight and other independent oversight?*

## Parliamentary oversight

### *The Intelligence and Security Committee*

23. The Intelligence and Security Committee (ISC) provides parliamentary oversight of the security and intelligence agencies. The Government supports a number of proposals to modernise the ISC and change its status, remit and powers. A key question for reform is whether the status of the ISC can be changed, to strengthen its links to Parliament. The Government proposes, in line with the ISC’s own proposals, that it becomes a statutory Committee of Parliament. The Government is also committed to working with the ISC to provide public evidence sessions and agrees with the ISC’s proposal to have the power to require information from the security and intelligence agencies, with a veto resting with the Secretary of State.

*Question: What changes to the ISC could best improve the effectiveness and credibility of the Committee in overseeing the Government’s intelligence activities?*

## Independent oversight

### *The Commissioners*

24. Independent oversight of the security and intelligence agencies is also provided by the Intelligence Services Commissioner and the Interception of Communications Commissioner. In order to improve their effectiveness and credibility, this section examines whether to broaden their remit and outlines changes already taking place to increase the public profile of the Commissioners. The potential benefits of creating an Inspector-General are also examined.

*Question: What changes to the Commissioners’ existing remit can best enhance the valuable role they play in intelligence oversight and ensure that their role will continue to be effective for the future? How can their role be made more public facing?*

### *An Inspector-General*

25. An alternative approach for independent oversight would be for an Inspector-General, which concentrates more oversight functions in one body. Importing such a system into the UK would require an overhaul of the Commissioner arrangements and would need careful management to ensure that its remit did not overlap with the ISC. The Government is considering whether the benefits of such a system would outweigh the costs. A number of approaches could be taken.

***Question: Are more far-reaching intelligence oversight reform proposals preferable, for instance through the creation of an Inspector-General?***

### **How to respond to the consultation**

26. This is a public consultation to which anyone with an interest may respond. The Government invites the contribution of evidence, ideas and recommendations in response to the questions posed in this Green Paper.

Responses should be sent to [justiceandsecurity@cabinet-office.x.gsi.gov.uk](mailto:justiceandsecurity@cabinet-office.x.gsi.gov.uk) by Friday 6 January 2012.

Responses can also be filed online on the website <http://consultation.cabinetoffice.gov.uk/justiceandsecurity>

Alternatively, responses can be sent to the following postal address: Justice and Security Consultation, Cabinet Office Room 335, 3rd Floor, 70 Whitehall, London SW1A 2AS.





# Chapter 1

## Background, recent developments and the case for change

### The twin imperatives of justice and security

1.1 When the Coalition came into government in May 2010 it stated that its first duty was to safeguard national security while at the same time affirming a commitment to be strong in the defence of our freedoms.<sup>1</sup> The Coalition's Programme for Government was based on the three core principles of freedom, fairness and responsibility and the Government stated that it believes that more needs to be done to ensure fairness in the justice system.

1.2 The Government recognises that preserving a strong and independent judiciary is one of the most effective safeguards of the freedom, rights and liberties of its people. The ability to effectively vindicate one's rights through the justice system is a vital element in a modern democracy. It ensures that justice, in its broadest sense, can be done, and it provides an essential check on executive action.

1.3 The Government has a range of capabilities for providing security to those within its jurisdiction, for keeping its people safe and to enable vital institutions such as the courts to continue to function properly. These include the police and law enforcement agencies, the armed forces, the diplomatic service and the security and intelligence agencies (the Secret Intelligence Service or MI6, the Security Service or MI5 and the Government Communications Headquarters or GCHQ; collectively the Agencies). The Agencies, together

with the intelligence gathering arms of the armed forces and law enforcement agencies, provide a secret, or covert, capability which is an essential element in the Government's national security capability. Secret intelligence allows the Government to disrupt individuals, networks and events that pose a threat to national security and the economic well-being of the country.

1.4 Appendix A on page 49 contains further explanation of the types of government business that generate sensitive material.

1.5 As with all public bodies, it is essential that the Agencies are subject to effective judicial and non-judicial scrutiny in order that the public has confidence that they are working lawfully, effectively and efficiently for the good of the public.

1.6 In considering the role of the courts and parliamentary and independent oversight bodies in scrutinising matters of national security, we must strike a balance between the transparency that accountability normally entails, and the secrecy that security demands. This Paper will examine this balance and make proposals to ensure that oversight mechanisms – both judicial and non-judicial – are relevant and effective in the modern era. Excessively strong national security structures may make us safer but not freer, and security structures that are too weak put at risk the values, freedom and way of life that we all both hold dear and take for granted.

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<sup>1</sup> *The Coalition: our programme for government* (2010), pages 7 and 11

### Recent secret intelligence successes

- Secret intelligence can be used to prevent individuals from engaging in terrorist-related activities, which of course may save lives. In 2006, a 'liquid bomb' plot was foiled; this was an attempt to launch simultaneous suicide attacks against multiple mid-flight transatlantic airliners, which would have resulted in thousands of fatalities.
- On 29 October 2010, two explosive devices concealed in air freight were discovered and intercepted following the receipt of specific intelligence. One device, concealed in a printer, was found at East Midlands Airport on an inbound flight en route from Yemen to Chicago that had transited through Cologne. The other device was intercepted at Dubai International Airport, also en route from Yemen to Chicago. Both devices were probably intended to detonate over the Atlantic or the eastern seaboard of the United States. They may have brought down the aircraft.
- Through secret intelligence we can seek to mitigate the risk from states who seek to obtain weapons of mass destruction, whether nuclear, chemical or biological, through identifying ways to slow down or remove the access of such states to essential equipment and technology. The recent discovery of Iran's secret nuclear facility at Qom was one such intelligence success.
- In military conflicts, secret intelligence can be decisive, including in counter-insurgency situations. Tactical (short-term) intelligence, for example, can provide vital information for military operations, leading to gains on the battlefield, potentially saving the lives of the UK's service personnel. Strategic (long-term) intelligence can help plan for the political way forward (such as in Afghanistan).
- Secret intelligence can help to thwart the continuing threat from foreign espionage. This was demonstrated recently by the discovery and arrest of a group of Russian 'illegals' in the USA and Cyprus in 2010, of whom one had significant UK ties. Intelligence enables the Government to guard against such threats and protect the UK's interests, preventing hostile states from gaining sensitive information that could damage the UK's economy, reduce the UK's advantage in advanced military capabilities and damage the effectiveness of the UK's diplomacy.
- Secret intelligence plays a key role in the fight against serious and organised crime. For example:
  - Surveillance by the Serious Organised Crime Agency (SOCA) on a print business in the UK resulted in a total of more than 34 years' imprisonment for five organised crime group members convicted of counterfeiting £20 banknotes worth millions of pounds. To date, banknotes with a face value of more than £17.5 million believed to be linked to the gang have been removed from circulation.
  - In July 2011, secret intelligence led to the seizure of 1.2 tonnes of high-purity (90%) cocaine in Southampton and the subsequent surveillance and arrest of six members of the organised crime group responsible in the Netherlands.
- Secret intelligence can provide information on the intentions and capability of hostile state or non-state actors to launch cyber attacks against UK networks. Such attacks may be aimed at stealing information or damaging the integrity of the networks themselves. Secret intelligence has a role in detecting and preventing such attacks.

## Evolution of the principle of fairness in our justice system

1.7 Protections to ensure procedural fairness and fair trials in the justice system have evolved gradually over the centuries. The rules of natural justice have developed over time, one of which is the right to know the opposing case. What this means will vary depending on the circumstances.

1.8 Additionally and linked to the rules of natural justice is the principle that justice should not only be done, but must also be seen to be done.<sup>2</sup> A number of procedural requirements and rules arise out of this principle: for example, the requirement that judges must give reasons for their decisions that court hearings should be held in public and that the press should be free to report on court proceedings. Taken together, these requirements help achieve the aim of open justice. Again, these are not absolute requirements that allow no exceptions.

1.9 There are a number of limited but well-recognised exceptions to the open justice principle which do not infringe on the requirement that hearings should be fair. These are set out in the Civil Procedure Rules.<sup>3</sup> A hearing, or any part of it, may be in private in certain circumstances. For example, a private hearing may be necessary to protect the interests of any child<sup>4</sup> or if the court considers it necessary in the interests of justice<sup>5</sup> or of national security.<sup>6</sup> Similarly, it may be compatible with the right to a fair and public hearing in Article 6 of the European Convention on Human Rights (ECHR) for hearings to be held in private or for information to be withheld from parties, as long as there are sufficient procedural safeguards.

### Article 6 and the right to a fair trial

Article 6 of the ECHR requires that in proceedings determining a person's civil rights, the person is entitled to a fair hearing. The requirements of a fair hearing will be more onerous – approaching those required for criminal proceedings – in civil cases that determine a significant matter such as the claimant's liberty. The principle is that the protections provided in the proceedings should be commensurate with the gravity of the potential consequences on the individual concerned.

Article 6 requires that hearings should normally be held in public, although exceptions are permitted on grounds such as national security.<sup>7</sup> Under Article 6, relevant evidence should generally be disclosed to the parties to civil proceedings.<sup>8</sup> But this right is not absolute, and limits on disclosure may be justified, for example in the interests of national security in order to protect the public from harm.<sup>9</sup>

1.10 The British Government is committed to open justice. However, in justice, as in other areas, the benefits of transparency have to be balanced against important imperatives, such as national security. In certain instances, to hear a case in public or disclose information to the other party would be to endanger national security, and to withdraw from or settle the case (which may be the only alternatives) could also endanger national

2 *R v Sussex Justices Ex parte McCarthy* [1924] 1 K.B. 256 as per Lord Hewitt CJ: 'it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

3 The Civil Procedure Rules (CPR) in Scotland and Northern Ireland are also based on the same principles.

4 CPR Rule 39.2(3)(d)

5 CPR Rule 39.2(3)(g)

6 CPR Rule 39.2(3)(b)

7 *Kennedy v UK* (2011) 52 EHRR 4, at [188]

8 E.g. *Martinie v France*, App. No. 58675/00, judgment of 12 April 2006, at [45]-[50]; *Hudakova v Slovakia*, App. No. 23083/05, judgment of 27 April 2010, at [25]-[32]

9 *Jasper v UK* (2000) 30 EHRR 441, at [52]; *A and Others v UK* (2009) 49 EHRR 29, at [205]; *Kennedy v UK* (2011) 52 EHRR 4, at [184].

security or public safety as well as not being in the interests of justice overall.

1.11 As we shall see in the following sections of this Paper, the law has developed significantly in recent years in response to the question of how to facilitate appropriate handling of relevant sensitive material in civil court proceedings in a way that is consistent with well-developed principles of natural justice and fairness. But in a number of respects the law remains uncertain.

1.12 The Government believes that it is now time to bring clarity to this area of the law. The proposals aim both to safeguard national security and to establish a durable, sustainable and just framework by which sensitive material may be handled securely and effectively in civil proceedings. The Government's intention is that a Minister will be able to make a statement of compatibility in relation to any Bill which implements the proposals flowing from this consultation document in accordance with section 19(1)(a) of the Human Rights Act 1998.

### Evolving role of the courts in national security

1.13 It is long established in the UK, and a fundamental pillar of the rule of law, that the courts are independent adjudicators to which the executive powers of government must be answerable.

1.14 One form of scrutiny of the compliance of governmental and public bodies with the law is judicial review. In a judicial review a judge will seek to determine whether a body has exercised its powers lawfully. Judicial review is a flexible tool that allows differing degrees of intensity of scrutiny depending on the circumstances and the impact of the decision on the individual concerned.

1.15 Recourse to judicial review has increased significantly in recent decades, from 160 applications in 1974 to 4,539 in 1998.<sup>10</sup> By 2010 the number of applications had reached 10,548.<sup>11</sup>

1.16 Coinciding with this period of increased development of judicial review were the two Acts of Parliament that placed the Agencies on the statute book – the Security Service Act 1989 and the Intelligence Services Act 1994. Furthermore, the Regulation of Investigatory Powers Act 2000 (RIPA) regulates the powers of public bodies, including the Agencies, to carry out surveillance and covers the interception of communications. With the Agencies underpinned by statute, their activities formally regulated and overseen, and against the backdrop of an increased public recourse to judicial review, judicial and non-judicial scrutiny of the Agencies became more commonplace.

1.17 The Agencies have been affected by an increasing number of court cases over the past decade. The increased recourse to judicial review, and increased awareness of the importance of national security in the years after the attacks of 11 September 2001, were drivers for this change. In addition, the unprecedentedly high level of threat against the UK from both home and abroad meant that the Agencies were required to act faster, co-operate with more international liaison partners and investigate more threats in order to protect the public. Some of the operational activities of the Agencies during this period have recently been, and continue to be, scrutinised in the courts, through civil damages claims filed by former Guantanamo detainees, through public inquests (such as the recently concluded inquests into the 7 July 2005 bombings), through appeals against decisions relating to Control Orders and immigration decisions, or through judicial review of Government decisions in the national security context. By way of illustration, in the first 90 years of the Security Service's existence, no case impacting directly on that Service's work reached the House of Lords. In the last ten years there have been 14 such cases in the House of Lords or Supreme Court. All three Agencies have been involved in many more cases heard in the lower courts.

<sup>10</sup> Treasury Solicitor (2000), *The Judge Over Your Shoulder: a guide to judicial review for UK government administrators*, 3rd edition

<sup>11</sup> Source: [www.judiciary.gov.uk](http://www.judiciary.gov.uk)

### **Criminal vs Civil: Why criminal proceedings are out of scope for this Paper**

Civil and criminal proceedings in England and Wales are fundamentally different. In **civil** cases, the courts adjudicate on disputes between parties under the civil law. In **criminal** cases, it is usually the state which prosecutes individuals for the commission of criminal offences; where defendants are convicted, they face criminal sanctions including imprisonment. Due to the understandably more onerous requirements of the right to a fair trial in criminal cases, the rules concerning the use and protection of sensitive evidence are different to those in civil cases.

**Criminal proceedings** have the strictest requirements under Article 6 of the ECHR regarding the disclosure of sensitive material. Long-standing procedures, generally supported by all parties, are in place:

- The evidence that the prosecutor uses in court to secure a conviction is never withheld from the accused.
- The prosecutor is required to disclose to the accused all relevant material obtained in an investigation (whether or not it is admissible as evidence) that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused – this is known as the ‘unused material’.
- If the prosecutor considers that any of this ‘unused material’ is too sensitive to be disclosed, in order to continue the prosecution, the prosecutor must apply to the court for permission not to disclose the material. Material may be sensitive if it relates to national security, to police informants or to a child’s social services records, for example. This involves a Public Interest Immunity or PII application – the same mechanism that exists in civil proceedings and **is discussed fully elsewhere in this Paper**.
- The court can, however, decide to overturn the PII certificate and order disclosure; the prosecutor will have a right of appeal in certain cases and – clearly if the risk resulting from disclosure is too great – ultimately the prosecutor has the discretion to withdraw the prosecution. This will result in the acquittal of the accused, but the sensitive material will not be disclosed.

In Scotland, provisions relating to disclosure of material in a PII application are set out in the Criminal and Licensing (Scotland) Act 2010.

In **civil** claims, as HMG is a defendant, there is no possibility of withdrawing from the case, so the ability to protect sensitive material is entirely dependent on PII claims.

1.18 Given this increased volume of court cases, the lack of an effective framework in which the courts can securely consider sensitive material presents a very real challenge in proceedings in which sensitive material is centrally relevant. The Government has strained key international relationships and risked compromise of vital sources and techniques in no fewer than seven court cases in which the applicants sought sensitive UK Government-held but very often foreign government-originated information for disclosure into foreign legal proceedings; and the

Government has had to reach expensive out-of-court settlements with former Guantanamo detainees because of a lack of an appropriate framework in which civil damages claims involving sensitive material could be heard.

1.19 In addition, in certain immigration cases, in particular when taking a decision to exclude from the UK on national security grounds an individual who holds no current immigration status, the only form of legal challenge available to the individual is judicial review. The courts had recently approved

the use of a closed material procedure (CMP)<sup>12</sup> in judicial reviews<sup>13</sup> but this is now subject to the decision in *Al Rawi*<sup>14</sup> (see paragraph 1.32 for detail). The absence of CMPs in judicial review may make the defence of the decision extremely difficult, particularly in cases where the majority of the case consists of sensitive material. The court may conclude that it needs to consider the full facts of the case in order to come to an informed decision and that without that material the exclusion decision cannot stand. This may result in the Secretary of State being unable to exclude individuals from the UK that they consider to be a threat to national security because they cannot defend the actions in court.

1.20 In contrast, in the very specific legal contexts in which effective mechanisms for considering sensitive material do exist, most notably in the Special Immigration Appeals Commission (SIAC),<sup>15</sup> the Government is successfully delivering its national security requirements while also fulfilling its legal and human rights obligations. SIAC has been used in around 70 cases since December 2001, of whom 10 individuals have been deported and another 11 have left voluntarily. Some of those 70 have been subject to deprivation of citizenship proceedings, some to immigration decisions relating to an exclusion from the UK, and a number of others have been detained or put on strict bail for a period of time, reducing their ability to engage in terrorist or criminal activity. They may also still be facing deportation as their cases progress through the courts.

1.21 The UK's counter-terrorism strategy, CONTEST, also makes clear that we want to 'ensure that judicial proceedings in this country can better handle sensitive and secret material

to serve the interests of both justice and national security'.<sup>16</sup> This is a key objective in our counter-terrorism strategy and is consistent with our Pursue objective: that our counter-terrorism work is **effective, proportionate and consistent with our commitment to human rights**.

1.22 There is the further challenge of ensuring that we, the UK Government, honour our understandings with foreign governments by safeguarding sensitive material that they have shared with us (see 'The Control Principle' on the next page for more detail). In the aftermath of the UK court-ordered release of sensitive US intelligence material in *Binyam Mohamed*<sup>17</sup> (see second box on the next page for detail), the UK Government has received clear signals that if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected. The risk is that such material withheld by a foreign partner might, when pieced together with other intelligence material in the possession of the Government, provide the critical 'piece of the jigsaw' that would allow a threat to be contained, or a terrorist to be brought to justice. The fullest possible exchange of sensitive intelligence material between the UK and its foreign partners is critical to the UK's national security.

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12 A fuller explanation of CMPs is given at Appendix C.

13 *R(AHK) v Secretary of State for the Home Department* [2009] EWCA Civ 287

14 *Al Rawi v Security Service* [2011] UKSC 34

15 Established under the Special Immigration Appeals Commission Act 1997

16 *CONTEST: The United Kingdom's strategy for countering terrorism* (2011), page 10, paragraph 1.17

17 *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

### **The Control Principle**

To help to keep the UK as safe as possible, we need to receive secrets from other countries. Secret intelligence gathered by foreign governments and shared with us on a strictly confidential basis represents a significant proportion of all the information that we gather on terrorists, organised criminals and others seeking to harm our national security. Analysing the foreign material in conjunction with our own domestically generated intelligence information allows us to construct as full and detailed a picture as possible of the threats against us so that we may determine how best to thwart them. Any reduction in the quality and quantity of intelligence that overseas intelligence partners share with us would materially impede our intelligence community's ability to do what is asked of them in protecting the security interests of the United Kingdom.

In all intelligence exchanges it is essential that the originator of the material remains in control of its handling and dissemination. Only the originator can fully understand the sensitivities around the sourcing of the material and the potential for the sources, techniques and capabilities to be compromised by injudicious handling. We expect our intelligence partners to protect our material when we share it with them, and we must be able to deliver the same protection of their material. Confidence built up over many years can all too quickly be undermined. That is why, if the trust of the UK's foreign 'liaison' partners is to be maintained, there should be no disclosure of the content or fact of the intelligence exchange with them without their consent. This is known as the **Control Principle**.

### ***Binyam Mohamed* and court-ordered disclosure challenges**

In May 2008, Binyam Mohamed brought judicial review proceedings against the Foreign Secretary. Under 'Norwich Pharmacal' principles (see the box on page 15), he sought disclosure of information and documents necessary to assist his defence in his trial before a US military commission and, in particular, to show that the prosecution case consisted of evidence obtained through torture.

The Foreign Secretary said that to disclose material that has been passed to the UK on intelligence channels would breach the Control Principle. He argued, therefore, that the court should not order disclosure in this case.

Disclosure issues in the *Binyam Mohamed* judicial review case were resolved in part by disclosure of certain documents (with redactions) by the US authorities to Binyam Mohamed's security-cleared US legal team. In the meantime the Foreign Secretary continued to seek PII protection of other information contained in seven paragraphs of one of the UK court's closed judgments in the judicial review proceedings (the 'seven paragraphs') on the grounds that to disclose it would breach the Control Principle, and that such a breach would be damaging to intelligence sharing and thereby national security. The seven paragraphs summarised material passed to the UK on intelligence channels. The legal issue about the public disclosure of the seven paragraphs reached the UK Court of Appeal some time after Binyam Mohamed had returned to the UK. By the time that court handed down its judgment, a court in the US had made findings of fact directly relevant to the content of the US reporting in the seven paragraphs. This US court finding appears to have been a critical factor in the Court of Appeal's decision not to uphold the Foreign Secretary's claim for PII. The US Government continues to assert that the relevant information is classified, contrary to the Court of Appeal decision.

Mohamed went on to join other former detainees in a civil claim for damages against the UK Government, alleging, among other things, complicity in his rendition, detention and torture. In November 2010, the parties agreed a mediated settlement, the terms of which remain confidential. The Government made no admission as to liability.



## Existing mechanisms for handling sensitive material in civil courts – a summary

1.23 Common law principles have developed to ensure that a case involving sensitive material can proceed as fairly as possible. The traditional common law tool in these cases is PII. For more detail, see Appendix B.

1.24 The courts have long recognised that evidence, while relevant to the issues between the parties in a case, must be **excluded** if the public interest in withholding the information outweighs the public interest in disclosing it. This involves the court balancing competing aspects of the public interest: the public interest in preventing harm to national security and the public interest in the administration of justice, for example.

1.25 The areas of public interest that may be protected by PII include: national security, international relations and the prevention or detection of crime. The categories of PII are not fixed.<sup>18</sup> However, the courts will not recognise new categories of immunity without clear and compelling evidence.<sup>19</sup>

1.26 In addition to the obligation on the Crown to raise PII where relevant, the Heads of the Agencies are under a statutory duty to ensure that there are arrangements to secure that no information is disclosed by the Agencies except insofar as it is provided for in statute. For more detail on this statutory duty, see Appendix E.

1.27 More recently and for very specific legal contexts, Parliament has made statutory provision

for a mechanism through which sensitive material can be handled by the courts. These are known as closed material procedures (CMPs), and were first established to facilitate the hearing of national security sensitive deportation cases through the SIAC.<sup>20</sup> A number of other countries use CMPs in civil legal proceedings. For more detail, see Appendix J.

1.28 A CMP is a procedure in which relevant material in a case, the disclosure of which would be contrary to the public interest, is neither openly disclosed to the other party or its legal team nor excluded from consideration but instead disclosed to the court and to Special Advocates appointed by the Attorney General<sup>21</sup> to represent the other party's interests. For more detail, see Appendix C. **A CMP will represent a part, possibly only a small part, of the overall case, the rest of which will be heard in open court.**

1.29 A CMP is capable of satisfying the requirements of the ECHR.<sup>22</sup> Under Article 6, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security.<sup>23</sup>

1.30 A CMP enables the court to take into account relevant material that might otherwise be excluded from consideration altogether by the operation of PII. A CMP is a mechanism for seeking to reconcile the public interest in the administration of justice and the public interest in safeguarding national security.

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18 Lord Hailsham remarked in *D v NSPCC* [1978] AC 171 that 'the categories of public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and social legislation develop'.

19 *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274

20 Established through the Special Immigration Appeals Commission Act 1997.

21 In Scotland appointed by the Advocate General.

22 *A and Others v UK* (2009) 49 EHRR 29; *Kennedy v UK* (2011) 52 EHRR 4; *Chahal v UK* (1997) 23 EHRR 413, at [131]; *Al-Nashif v Bulgaria* (2003) 36 EHRR 37, at [95]-[97]; *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28; *Tariq v Home Office* [2011] UKSC 35

23 *Kennedy v UK* (2011) 52 EHRR 4, at [184]

### **Intercept as evidence: a separate challenge and a separate Government project**

Intercept as evidence (IAE) is the proposed use of intercept material (for example telephone calls, emails and other internet communications) obtained under a RIPA<sup>24</sup> warrant as evidence in criminal proceedings.

Both the Green Paper and work on IAE reflect the Government's commitment to justice, openness and transparency, and its desire that, wherever possible, evidence is brought before the courts. However, as made clear when it was announced, the Green Paper is not the appropriate means for addressing the Government's commitment to seeking a practical way of adducing intercept evidence in court. Although some of the issues may appear related, in practice the topics are clearly distinct. Seeking to group them would complicate and delay progress rather than expedite it. Importantly:

- First, the Green Paper is centred on civil proceedings, addressing specific issues raised by recent court judgments. In contrast, work on IAE is centred on the practicalities of introducing its use across serious criminal proceedings. Intercept material can already be adduced in certain civil proceedings, such as SIAC and Proscribed Organisations Appeal Commission cases.
- Second, the Green Paper is centred on the issue of protecting sensitive material. While this must also form an essential feature of any viable IAE regime, the requirements of Article 6 of the ECHR are different – and more demanding – in the criminal than the civil sphere. So bespoke solutions need in any event to be developed for both circumstances.
- Finally, the issues to be addressed in developing a legally compliant and operationally practical approach to IAE go much wider than protecting sensitive material alone – essential though this is.

Reflecting this, work on IAE continues to be overseen by the cross-party Advisory Group of Privy Counsellors.

## Recent developments – exacerbating the challenge

1.31 Previous sections have described in general terms the challenges to the fair administration of justice in the national security sphere. In this section we examine in some more detail the specifics of the challenge and the particular cases and contexts that have given rise to the most notable challenges to the administration of justice, the current lack of clarity in terms of the operations of the current system, and the biggest concerns in terms of the safeguarding of our most sensitive material.

### Closed material procedures and the Supreme Court: the case of *Al Rawi*

1.32 In the case of *Al Rawi v Security Service*,<sup>25</sup> the Supreme Court was asked to consider whether the court has the power to order a CMP for the whole or part of a civil claim for damages. The issue arose in a civil claim for damages brought by former detainees in Guantanamo Bay who alleged that the UK Government was complicit in their detention and ill treatment by foreign authorities. In their defence the defendants wished to rely on material the disclosure of which would cause harm to the public interest and asked the court to determine the preliminary issue of whether a court could adopt a CMP in such a claim. A successful claim of PII in relation to this material would have led to its exclusion but would have made progression of the case more difficult. The defendants argued that they should be able to defend themselves by relying on important evidence in a CMP. Although the underlying claim was settled on confidential terms, the Supreme Court continued to hear the appeal on this important point of principle.

1.33 The majority of the Supreme Court held that in the absence of statutory authority, it was not open to the court to adopt a CMP in such a claim. Many of the judgments took the view that provision for a CMP is a matter for Parliament and not the courts. Lord Clarke, for example, stated that:

*It would be better for the problems which arise in this class of case to be dealt with by Parliament.*<sup>26</sup>

The Supreme Court acknowledged that the absence of a CMP could lead to a claim being untriable and struck out, as was the case in *Carnduff v Rock*<sup>27</sup> (see following paragraphs).

### Cases struck out by courts

1.34 In *Carnduff v Rock*<sup>28</sup> a majority of the Court of Appeal found that that case could not be litigated consistently with the public interest and that it should be struck out. The determination of the claim would have required the disclosure of information that was sensitive, such as the operational methods used by police and how they made use of informers' information. The court would have required this information in order to investigate and adjudicate upon the claim. Disclosure of this information was not in the public interest and thus the case was not allowed to proceed.

1.35 The claimant complained to the European Court of Human Rights (ECtHR), alleging a breach of Article 6, but his complaint was rejected as unfounded.<sup>29</sup> The ECtHR found that the 'strike out' did not amount to preventing Mr Carnduff from having access to the court. A key part of their reasoning is that the case was only struck out after full oral, reasoned argument before the Court of Appeal, during which the applicant was legally represented.

25 [2011] UKSC 34

26 At [162]; see also Lord Dyson at [44] and [48], Lord Hope at [74] and Lord Phillips at [192], who all comment along similar lines.

27 [2001] EWCA Civ 680

28 *Carnduff v Rock and another* [2001] EWCA Civ 680 involved a claim by a registered police informer. He sought to recover payment for information that he supplied to West Midlands Police. The police denied any contractual liability to make the payments or that the information provided by the claimant had led to the arrests or prosecutions which the claimant suggested.

29 *Carnduff v United Kingdom* (App. No. 18905/02) (unreported) 10 February 2004

1.36 This was a decision that was reached on the particular facts and pleadings of the case. The Supreme Court in *Al Rawi* did acknowledge that there could be cases that could not be tried at all consistent with the public interest.<sup>30</sup> Although the approach taken in *Carnduff* remains an option that is open to the courts in England and Wales, **the Government favours having as many cases as possible tried fully and fairly.** To this end, the availability of a CMP in cases involving sensitive information would allow sensitive information to be considered by a court in a manner that is consistent with the public interest. There are cases in which there are competing public interests, such as the public interest in achieving justice for both parties, and the public interest in maintaining the operational effectiveness of the Agencies. Where they are currently available, CMPs allow these competing aspects of the public interest to be reconciled.

#### Providing a summary of the closed material to the excluded party, and the case of *Tariq*

1.37 The Government has always sought to ensure that at the outset of the case the excluded party in a CMP is given as much material as possible, including summaries of the sensitive case against them, subject only to public interest concerns related to national security. (This process is often abbreviated, and referred to from now on in this Paper as ‘gisting’.) However, in recent judgments the courts have decided that in cases in which the liberty of the individual is to some extent at stake<sup>31</sup> (although the precise extent of this has yet to be determined – see paragraph 1.39 below) Article 6 of the ECHR requires that excluded parties in CMPs need to be provided with a summary of the main elements of the intelligence case against them, even where the gist will cause damage to national security through the

disclosure of sensitive material. See Appendix D for a summary of a key case in this area.

1.38 The Secretary of State will in any event provide as complete a gist of the intelligence case to the excluded party in the CMP as is possible within the constraints of national security. However, by virtue of having to provide a summary of the case against the individual that includes the disclosure of information damaging to national security, the Secretary of State sometimes faces the significant risk that, for example, the source or technique used to obtain the information about the individual might become known to the individual and their legal representatives, with resultant potential harm to the public interest including national security. Not providing the required gist in such cases may mean forfeiting the action or order against the individual, with a similarly harmful impact on the public interest or not allowing the Government to defend itself in an action brought against it.

1.39 The case law so far has not clearly established the circumstances in which Article 6 requires gisting. In the case of *Tariq v Home Office* (2011),<sup>32</sup> the Supreme Court had recently to determine whether there was a requirement to provide a gist to an individual who had brought a claim of race and religious discrimination before the Employment Tribunal. The claim related to a decision to withdraw the claimant’s security clearance and suspend him from duty following the consideration of national security sensitive information. The majority of the Supreme Court<sup>33</sup> found that gisting was not required in every context in which Article 6 was engaged and that it was not required in a context related to national security vetting such as in *Tariq*. Lord Hope expressed this point in the following way at paragraph 83:

30 See Lord Dyson at [15], Lord Brown at [86], Lord Mance at [108] and Lord Clarke at [157].

31 This follows a ruling in the ECtHR, *A and Others v UK* (2009) 49 EHRR 29, which was built upon by the House of Lords in *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28 – for more detail on both these cases, see Appendix D.

32 *Tariq v Home Office* [2011] UKSC 35

33 Lord Kerr dissenting

*There cannot, after all, be an absolute rule that gisting must always be resorted to whatever the circumstances. There are no hard edges in this area of the law.*

1.40 Although the Government won in the case of *Tariq*, there remains considerable uncertainty as to the range of contexts in which gisting is and is not required. It could take many years of litigation for the courts to develop clear jurisprudence on this question that comprehensively accounts for all contexts. An alternative to this protracted period of uncertainty would be for the Government to clarify the position through legislation, using the existing court rulings as guidance. This question will be returned to in Chapter 2 of this Paper.

### Disclosure of sensitive material into foreign jurisdictions

1.41 The *Binyam Mohamed* case (detailed in the box on page 9) started as a request for UK Government-held sensitive material to assist the claimant in military court proceedings in a foreign jurisdiction (in this case the USA). The judicial review of the Secretary of State's decision not to release the sensitive material drew on 'Norwich Pharmacal' arguments (see the box on the next page for more detail) for the first time in a detention case. As a result of this use of Norwich Pharmacal principles, the Government was for the first time at risk of having to disclose sensitive material to non-UK-security-cleared individuals for use in court proceedings outside the UK. The court in *Binyam Mohamed* acknowledged that PII applied to Norwich Pharmacal cases<sup>34</sup> but concluded that disclosure was justified in the interests of justice. The US Government at the time expressed its disappointment with this finding.

1.42 Relief under Norwich Pharmacal principles is intended to be exceptional and its application to a case such as *Binyam Mohamed* was, until the time of that case, unprecedented. It had not previously

been used where there was any question of disclosure causing a real risk of damage to the public interest in protecting national security. Nonetheless, it has been a growing area of litigation, with the Government having defended no fewer than seven such cases since 2008. The problem of the extension of the Norwich Pharmacal jurisdiction in this way has hitherto been confined to cases where disclosure of sensitive material is required to be made overseas, although the problem could in theory arise in the future in cases in which sensitive disclosure is ordered for use in proceedings within the UK.

1.43 Cases of this kind have also have a disproportionate impact on our international, diplomatic and intelligence relationships with foreign governments. Since *Binyam Mohamed*, the Government and its foreign government partners have less confidence than before that the courts will accept the view of Ministers on the harm to national security that would result from disclosure. Other cases – not all of which have resulted in public judgments – have raised similar questions in the case of UK-owned intelligence.

1.44 The Government is concerned that the UK's critically important and hard-earned secrets and those of our intelligence partners may be obtained by individuals through a recent development in our justice system. It is crucial that we rebuild the trust of our foreign partners in order to ensure that they can be satisfied that the range of sensitive material they share with us, and the communications on diplomatic channels, all of which take place with an understanding of confidentiality, will indeed remain confidential. We expect our intelligence partners to protect our sensitive material from open disclosure. We must do likewise if we are to sustain the international partnerships that are crucial to the Government's efforts to protect the public.

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34 [2008] EWHC 2048 (Admin), at [149]

### Norwich Pharmacal: background

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

*Norwich Pharmacal Co & Others v Customs and Excise Commissioners*<sup>35</sup> was a case involving the owner and exclusive licensee of a patent for a chemical compound called furazolidone. Unlicensed consignments of the compound were imported into the UK, but Norwich Pharmacal was unable to identify the importers. The Commissioners held information that would identify the importers but would not disclose this, claiming that they had no authority to give such information.

The House of Lords held that where a third party who had been mixed up in wrongdoing had information relating to unlawful conduct, a court could compel them to assist the person suffering damage by giving them that information. This is now known as a 'Norwich Pharmacal Order'.

There is no equivalent remedy in Scotland.

1.45 The Government recognises that claimants in cases of this kind have often faced, or are facing, very difficult circumstances. Our objective is to ensure that individuals have proper access to the courts to address well-grounded claims and that, in doing so, critical national security partnerships are protected.

1.46 The consequences of striking the wrong balance in this area of law are potentially serious: we cannot afford for uncertainty in this area of the law to risk further the trust of our international intelligence partners, on whom we rely for our national security. The Government therefore wants to develop an improved framework for addressing these issues, one that fits coherently with other proposals in this Paper to manage sensitive information in cases heard in our own courts and builds sensibly on other relevant aspects of common law.

### Inquests involving sensitive material

1.47 Over recent years there have been a small number of inquests in which sensitive material has been relevant to proceedings. In the majority of inquests in England and Wales<sup>36</sup> it has proved possible to deal with the challenges of handling sensitive information. Ad hoc solutions have been found that have enabled inquests to fulfil their purpose – determining how and in what circumstances the deceased person died, and providing a more thorough investigation where the circumstances of the death require it. For example, in the inquest into the 7 July 2005 bombings, the coroner ruled that she could not hold a closed procedure. This meant that she could not take account of some relevant material. PII applications were used to protect some of the sensitive material. In that case the coroner was able to reach a verdict and deliver a comprehensive 'Rule 43

35 [1974] AC 133

36 There is no coronial system in Scotland. Its equivalent is the Fatal Accident Inquiry system of judicial investigation of sudden or unexplained deaths, which is governed by the framework in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. As a general rule, Fatal Accident Inquiries must be held in public (section 4(3)) and there is no Scottish equivalent of the provision in the England and Wales Coroners Rules allowing hearings in private. A recent review of the legislation recommended that the sheriff should be able to hold such part of the inquiry as they think appropriate in private, but that has not (to date) been implemented. It is possible for a sheriff to compel the recovery or inspection of documents, and the attendance of witnesses, at a Fatal Accident Inquiry, though it is also possible to assert PII to exclude material from consideration by a Fatal Accident Inquiry.

When the relevant provisions of the Coroners and Justice Act 2009 are brought into force, the Fatal Accident Inquiry system will have jurisdiction in relation to service personnel and embedded civilian personnel even when those persons were killed abroad. Any Fatal Accident Inquiry in relation to these personnel could obviously raise issues of sensitive material.

Report' based on the evidence adduced in open court. She commented that the public summaries were detailed and, together with the disclosed documentation and the lengthy oral evidence, allowed the most intense public scrutiny of the relevant issues. However, because of the absence of any closed procedure, 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.

1.48 It is conceivable that in a different case an inquest might not be able to properly investigate a death, for example if the coroner or jury were not able to take into account all relevant information. In some cases, coroners have concluded that the exclusion of material means that they have been unable to complete their investigation. Only when it has been possible to disclose more of that information (for example, with the passage of time) have such inquests been able to proceed.

1.49 In some cases where an inquest is not able to proceed, it may be possible to hold a public inquiry.<sup>37</sup> However, public inquiries are costly and complex (the four public inquiries established by the previous Government into deaths during the Troubles in Northern Ireland are expected to cost in excess of £300 million), and have always been an exceptional means of last resort to investigate deaths of significant public interest. The number of inquests where sensitive information is relevant continues to be small, but they are also likely to include particularly high-profile cases and will certainly also include cases where it would be absolutely disproportionate to have a public inquiry simply to be able to deal with a small amount of sensitive material.

1.50 This Paper will examine whether reform of inquests is warranted in order to enable more full and comprehensive conclusions, while ensuring that relevant sensitive material is safeguarded appropriately.

### Article 2-compliant inquests

Article 2 of the ECHR requires a state to initiate an effective, independent investigation into any death occurring in circumstances in which it appears that agents of the state are, or may be, in some way implicated. This includes, for example, a death in state custody, or where a person has been killed by a state agent.

The nature and degree of the scrutiny required by Article 2 depends on the circumstances of the death, but broadly an investigation that is compliant with Article 2 of the ECHR is:

- initiated by the state
- independent of both the state and the parties
- effective and prompt
- open to public scrutiny and
- supports the participation of the next-of-kin so as to safeguard their legitimate interests.

Not all of the proceedings must necessarily be in public, and the degree of public scrutiny that is needed will vary from case to case. But the ECtHR has held that there must be:

*a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.*<sup>38</sup>

In all cases the victim's next-of-kin must be involved to the extent necessary to safeguard their legitimate interests.<sup>39</sup>

37 Section 17A of the Coroners Act 1988 requires the adjournment of an inquest by the coroner if a public inquiry chaired by a judge is being, or is to be, held into the events surrounding the death.

38 *Ramsahai v Netherlands*, App. No. 52391/99, judgment of 15 May 2007, para. 353; *Amin*, para. 60; *JL*, paras. 45 and 80

39 *Amin*, para. 20

## Summary and the case for change

1.51 These developments demonstrate that in recent years there has been a significant increase in the number, range and complexity of cases reaching the civil courts in which evidence of a genuinely sensitive nature is relevant to proceedings. Although still few in absolute terms relative to the overall number of non-sensitive cases being heard by our courts every year, these cases have a disproportionately high impact, including in terms of the strain that they place on our crucial relationships with international partners.

1.52 The well-established and understood mechanism of PII works well when the excluded material is only of marginal or peripheral relevance. It is much less successful as a mechanism for balancing the competing public interest in the administration of justice and the protection of national security in those exceptional cases where a large proportion of the sensitive material is of central relevance to the issues in the proceedings – judgments in these cases risk being reached based only on a partial and potentially misleading picture of the overall facts. When applied to proceedings such as *Carnduff*, which involve substantially all and only sensitive material, justice seems barely to be served as the case is struck out for a lack of a mechanism with which to hear it.

1.53 Where they are already provided for in legislation, CMPs do provide a satisfactory compromise in enabling both justice to be done and sensitive material to be safeguarded, and we are committed to looking for further opportunities to make the system as fair as possible. Areas for potential improvement and clarification do exist, primarily in terms of maximising the effectiveness of the role that can be played by Special Advocates, and in better clarifying the contexts in which courts will require summaries of sensitive material to be provided to the party affected by the CMP.

1.54 CMPs, however, are not available in many contexts in which, increasingly, they would benefit the interests of justice. It was their lack of availability in the Guantanamo civil damages claims, for example, that required the Government to reach an expensive out-of-court settlement, without the merits of the case having been argued. As the Secretary of State for Justice stated in Parliament,<sup>40</sup> at the time of the settlement:

*the alternative to any payments made was protracted and extremely expensive litigation in an uncertain legal environment in which the Government could not be certain that we would be able to defend Departments and the security and intelligence agencies without compromising national security.*

1.55 No other effective mechanism is available to the courts which might provide sufficient safeguards for sensitive material. Private hearings and confidentiality rings exist and operate effectively for less sensitive material, where the information can be shared safely between the parties and the problems caused by mishandling of information or leaking can be managed and contained. However, where national security is at stake, these mechanisms cannot give the required degree of assurance and there may be no way to manage or contain the harmful impact of making sensitive information public. This Government will never take risks with the security of our country.

1.56 The Government is well aware of the public debate and disquiet about the development of closed procedures. We reaffirm here our strong commitment to the general principle of open justice, but draw attention to the fact that, in certain, narrowly defined circumstances, the general principle can, and must, be set aside. As the Master of the Rolls stated in a recent speech,<sup>41</sup> this general principle can be set aside in narrowly defined circumstances because open justice is subject to a higher principle: that being, as Lord Haldane LC put it in *Scott v Scott*,<sup>42</sup> the:

40 Hansard, HC 16/11/10 col. 752

41 Lord Neuberger of Abbotsbury, *Open Justice Unbound*, Judicial Studies Board Annual Lecture, 16 March 2011. The same argument appears in 1.19 of the recent *Report of the Committee on Super-Injunctions*, under the chair of Lord Neuberger.

42 [1913] AC 417



*yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done.*

1.57 In the next chapter of this Paper we examine a series of proposals aimed at improving fairness to all in civil proceedings in which sensitive information is relevant, and aimed at equipping the courts to better serve the interests of justice and of fairness. We believe it is possible to preserve procedural fairness while ensuring that cases can be heard, all relevant material considered and, where that material is sensitive, safeguarded appropriately. In an increasing number of proceedings, the Government must balance the desire to defend itself and receive independent judgments on its actions against the highly important duty to protect the public. These are unique pressures that normal parties in legal proceedings do not face. We must respond to the challenge of recent developments by finding improved ways for the courts and the Government to manage such cases. The Government believes it is in the public interest to strengthen the civil justice system in this area.



## Chapter 2

# Sensitive material in civil proceedings: proposals and consultation questions

2.1 In this chapter we examine a series of proposals aimed at addressing the challenges that have been set out in the first sections of this Paper. The strength of support that we express for these proposals depends upon the extent to which they meet the Government's key principles for this Green Paper, as outlined in the Executive Summary. We have also looked at how practices have developed in other countries facing similar challenges and bound by similar legal commitments. While we have found no definitive solutions elsewhere, options that are used abroad are analysed where relevant and more detail about other countries' arrangements can be found at Appendix J.

**Consultation questions arise at the conclusion of each section and appear in boxes.**

### Enhancing procedural fairness

2.2 The first set of proposals in this Paper seek to **maximise** the amount of relevant material that is considered by the court while at the same time ensuring that, where the material is sensitive, it is protected from potentially harmful disclosure. We argue 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. (Proposals that deal with how material is protected when it is excluded from proceedings are discussed later in this Paper in the section entitled 'Safeguarding material' (page 33).)

### Proposal to expand CMPs to all civil judicial proceedings

2.3 CMPs have been a part of the framework of the courts of the UK since 1997. They are an existing mechanism that has been proven to work effectively and is familiar to practitioners. Making CMPs an option for the parts of any civil proceeding in which sensitive material is relevant would offer a number of benefits:

- In contrast to the existing PII system, CMPs allow the court to consider **all** the relevant material, regardless of security classification. A judgment based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material.
- With both sides able to present their case fully to the court, it would be less likely that cases would have to be dropped or settled, as was the case in the Guantanamo civil damages claim, or struck out altogether, as in *Carnduff*. CMPs would provide a mechanism for cases to be heard where at present the Government has no choice but to settle a claim against it, owing to its primary duty to safeguard national security.
- A broad extension would enable the courts to deal effectively with the challenges in all the contexts in which they arise.
- The contexts in which CMPs are already used have proved that they are capable of delivering procedural fairness. The effectiveness of the Special Advocate system is central to this, and it is examined in more detail later in this Paper (see paragraphs 2.24–2.38).
- CMPs reduce the risk of damaging disclosure of sensitive material.

2.4 CMPs should only be available in exceptional circumstances, and where used, every effort is and should continue to be made to have as much material considered in open court as possible. But in the small number of cases where sensitive material is crucial to the outcome, it is better that the court should be able to decide the case, despite the additional complexities a CMP might create, than – in a worst case – that the case should not be tried at all.

**The Government proposes to legislate to make CMPs available wherever necessary in civil proceedings.**

2.5 An appropriate mechanism for triggering the CMPs will help to ensure that they are only used where it is absolutely necessary to enable the case to proceed in the interests of justice. The principle of open justice is an extremely important one, and any departure from it should be no more than is strictly necessary to achieve a proper administration of justice.

2.6 There are a number of ways that a CMP could be triggered and it will be critical to get the balance right between the role of the Secretary of State (who is best placed to assess the harm that may be caused by disclosing sensitive information) and the judge (who must ensure that the interests of justice are served, including by ensuring that proceedings are as fair as possible, in the broadest sense).

2.7 Building upon existing models (see Appendix C), a proposed mechanism for triggering CMPs in new contexts is as follows:

- A decision by the Secretary of State that certain relevant sensitive material would cause damage to the public interest if openly disclosed, supported by reasoning and, where appropriate, by evidence.
- This decision would be reviewable by the trial judge on judicial review principles if the other side decides to challenge the Secretary of State's decision.
- If the Secretary of State's decision is upheld, a CMP is triggered. In the first phase of the CMP, the judge hears arguments from the Special Advocate and counsel for the Secretary of State about the appropriate treatment (in closed or

open court) of specific material or tranches of material, based on an assessment of harm to the public interest that would be caused by open disclosure – the aim here is to ensure that as much material as possible can be considered in open court. The ability of a Special Advocate to submit that any part of the closed material should become open material will continue until the conclusion of the proceedings.

2.8 The number of cases in which these procedures would be used will be a very small percentage of the overall number of civil cases passing through the courts each year – but these cases could be tried more effectively and with greater protection for sensitive material.

**Question: How can we best ensure that closed material procedures support and enhance fairness for all parties?**

2.9 Extending CMPs is not the only way that challenges around the handling of sensitive material in civil proceedings, including inquests, could be addressed. Other proposals are discussed later in this chapter, including:

- greater 'active case management' powers for judges (paragraphs 2.47–2.52)
- creation of a new 'specialist' court for national security cases (paragraphs 2.53–2.62)
- a wider remit for the Investigatory Powers Tribunal (paragraphs 2.63–2.71)
- putting PII on a statutory footing (paragraphs 2.74–2.82).

**CMPs and inquests**

2.10 Inquests are different to other forms of civil proceedings – they are a public, inquisitorial investigation into the cause and circumstances of violent or unnatural deaths, sudden deaths of unknown cause and deaths in custody. Some inquests require juries. Furthermore, if the death occurred in state custody or was caused by a state agent, then Article 2 of the ECHR will also require the involvement of the deceased's next of kin and a greater degree of public scrutiny. The number of inquests where sensitive information is relevant

continues to be very small, but they are also likely to include particularly high-profile cases. Because an inquest is a form of public inquiry, it can be difficult for it to proceed if sensitive material is relevant but cannot be disclosed in open court. PII has been effective in the vast majority of inquests in protecting sensitive material of marginal relevance, but in exceptional cases inquests are unable to proceed at all if highly relevant material is excluded because of its public interest sensitivity.

2.11 In a small number of high-profile recent inquests, sensitive material has been relevant but was protected by PII because it was too sensitive to disclose to the inquest. However, access to **all** the relevant information would enable the investigation to be more thorough and more effective. While there appear to be benefits in extending CMPs to all civil proceedings, the issues surrounding inquests are more complex and require separate consideration. If more information were to be put before an inquest, including sensitive material, this would of course have to be done in a way that can protect national security interests that might be damaged by unrestricted disclosure.

2.12 An inquest jury must be summoned by law when a death occurs in state custody or is caused by a state agent. This provides an additional independent element in public scrutiny of state action that is invaluable in ensuring public confidence in such investigations, particularly if it proved necessary to exclude the public from any part of an inquest. Proposals to exclude juries from inquests on national security grounds were brought forward by the last Government in the Counter-Terrorism Bill and the Coroners and Justice Bill, but were not enacted following clearly expressed views in Parliament about the measures. Those proposals are not revisited in this Green Paper.

2.13 Any risks posed by the disclosure of sensitive material to inquest juries could potentially be addressed by other, lesser measures. These could include:

- asking jurors to sign **confidentiality agreements**, though this would not of itself provide sufficient reassurance that sensitive information would be protected
- requiring jurors to undergo **security clearance** to the same level as Special Advocates, thus enabling them to hear the sensitive material under consideration. This would provide the greatest level of protection to sensitive material, but this type of vetting is an intrusive process, requiring detailed background checks; it would also be costly and time-consuming. While this type of vetting works well in the employment context (for example, where someone chooses to submit to it as a condition of taking a particular job), requiring it of a person fulfilling their civic obligations by sitting as a juror is a different matter
- **light-touch vetting** of juries (for which there is precedent in criminal cases in England, Wales and Northern Ireland; here, additional checks over and above criminal record checks to identify disqualified jurors can be made in certain circumstances with the permission of the Attorney General, though these arrangements are rarely used). This model could be applied to inquest juries as well. While the level of checks permitted provides a lesser degree of protection for sensitive material, in some cases – depending on the circumstances – it may be worth considering.

2.14 Inquests play an important role for families in understanding and coming to terms with the death of a loved one. This is recognised by the status given to the deceased's relatives in a coroner's inquest; as 'properly interested persons' (PIPs) they are entitled to examine witnesses. This is also recognised by the ECHR, which requires that where Article 2 is engaged, an investigation into a death must provide for involvement of the deceased's next of kin to the extent that protects their interest. Families can also provide vital information to assist the coroner in investigating a death.

2.15 Improving the way that sensitive information is handled in inquests could help families to better understand the circumstances of the death of a relative, but protections would need to be put in place to safeguard national security interests. Options to do this could include:

- **security vetting of family members** in order to enable them to see and hear sensitive material but, as with jurors, this would be an

intrusive process and it could be extremely distressing for a family grieving the loss of a relative. Additionally, some means would have to be provided to exclude family members in the event that they did not wish to be vetted or were not cleared to see the material

- amending or adding to the Coroners Rules to allow the coroner to have a CMP for part or all of an inquest, and provide for families to receive ‘gists’ of sensitive material and be represented by Special Advocates when sensitive evidence is presented to the inquest.

2.16 Families are not the only people who can be PIPs in an inquest. The definition of a PIP is set out in Rule 22 of the Coroners Rules 1984. As well as family members, PIPs can include anyone alleged to have caused or contributed to the death, or anyone that the coroner thinks should be granted PIP status. If steps were taken to introduce CMPs into inquests, then provision should be made in certain circumstances for Special Advocates to represent the interests of any other PIPs excluded from any closed part of the inquest, thereby enabling them to question witnesses.

2.17 Normally, most inquests are conducted by a coroner, who is either a lawyer or a doctor appointed to investigate deaths. In certain circumstances, a judge can be appointed as a coroner and conduct an inquest (as happened in the 7 July 2005 inquests, which were conducted by Lady Justice Hallett). Judges are likely to have greater experience at dealing with complex cases involving sensitive information, and some types of sensitive information (such as material derived from the interception of communications) can be disclosed to a judge in certain circumstances, but not to a coroner. Where an inquest is dealing with sensitive information there could therefore be benefit in a judge being appointed as coroner to hear the case.

2.18 The alternative to these options would be to continue to rely on PII in cases in which sensitive material is relevant to proceedings. Public inquiries, as alternatives to inquests, might also in exceptional circumstances have to be established, as is currently provided for in the Inquiries Act 2005. However, public inquiries can take a long time to complete and are often very expensive.

2.19 These issues are finely balanced and public views are sought on these particular challenges.

**Question: What is the best way to ensure that investigations into a death can take account of all relevant information, even where that information is sensitive, while supporting the involvement of jurors, family members and other persons?**

#### *Fatal Accident Inquiries in Scotland*

2.20 Given the entirely different system in Scotland, the UK Government is engaged with the Scottish Government and Crown Office to determine how best to effect changes in Scotland.

#### *Northern Ireland inquests*

2.21 The Government recognises that specific circumstances apply to inquests in Northern Ireland. The coronial system is devolved and inquests in Northern Ireland operate under a different statutory framework. Particular to Northern Ireland, there are also 34 outstanding ‘legacy inquests’ into deaths that occurred during the Troubles.

2.22 The Government would welcome the views of political parties, families, non-governmental organisations and legal organisations on whether any aspects of these proposals should apply to inquests in Northern Ireland. We will also be consulting with the Northern Ireland Justice Minister, the devolved administration and those who operate the system in Northern Ireland.

2.23 The ‘legacy inquests’ into deaths that occurred during the Troubles raise specific issues. The Government is extremely mindful of the important role that families have played in these proceedings to date. As the Consultative Group on the Past said in its 2009 report:

*the outstanding inquests raise important questions and... some families have fought for many years through the courts to establish their rights in these proceedings.*

However, the Government does recognise the limitations of the current arrangements from the perspective of bereaved families. The Government

recognises that new arrangements on disclosure may help to increase the confidence of the families involved that all relevant information could be considered by an independent figure rather than being excluded from the process entirely under PII.

**Question: Should any of the proposals for handling of sensitive inquests be applied to inquests in Northern Ireland?**

### Improvements to the Special Advocate system

2.24 How well the Special Advocate system works will be a critical factor in the success of the proposed expansion of CMPs into new contexts. Special Advocates are effective in representing the interests of individuals excluded from the whole or parts of proceedings, but there may be ways that the existing arrangements can be further improved, in particular:

- additional training on intelligence analysis and assessment methods in order to enable more rigorous challenge of closed material
- better arrangements for communication with the party whose interests they are representing after service of closed material.

2.25 Special Advocates attend a one-day training course facilitated by the Security Service which explains intelligence processes, including how intelligence is assessed (including its reliability), how investigations are prioritised, what sort of actions are taken and when and why. The training includes the examination of case studies from the perspective of intelligence analysts. This training is intended to better equip the Special Advocate to represent the interests of an excluded person during the CMP by better enabling them to challenge sensitive material during closed hearings.

2.26 Feedback from Special Advocates on their training has been overwhelmingly positive but it is clear that, while the training meets all requirements for newly appointed Special Advocates, there is currently a gap in training provision for experienced Special Advocates who either require refresher modules, re-attendance

at the introductory course or specific training on particular issues that commonly arise in CMPs.

**The Government will make available increased training for Special Advocates where required.**

This will be particularly important if CMPs and Special Advocates are available in a wider range of types of proceedings.

2.27 If CMPs are used more widely then there will be a greater range of civil proceedings in which Special Advocates may have to operate in the future. These types of contexts may raise more complex issues to be dealt with in the litigation. Consequently, in addition to further training sessions that Special Advocates may feel that they require, **they will be provided with sufficient resources in terms of independent junior legal support to ensure that they are able to carry out their function as effectively and thoroughly as possible.**

2.28 Concerns have been expressed around whether the restrictions on the ability of Special Advocates to communicate with the excluded individual after seeing the closed material without permission of the court (on notice to the Secretary of State) affects Special Advocates' ability to discharge their function of representing the individual's interests in the CMPs.

2.29 A Special Advocate may take instructions from the individual before they have seen the closed material. There is currently no absolute prohibition on communication between the Special Advocate and the individual after service of the closed material. Such communication can occur, providing it is with the permission of the court. The court must notify the Secretary of State when the Special Advocate seeks permission, giving the Secretary of State time to object to the communication if it is considered necessary in the public interest, although the final decision is that of the court. However, in practice, Special Advocates have only rarely sought permission from the court to communicate with the individuals whose interests they are representing after service of the closed material, owing at least in part to concerns that such communication, once requested of the Secretary of State, would reveal litigation and other tactics and strategy and consequently unfairly benefit the Government side.

2.30 The proposed communication may pertain to questions that the Special Advocate would wish to ask the individual **about**, or even remotely **linked to**, the closed material. A Special Advocate may believe that they are able to construct communication in such a way that would not risk damage to the public interest, but the answer to which would, nonetheless, aid the Special Advocate's ability to represent the interests of the individual. However, without detailed knowledge of the investigation, or other linked investigations, the Special Advocate could inadvertently disclose sensitive information, for example the identity of an agent or details of related ongoing investigations. In order to know whether the proposed communication could be damaging to national security, those familiar with the day-to-day operation of that (and connected) investigation(s) must be able to review any proposed communication.

2.31 Any such communication would have to be cleared through the Secretary of State on advice from the relevant experts, most commonly officials in the Agencies familiar with the case in question and with an understanding of the potential for public interest damage to be caused.

2.32 Reforms in this area could enhance the ability of Special Advocates to discharge their duties. The Government is accordingly giving consideration to all feasible options.

2.33 A properly functioning 'Chinese wall' may be an innovation that could enhance the willingness of Special Advocates to make use of existing procedures in communicating with the excluded individual(s) after the service of closed material. One possible solution could be in the placing of a Chinese wall mechanism between government counsel (including Treasury Solicitors) and those clearing the communications request within an Agency. Treasury Solicitors and counsel would not be able to view the proposed communication. This arrangement could be further strengthened by a protocol which would confirm that within the Agencies, the minimum number of people necessary to carry out the security check would be involved. The Government is accordingly giving consideration to such a mechanism and protocol, as well as considering the resource and

deliverability implications for other Chinese wall models which place the 'wall' in different positions within the Government side.

2.34 One difficulty will be to regularly source an official, or cadres of officials, from within the relevant government department or Agency who will have sufficient knowledge of the case, the sourcing of the relevant material, issues around the litigation itself and the context of the case relative to other similar cases, who will as a result be able to provide definitive assessments of the risk level of proposed Special Advocate communication, but who is not in contact with, nor can have contact with, the litigation team itself and government counsel.

2.35 Special Advocates may argue that, in some instances, their proposed communication will relate only to purely procedural or administrative matters that relate solely to directions in the case, as opposed to substantive factual or legal issues and that therefore there is no requirement for the Government to clear these communications. However, the Special Advocate is not in a position to fully determine harm to the public interest and thus it does not seem possible to create 'categories' of communication which would require different clearance procedures. **Further analysis of whether 'categorisation' of communication is possible continues to be undertaken.**

**Question: What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?**

2.36 Special Advocate communication requests have to be cleared not only by the Secretary of State but also the judge. Some Special Advocates have voiced concern that here too they are potentially exposing their strategy and the strengths or weaknesses of their case to the judge. One solution would be for a separate judge to deal with applications to communicate with an excluded person. The Government has no concerns regarding this proposal from a national security perspective. However, there are clear resource and administrative implications of involving an



additional judge in the administrative aspects of a case involving CMPs, including a potential delay to proceedings. Given that this is likely to be a less significant issue than exposing litigation strategy to the other side, and that it seems unlikely that a judge would need to excuse themselves from a case as a result of something heard during the course of an application made during a case, **we consequently do not propose involving a separate judge.**

2.37 The Special Advocate system is provided for in legislation in 14 different contexts of civil proceeding as well as performing a slightly different role in criminal trials in exceptional circumstances. In each context, the system operates along the same broad lines (unless affected by specific case law, such as *AF (No.3)*<sup>1</sup>), based on the original model used in SIAC.

2.38 The one exception to this uniformity of system across contexts is in employment tribunal hearings – the provisions governing communications after service of closed material in employment tribunal hearings are not as clearly defined as in the other contexts in which Special Advocates are provided for in statute.<sup>2</sup> The Government sees no reason why, in principle, the Employment Tribunal Rules on Special Advocates should not be brought into line with other Special Advocate regimes and **we propose making the necessary amendments to the Employment Tribunal Rules<sup>3</sup> in order to harmonise the Special Advocate system across contexts.** This will enable Special Advocates to operate more readily in different courts and tribunals and bring a greater degree of consistency to proceedings in which

Special Advocates are appointed. Consideration of other concerns raised about the operation of the Special Advocate system can be found at Appendix F.

### Clarifying the requirements for disclosure of damaging summaries of sensitive material: the 'AF (No.3)' principle or 'gisting'

2.39 In this section we examine the risks and benefits of seeking, through legislation, to clarify the range of contexts in which it is and is not necessary to provide an individual with sufficient information about the allegations against them, however sensitive, to allow them to give effective instructions to their Special Advocate, as set out in the June 2009 Law Lords judgment in *AF (No.3)*<sup>4</sup> (see Appendix D). At present no such clarity exists, other than in relation to the now repealed powers set out in Part 4 of the Anti-terrorism, Crime and Security Act 2001; and in stringent control orders and financial restriction orders where such a disclosure requirement has been imposed by the courts.

2.40 However, the Supreme Court recently ruled in *Tariq*<sup>5</sup> that 'gisting' is not required in employment tribunal proceedings concerning security vetting. Furthermore, it is clear from the Strasbourg Court's decision in *Kennedy*<sup>6</sup> that 'gisting' is not necessary in cases concerning secret surveillance. In addition, there are categories of proceedings to which Article 6 of the ECHR does not apply because they do not determine 'civil rights'; in particular, immigration cases – including SIAC cases – fall outside Article 6.<sup>7</sup>

1 *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28

2 See rule 54(2)(b) of Schedule 1 to the Employment Tribunals (Composition and Rules of Procedure) Regulations 2004 (S.I.2004/1861). Compare rule 36 of the Special Immigration Appeal Commission (Procedure) Rules 2003 (S.I. 2003/1034).

3 Procedures set out in Schedule 2 to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 S.I. 2004/1861.

4 *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28.

5 *Tariq v Home Office* [2011] UKSC 35

6 *Kennedy v UK* (2011) 52 EHRR 4

7 *Maaouia v France* (2001) 33 EHRR 42; *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [32]. However, Article 5 (4) and consequently the disclosure requirement does apply to bail proceedings before SIAC: *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

2.41 However, it is unclear how far Article 6 may require 'gisting' in other categories of cases. In his judgment in *Tariq*, Lord Dyson stated<sup>8</sup> that:

*In many cases, an individual's case can be effectively prosecuted without his knowing the sensitive information which public interest considerations make it impossible to disclose to him.*

2.42 The Supreme Court did not seek to define the 'many cases' to which Lord Dyson referred in his judgment.<sup>9</sup>

2.43 It would be possible for Parliament to seek to legislate to clarify the contexts and types of civil cases in which the 'AF (No.3)' disclosure requirement does not apply.

2.44 Clarity on these disclosure requirements would create a greater degree of predictability in CMP litigation, where in many contexts uncertainty over requirements is spawning considerable satellite litigation away from the substantive proceedings. For the Government, knowing in advance of proceedings that there will or will not be such a requirement means that the Government may embark on non-prosecution actions against (for example) suspected terrorists, or defend cases that crucially depend on sensitive material, without the risks that the case might have to be abandoned or conceded midway through, due to undeliverable and unforeseen disclosure requirements set out by the court.

2.45 It would of course still be possible for affected individuals to bring proceedings under the Human Rights Act 1998 (HRA) arguing that the legislation preventing them from receiving the 'gist' was incompatible with the ECHR. But in such proceedings, the court would have the benefit of Parliament's clearly expressed view about how the balance between the competing interests should be struck.

2.46 For the individual who does not need to be provided with a 'gist', owing to the strong countervailing public interest in protecting national

security, the courts will ensure that their case is tried with sufficient procedural fairness and that they may benefit from the other safeguards such as a Special Advocate who will, on the individual's behalf, work to ensure that as much of the case as possible is heard in open court.

**Question: If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the 'AF (No.3)' 'gisting' requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No.3) does not apply?**

#### More active case-management powers for judges

2.47 In this section we look at whether it is possible to replicate any 'best practice' methodology from the more 'inquisitorial' style of proceedings that is used in some other ECHR-compliant European jurisdictions. The intention in looking at European best practice is to see whether elements of models in other jurisdictions could play a role **in conjunction with** our central proposal for more widely available CMPs, in order to deliver as great a degree of procedural fairness as possible, while at the same time realising the other objectives of this Green Paper.

2.48 Inquisitorial proceedings are proceedings that are controlled and directed by the judge rather than the parties. Other countries have systems which involve more inquisitorial elements than the UK's system. It is sometimes said that the objective of an 'adversarial' system is to settle the dispute as defined by the parties, whereas the objective of an 'inquisitorial' system is to ensure that an objectively just outcome is achieved. The legal system in the UK is rooted in the adversarial system. There are very few legal contexts or processes in the UK that operate primarily through an inquisitorial system – coroners' inquests, as mentioned earlier, are one

8 At [147] of *Tariq v Home Office* [2011] UKSC 35

9 But the court pointed out that the *A v UK* and *AF* decisions concerned the special cases where the liberty of the individual was at stake.

such rare exception. Given the overwhelmingly adversarial tradition in the UK justice system, the introduction of greater elements of an inquisitorial system into our courts would be a significant culture shock and methodological upheaval for the judiciary.

2.49 It would not be possible to introduce entirely inquisitorial proceedings into UK courts. The right to a fair hearing in Article 6 of the ECHR implies the right to adversarial proceedings, according to which the parties must normally have the opportunity to see and comment on the evidence against them.<sup>10</sup>

2.50 However, it might be possible to introduce a greater inquisitorial element at some stages of the proceedings. For instance, having an inquisitorial phase precede adversarial proceedings might result in the judge deciding on a narrower scope for the case. This could significantly streamline proceedings and related disclosure exercises as the judge would have already decided which evidence was relevant. However, once the adversarial element of the proceedings commences, the effect of having run the inquisitorial phase at the outset will not in itself provide the required safeguarding of sensitive material without PII or CMPs. This is a further reason why the analysis in this section must be considered in conjunction with the proposal in paragraph 2.4 above.

2.51 Granting the judge more powers through the inquisitorial model is unlikely to result in a more efficient process. While the role of the Special Advocate might diminish slightly as the judge takes on a greater role in testing, challenging and probing material, the judge will require greater staffing and resourcing in order to carry out the inquisitorial pre-hearing phase.

2.52 The Government has concluded that there appear to be no clear benefits to introducing an inquisitorial system into our courts purely for the management of civil proceedings involving sensitive material. It would not in itself increase the number of cases that can be dealt with effectively in the justice system as it would be reliant on a

CMP (and adversarial) phase to proceedings. Its introduction could represent a significant cultural and procedural upheaval in the British judicial system which would be difficult to justify for the small number of exceptional cases that it would be seeking to address. **The Government does not propose to introduce inquisitorial elements or more active case-management responsibilities for judges in cases involving sensitive material.**

### Specialist court structures

2.53 This section looks at whether civil legal proceedings that require an examination of sensitive material should be heard in a specialist court, with appropriate safeguards that serve both the interests of justice and of national security.

2.54 There exist already in the judicial system many specialist courts and tribunals. These are not independent bodies, but administrative divisions and subdivisions of the courts and tribunals. Thus, for example, the Queen's Bench Division of the High Court has within it the Administrative Court, the Admiralty Court, the Commercial Court and the Mercantile Court, to cite but a few.

2.55 Although structured along slightly different lines, specialist chambers of tribunals also exist, as do separate tribunals such as the Investigatory Powers Tribunal (IPT), SIAC and Employment Tribunals, which are also examples of specialist court/tribunal structures within our existing system.

2.56 Previous governments have not previously sought to establish a 'national security' court or tribunal for the hearing of cases in which most or all of the content may be sensitive. Rather, national security is an aspect of disputes which may arise in any field of law. Thus employment or immigration cases will be heard by the specialist tribunals that deal with those types of case even if they have national security sensitive elements. National security interests arise as individual rights are determined and issues between parties are set out.

<sup>10</sup> E.g. *Martinie v France*, App.No.58675/00, (2007) 45 EHRR 15, at [45]-[50]; *Hudakova v Slovakia*, App.No.23083/05, judgment of 27 April 2010, at [25]-[32].

2.57 Our research on international practice in this area confirmed that none of the countries we surveyed had established a specialist court solely for the purpose of hearing national security cases, and we did not find examples of specific government efforts to promote judicial specialisation.

2.58 In the Supreme Court judgments of *Al Rawi*<sup>11</sup> and *Tariq*,<sup>12</sup> Lord Brown reflected on whether the IPT, or a body which is similar, could provide a solution to the difficult issues raised in cases against the intelligence services or involving security vetting decisions. The Government has given such issues careful consideration, and we examine the role and remit of the IPT in paragraphs 2.63–2.71.

2.59 It would be possible to create a new specialist court or tribunal, with its own rules and nominated judges, that exclusively considers national security cases. This would require primary legislation. Such a court would be very different from the existing specialist courts and tribunals, which are made up of judges who have specialist knowledge of a particular technical area of law (such as employment, tax or immigration). The advantage of a specialist court or tribunal of that sort is that it can deal efficiently with the large number of cases falling within that area, because the judges are already familiar with the technicalities and do not need to have the fundamental concepts explained to them each time. In contrast, a specialist court would deal with a wide range of substantive law; the only aspect that the cases would have in common is that they would all involve sensitive evidence.

2.60 Overall, we consider that proposals to establish a specialist court carry significant risks and unclear benefits. Establishing such a structure would represent a significant cultural upheaval for many members of the judiciary and would unnecessarily distinguish cases involving sensitive material from other types of proceedings, against the usual case management practices of our courts.

2.61 We propose that, rather than establishing or designating a particular court for hearing national security cases, the specialised procedures of a CMP should be available in the ordinary courts when the exceptional circumstances of a particular case require them. The judge who sits in the open court would also hear the closed sessions, so the effect of moving into a CMP would simply be to remove all persons from the court with the exception of the judge, government counsel and the Special Advocate.

2.62 The risk of having CMPs available in the ordinary courts is that the judge might have little or no experience of closed hearings and might additionally lack experience of handling sensitive material and recalling what can and cannot be discussed as the court moves between open and closed hearings. In practice, this risk is minimal given that cases tend to be allocated to judges with experience of dealing with the subject matter or the issues in the case. It is usually possible to determine in advance of a case starting whether sensitive material might be relied on by one or other party and this can therefore be taken account of in the allocation process by the judges themselves.

**Question: At this stage, the Government does not see benefit in introducing a new system of greater active case management or a specialist court. However, are there benefits of a specialist court or active case management that we have not identified?**

### The Investigatory Powers Tribunal

2.63 The IPT was created<sup>13</sup> to provide a judicial body to hear and determine complaints and HRA- and ECHR-based claims against the Agencies, including in respect of conduct by them. The IPT is an important component of the control

11 *Al Rawi v Security Service* [2011] UKSC 34, at [86]

12 *Tariq v Home Office* [2011] UKSC 35, at [94]

13 By S.65 of the Regulation of Investigatory Powers Act 2000.

mechanism established by RIPA to ensure that the exercise of investigatory powers by the Agencies and other public authorities, and any other conduct by the Agencies, is subject to adequate and effective safeguards against abuse.

2.64 In this section, we consider whether the remit of the IPT could be expanded to hear more civil proceedings that centrally involve national security sensitive material, developing the comment of Lord Brown in his judgment in *Al Rawi*.<sup>14</sup>

2.65 Currently the IPT has two primary functions in this area.<sup>15</sup> First, it has exclusive jurisdiction to hear and adjudicate on ECHR-based claims against the Agencies. Second, to consider and determine complaints by individuals against the Agencies. These functions mean that the IPT has a significant role in providing scrutiny and oversight of conduct by, and the ECHR-compliance of, the Agencies.

2.66 The IPT's rules ensure that it can consider and determine complaints and adjudicate on ECHR-based proceedings without breaching the 'neither confirm nor deny' principle or revealing information about techniques and capabilities that would prejudice national security or be contrary to the public interest.

2.67 Given the IPT's existing statutory framework for securely handling sensitive material, the Government has considered the merits of expanding the remit of the IPT in order that it may hear more (or all) non-criminal cases involving national security sensitive material.

2.68 There is already statutory provision to expand the remit of the IPT to some extent through the commencement of sections of RIPA that are not in force. This would:

- enable the IPT to consider and determine references to it by an individual who has suffered detriment in civil proceedings as a result of the application of section 17 of RIPA (which restricts the use of warranted intercept in legal proceedings)<sup>16</sup>
- enable the IPT to consider such other proceedings against the Agencies as are allocated to the IPT in accordance with an order and approved by Parliament and then made by the Secretary of State.<sup>17</sup>

2.69 If the IPT's remit is expanded then the mechanisms and rules of the IPT may have to be amended in order to ensure continued compliance with requirements under Article 6 of the ECHR, in the new contexts in which the IPT would operate.<sup>18</sup> Special Advocates may have to be appointed to represent the interests of the individual in cases falling within the IPT's amended jurisdiction. An appeals procedure would have to be provided against any exercise by the IPT of its new jurisdiction.<sup>19</sup>

2.70 Given these necessary large-scale and resource-intensive amendments to the current working practices of the IPT, there are no clear benefits to expanding the remit of the IPT through RIPA relative to the primary recommendation of this Green Paper, namely to make CMPs more available in statute, for use in civil proceedings in exceptional circumstances. The secure handling of sensitive material, together with the sufficient procedural fairness that CMPs have been shown to deliver in SIAC and other contexts, lead the Government to express in this Paper a strong preference for their expanded availability, rather than a significant reconfiguration of the IPT.

<sup>14</sup> *Al Rawi v Security Service* [2011] UKSC 34, at [86]

<sup>15</sup> In addition, a role for the IPT is also provided for in paragraph 14(3)(b) of Schedule 2 to the Equality Act 2006 and S.69B(2)(b) of the Northern Ireland Act 1998, as inserted by the Justice and Security (Northern Ireland) Act 2007.

<sup>16</sup> S.65(2)(c) of RIPA

<sup>17</sup> S.65(2)(d) of RIPA

<sup>18</sup> In *Kennedy v UK* (2011) 52 EHRR 4, the ECHR confirmed that the IPT's procedures within its present remit comply with Article 6.

<sup>19</sup> S.67(9) of RIPA, not presently in force.

2.71 The IPT is a specialist tribunal that provides a forum for the proper and effective judicial determination of a specific type of claim. The IPT rules provide specific protections for sensitive intelligence material while ensuring that the IPT can take into account all evidence, irrespective of whether it would be admissible in the ordinary courts. This involves a departure from the usual procedures of adversarial courts and, as such, these procedures should be used sparingly. The resource-intensive IPT model would not be appropriate for civil damages claims, which typically may involve a large number of government departments.

***Question: The Government does not see benefit in making any change to the remit of the Investigatory Powers Tribunal. Are there any possible changes to its operation, either discussed here or not, that should be considered?***

## Safeguarding material

2.72 The previous section, 'Enhancing procedural fairness', focused on maximising the amount of material disclosed in court proceedings through proposals to permit the safeguarded disclosure of relevant sensitive material through a wider availability of CMPs.

2.73 An alternative approach would be to strengthen the mechanisms through which sensitive material could be excluded from the court process, thereby avoiding damaging disclosure. We discuss this approach here. None of the proposals considered here meet our objective of allowing the court to consider as much relevant material as possible. However, if carefully applied, they could provide an important alternative or complement to the proposals in the previous section, in support of the objectives of protecting material in a manner consistent with domestic law and ECHR, reducing the number of cases that have to be dropped, settled or struck out, and achieving this by building on existing processes.

## Enshrining PII in legislation

2.74 While CMPs, if adopted, would significantly reduce the number of cases in which a PII claim was necessary, there is still a need to consider PII and other existing procedures, refining and adapting them as a complement to CMPs. The overarching question for consultation in this area is as follows:

**Question: In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?**

2.75 The current system of PII is well understood and generally operates effectively, particularly in cases where the PII claim is confined to sensitive material which is of only marginal or peripheral relevance. The onus rests on the executive to exercise rigour, candour and responsibility in making PII claims. Damage caused by poorly justified assertions of damage to public interest cannot be overestimated; Ministers (and their officials) must ensure that claims are well reasoned, necessary, proportionate and supported by evidence. Ministers have a duty to claim PII where they assess that disclosure would cause real harm to the public interest and the balance of public interests is in favour of non-disclosure.

2.76 In a small number of cases, courts have taken a decision to order disclosure of material, despite a claim by the Government that the material should be subject to PII. One of the most well known of these was *Binyam Mohamed*.<sup>20</sup> In that case and for specific reasons, while acknowledging that the Foreign Secretary's views should be given great weight, the Court of Appeal did not uphold the Foreign Secretary's claim to PII for material passed through intelligence channels to the UK.

2.77 Examples of cases in which the courts do not uphold the Government's claim to PII are few and the courts have stated<sup>21</sup> that they will continue to give weight to Ministerial views on the damage to national security that would result from disclosure. However, the fact of these cases, together with others where there has been a very real risk of a certificate not being upheld, mean that the Government and its partners have less certainty that they will be able to continue to protect material in court.

2.78 It would be possible for Parliament to provide the courts with clearer guidance in statute on the application of PII in more difficult areas,

20 *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65. The court would have upheld the PII certificate, if there had not been evidence that the relevant information had already been put into the public domain in Judge Kessler's Memorandum Opinion in the US District Court for the District of Columbia: see [191], [203] and [295].

21 Court of Appeal Judgment in *Binyam Mohamed* [2010] EWCA Civ 65: 'It would require cogent reasons for a Judge to differ from an assessment of this nature made by the Foreign Secretary. National security... is absolutely central to the fundamental roles of the Government... In practical terms, the Foreign Secretary [is] far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services.'

clearly defining the parameters of the balancing test when determining public interest imperatives around disclosure of sensitive material. In order for the statutory test to provide more stability and certainty than provided by the existing convention of judicial 'deference' to the Executive on national security arguments, the test would have to include statutory presumptions against open disclosure of sensitive material.

2.79 One such presumption would be against disclosure of sensitive material owned by foreign governments, obtained via intelligence relationships working on the basis of the Control Principle. The principle is central to all liaison relationships, so reciprocal adherence is as much about protecting the UK as it is anyone else's material. However, before considering legislation including statutory presumptions, the Government would need to analyse the full range of issues that such an approach might raise. For example, a procedure which sought to exempt **classes** of documents, rather than specific documents based on sensitive content, would be potentially controversial as it would return to class PII claims, which UK law has moved away from since the 1990s.<sup>22</sup>

2.80 It may therefore be most appropriate for any presumption to be rebuttable – that the courts would retain the power to decide in favour of disclosure. If this approach were followed, the court-led PII balancing exercise would thus remain at the heart of the process, and provide little advance on the current system in terms

of providing stability and certainty for the UK Government and our partners. A marginal benefit is that the courts would be bound to apply the statutory test and take account of the clearly expressed will of Parliament.

2.81 Finally, there is a risk that statutory presumptions of any kind, in creating a presumption of protection of certain types of material over others, could have the effect of diminishing the protection afforded to other types of material, for example the very large volume of domestically generated intelligence and other sensitive material. This could be avoided by defining very widely the types of material protected, but this would arguably reduce their impact on court decision-making.

2.82 As an established common law principle, PII will retain a residual role in civil proceedings even if broader reforms are introduced. However, if the proposals recommended in this Green Paper are pursued, we would envisage a much reduced role for PII. Furthermore, given the difficulties around the use of statutory presumptions, we judge that it would be difficult to ensure that legislation on PII could offer a substantial advance on existing expectations of judicial deference to executive advice on national security. In light of this, we judge that pursuing legislation on PII would deliver marginal benefits, and that there are better ways, explored elsewhere in this Paper, to strengthen our ability to protect material. **The Government does not propose to legislate for PII.**

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<sup>22</sup> The Scott Report considered PII, in the context of the criminal Matrix Churchill trial, and concluded that legislation on PII was neither necessary nor desirable. The Government agreed with this recommendation. The report was also critical of the Government's use of 'class claims'.



### Addressing the challenge of court-ordered disclosure of sensitive material into foreign legal proceedings

2.83 In this section, we examine several options for resolving the difficult issues which arise in cases where a claimant seeks disclosure of sensitive material held by the Government in order to assist in another set of proceedings, usually taking place abroad.

2.84 The Government's 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.

2.85 The Norwich Pharmacal jurisdiction enables a claimant to obtain disclosure of information from a defendant who is mixed up, whether innocently or not, in arguable wrongdoing of a third party. In summary, there are five elements to the test that a claimant must satisfy in order to succeed in their claim, namely:

- there must be arguable wrongdoing on the part of a third party
- the defendant must be mixed up in that arguable wrongdoing, however innocently
- it must be necessary for the claimant to receive the information by making the Norwich Pharmacal application; put another way, if the information can be obtained by another route, the court may not grant the order
- the information sought must be within the scope of the available relief; it should not be used for wide-ranging disclosure or evidence-gathering and it is to be strictly confined to necessary information
- finally, the court must be satisfied that it should exercise discretion to make the order sought.

2.86 Norwich Pharmacal applications are a special category of civil claims. In many claims which engage national security interests, the purpose of the application has been to obtain disclosure of material in order to assist the claimant in other proceedings. That is in contrast to other types of civil claim which have been discussed in this Paper, where disclosure of material is just one aspect of the proceedings but is not the whole purpose of bringing the claim.

2.87 Accordingly, for these difficult Norwich Pharmacal applications against the Government, while the Government is likely to need a CMP where the detail of the sensitive material is being discussed, implementing that CMP is not going to be sufficient to protect the sensitive material because disclosure of that material is exactly what is being sought. Hence in addition to consulting on implementing CMPs in civil damages claims, it is necessary for the Government to consider and consult upon the future of Norwich Pharmacal proceedings against the Government where sensitive material is involved.

2.88 The Government starts from the perspective that, in recent years, access by members of the public to information held by public authorities has been greatly enhanced, principally through the Freedom of Information Act 2000 and the Data Protection Act 1998. The Government is committed to openness and transparency, but it is to be noted that both Acts incorporate exemptions for national security material<sup>23</sup> which are not present in the Norwich Pharmacal jurisdiction.

2.89 The Government has examined a range of options for reducing the potentially harmful impact of court-ordered disclosure of sensitive material in Norwich Pharmacal claims.

2.90 We considered whether **to legislate to remove the jurisdiction of the courts to hear Norwich Pharmacal applications against a government department or any other public body**. This would meet the Government's

23 In particular sections 23 and 24 of the Freedom of Information Act 2000, and section 28 of the Data Protection Act 1998.

objective of protecting sensitive material from disclosure and a claimant who wished to obtain information from a public body would still be able to make an application under the Freedom of Information Act 2000 or the Data Protection Act 1998 in the usual way. However, it is the Government's view that such an approach would be a disproportionate response. There are situations in which the operation of the Norwich Pharmacal regime against a public authority raises no real sensitive issues. Accordingly, the Government takes the view that while this reform option would meet the aim of protecting sensitive government material from disclosure, it would go too far in preventing Norwich Pharmacal applications in other cases against Government in which non-sensitive material is at stake.

2.91 An alternative, more focused, option would be **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.**

Under this option, it is envisaged that for material held by or originated from one of the Agencies there would be an absolute exemption from disclosure. It is envisaged that in respect of non-Agency government material where disclosure would cause damage to the public interest if disclosed (for example, for international relations reasons), there would be an exemption from disclosure which would be based on a Ministerial Certificate.

2.92 In this model, if the exemption were raised by the Government on the basis that the material is Agency-held or originated, that would be the end of the proceedings and the Norwich Pharmacal application would be dismissed by the court. If the Minister signs a certificate to say that the material, while not being Agency-held or originated, would nonetheless cause damage to the public interest if disclosed, then that would also bring an end to the proceedings unless the claimant wished to challenge that decision, which they would be able to do on judicial review principles. The Government envisages that those parts of any such review addressing the nature of the sensitive material and the damage caused by disclosure would need to be held in closed session via a CMP.

2.93 The Government sees clear benefits to a proposal along these lines. The proposal is tailored to problematic Norwich Pharmacal applications where disclosure would cause damage to national security or another public interest, leaving the rest of the jurisdiction unaffected. The proposal is also consistent with the approach to national security adopted by Parliament in, for example, the Freedom of Information Act 2000. The Government **seeks views on the viability of such a proposal.**

2.94 An alternative reform option is **to legislate to provide more detail as to what will in future be required to satisfy each of the five elements of the Norwich Pharmacal test.** Seeking to define key terminology in legislation should lead to greater certainty in Norwich Pharmacal hearings and potentially, therefore, less protracted resource-intensive litigation and a reduction in the risk of damaging disclosure. The Government sees benefit in providing the court with a tighter framework when considering the various elements of the Norwich Pharmacal test and **the Government therefore seeks public views on this option.**

2.95 It would of course be possible not to seek to introduce new legislation to address the challenge posed by court-ordered disclosure of sensitive material into foreign legal proceedings, and instead for the Government to continue to defend such applications on a case-by-case basis. If CMPs were statutorily available, the Government would have more confidence that it could defend the application more thoroughly and robustly in a court that could adequately protect the material in question. This may lead to a more effective hearing – a better basis on which a judge may reach a decision.

2.96 However, the Government believes that the risks of such an approach outweigh the limited benefits. Continuing to grapple with the risk of sensitive disclosure overseas will reinforce the concern of foreign intelligence partners that the UK Government cannot safeguard their most sensitive material with any confidence. The UK courts will remain a forum of choice for speculative applicants, and Norwich Pharmacal applications for sensitive material will continue to have a disproportionate impact on the Government, primarily in terms of the risk to

national security caused by disclosure and the expenditure of diplomatic capital in minimising the damage caused to international relationships. Accordingly, the Government would prefer to legislate to clarify how these principles should apply in the national security context.

2.97 These are extremely difficult issues, not least given that the cases in which these issues have arisen have often occurred in circumstances where individuals are facing severe consequences for their liberty.

*Question: What role should UK courts play in determining the requirement for disclosure of sensitive material, especially for the purposes of proceedings overseas?*



## Chapter 3

# Non-judicial oversight: proposals and consultation questions

3.1 The courts play a crucial role in scrutinising matters of national security and the activity of the Agencies and the wider intelligence community. There are a number of other bodies responsible for ensuring that there is complementary independent oversight of this area of government activity. In considering the role of these oversight bodies, as with the courts, we must strike a balance between the transparency that accountability normally requires, and the secrecy that security demands.

3.2 Oversight of government has a number of different purposes. These include: improving the effectiveness of the bodies being overseen; detecting and preventing poor administration, waste, abuse and arbitrary behaviour; ensuring that organisations act within their legal boundaries; informing the public of their findings. Oversight typically involves the collection and consideration of evidence, the making of judgements and recommendations based on that evidence and the communication of those conclusions to the Executive, the general public and the bodies being overseen. Oversight must **be effective**, but it also must be **seen to be effective – in other words credible** in the eyes of Parliament and the general public.

3.3 Since the Intelligence Services Act 1994 (ISA) and the Regulation of Investigatory Powers Act 2000 (RIPA) which established the framework for oversight of the Agencies, there have been significant changes in the context in which the Agencies work and in the nature of their work. There have been revolutionary changes in information technology and in the ways in which people communicate. Cyber security is now a high

priority for the UK. There has been a series of events – 11 September 2001, the armed conflicts in Afghanistan and Iraq, the 7 July 2005 London bombings, the Arab Spring – with far-reaching implications for our foreign and security policies. The Agencies now have a more public profile and increased budgets in order to carry out their essential work. The requirement for strengthening the oversight arrangements for the Agencies has therefore grown.

3.4 The Government recognises the criticisms that have been made about current oversight arrangements, particularly that they do not provide sufficient public reassurance that current scrutiny is effective. This Green Paper makes proposals for the development of intelligence oversight arrangements. These are consistent with the proposals that address the need for sensitive material to be safeguarded in civil judicial proceedings.

3.5 Any reforms to the oversight system must not damage national security or impair operational effectiveness. The Agencies operate covertly and their activities and material are necessarily secret. Therefore much of the activity of oversight, given the sensitive nature of the material involved, must also be secret. This condition should not prevent oversight being effective and working well. However, there is a significant challenge involved in deciding how to make public details of the oversight process while at the same time ensuring that material is not released that would damage national security.

3.6 The present framework has built up over time. As the environment in which the Agencies

have operated has changed, and the investigative techniques which they use have developed, some gaps have emerged in the system of oversight. These gaps have been filled in an ad hoc way through Ministerial-approved but non-statutory additions to the remits of current oversight bodies. Another aim of reform, therefore, is to ensure that the system is coherent and robust but also sufficiently flexible to cope with future changes to the global and technological environments and any changes in how the Agencies operate.

3.7 The non-judicial oversight of government departments and associated public bodies generally involves a balance between oversight provided by Parliament and oversight provided by other bodies. In the case of the intelligence community, the key existing oversight bodies are the Intelligence and Security Committee (ISC), the Intelligence Services Commissioner and the Interception of Communications Commissioner as well as the Investigatory Powers Tribunal.

3.8 All these oversight bodies provide robust challenges to, and scrutiny of, the work of the intelligence community. The ISC, for instance, has investigated and produced special reports on the London terrorist attacks on 7 July 2005 and rendition. The Commissioners regularly monitor and audit the use of the Agencies' intrusive powers and outline their findings in annual reports.

3.9 In considering options for reform, the Government is determined to ensure the right balance of oversight: the framework should work as a cohesive whole, with different bodies playing the roles for which they have the appropriate expertise. Some choices are drawn out in the consultation questions below.

### Ministerial responsibility and oversight

3.10 The Prime Minister has overall responsibility within government for intelligence and security matters and for the Agencies. Day-to-day Ministerial responsibility for the Security Service lies with the Home Secretary and for the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ) with the Foreign Secretary. The Home Secretary is

accountable to Parliament, and therefore to the public, for the work of the Security Service; the Foreign Secretary has the same accountability for SIS and GCHQ. They each have a close knowledge of the work of the Agencies and personally authorise warrants under ISA and RIPA, and in some circumstances are responsible for authorising specific Agency operations.

3.11 The Heads of Agencies have a formal requirement to report to Ministers. Each Agency Head has a separate statutory requirement to make an annual report on the work of their organisations to the Prime Minister and the relevant Secretary of State and may at any time report to either of them on any matter relating to their work. However, the Agency Heads have a statutory responsibility for the operational work of their Agencies and are operationally independent from Ministers.

### Independent parliamentary oversight

3.12 The ISC is a unique committee of Parliamentarians drawn from both Houses of Parliament. It was set up under statute and reports to the Prime Minister. It oversees the expenditure, administration and policy of the three Agencies. The ISC's remit is in line with that of a departmental select committee. However, in order to give it safe access to secret intelligence material there are a number of safeguards regarding its reporting and appointment arrangements that differ from select committee procedures.

3.13 These arrangements were reviewed as recently as 2007 when *The Governance of Britain* Green Paper made a series of reform proposals aimed at bringing the ISC as far as possible into line with other select committees, while maintaining the necessary arrangements for safeguarding sensitive material. These proposals were: an increased role for Parliament in the appointment process for members of the ISC; some hearings of the ISC to be structured to allow unclassified evidence to be heard in open session; providing the Committee with additional support in order to enhance its abilities to conduct investigations; finding alternative, secure accommodation outside the offices of the Cabinet Secretariat; and the ISC

Chairman opening debates on its reports in the House, rather than a Government Minister. All of these proposals have now been implemented with the exception of evidence being heard in open session.<sup>1</sup>

For more detail on the ISC, see Appendix H.

3.14 However, there continues to be criticism of the ISC. These criticisms focus on the fact that it is separate and different from other parliamentary committees, that it answers to the Prime Minister, that it is insufficiently independent, that it does not have sufficient knowledge of the operational work of the Agencies and that the process by which the ISC is appointed, operates and reports is insufficiently transparent.

3.15 The current ISC has itself developed and put forward proposals for reform and has communicated these proposals to the Government in advance of this Green Paper. The ISC summarised the key principles on which its proposals are based in its 2010–11 Annual Report as follows:

- the Intelligence and Security Committee should become a Committee of Parliament, with the necessary safeguards, reporting both to Parliament and the Prime Minister
- the remit of the Committee must reflect the fact that the ISC has for some years taken evidence from, and made recommendations regarding, the wider intelligence community, and not just SIS, GCHQ and the Security Service
- the Committee's remit must reflect the fact that the Committee is not limited to examining policy, administration and finances, but encompasses all the work of the Agencies
- the Committee must have the power to require information to be provided. Any power to withhold information should be held at Secretary of State level, and not by the Heads of the Agencies
- the Committee should have greater investigative and research resources at its disposal.

3.16 The Government agrees with the current ISC that there are serious reforms that could be made to the Committee's status, powers and remit that could enhance public confidence in the scrutiny of intelligence activity. The Government is committed to giving effect to these improvements, subject to the outcome of this consultation, including on the broad range of options for oversight reform, and subject to agreeing with the current Committee the details of how the new system can best work.

### Status of the ISC

3.17 A key question for reform, therefore, is whether the ISC's status can be changed, to strengthen its links to Parliament, while retaining the appropriate safeguards that ensure it has access to the sensitive information it needs.

3.18 A possible option would be to change the status of the ISC to that of a departmental **select committee**. Departmental select committees have a remit 'to examine the expenditure, administration and policy' of the relevant government department and associated public bodies. A Standing Order, which would need to be renewed each Parliament, could cover appropriate handling of sensitive material, accommodation, staffing and reporting. Creating a select committee would result in oversight being demonstrably undertaken by Parliament.

3.19 However, under such arrangements the Government would clearly have no veto on publication of sensitive material. There would be a real risk that, with fewer safeguards in place than under the present arrangements, Agency Heads would find it hard to reconcile their statutory duty to protect information with their statutory duty to facilitate parliamentary oversight. Sharing of less sensitive information and a corresponding reduction in both the credibility and effectiveness of the oversight the committee provided could be the result. **For these reasons, the Government believes this option should not be taken forward.**

3.20 The Government has considered the ISC's own proposal that it becomes a **statutory Committee of Parliament**, reporting formally to Parliament alongside its existing reporting

<sup>1</sup> See paragraph 3.35 for more detail.

arrangements to the Prime Minister. This change would be significant. It would result in the Committee being demonstrably accountable to Parliament. In contrast to the select committee proposal, this change in status would be statutory and would therefore allow appropriate and enduring safeguards to be put in place (some of which are explored below) to ensure the protection of sensitive material. **The Government proposes that this option is pursued.**

### Remit of the ISC

3.21 The ISC has a broad, and in practice flexible, statutory remit that covers examination of the 'expenditure, administration and policy' of the Agencies. In some of its previous reports and inquiries, and in order to be able to fulfil its remit effectively, the ISC has also undertaken work that has involved some access to past operational material. The clearest example of this was the ISC's report into the 7 July 2005 terrorist attacks.

3.22 This ability to look at the operational work of the Agencies where it is relevant to the particular nature of the inquiry has been used effectively and constructively by the ISC in the past. For that reason the Government is giving careful consideration to the **ISC's proposal to extend its remit to include operational aspects** of the work of the Agencies. The consequences of creating such a general power are significant and need careful thought to ensure that the implications have been understood. The principles that the Government believes are important in considering this issue include safeguarding the integrity of Ministerial responsibilities, avoiding overlap with the roles of other independent oversight bodies and ensuring that there is no lessening of the effectiveness of the working of the Agencies or undue resource burden placed upon them. In addition, any such oversight of operational work would need to be clearly retrospective and in the Government's view would need to be focused on matters of significant national interest. Any change of this kind would therefore need to be based on a clear understanding between the Government and the Committee on how this should work in practice, articulated either in legislation or, possibly, a supporting document such as a Memorandum of Understanding.

3.23 As the ISC has developed its role it has, with the agreement of previous and current governments, **taken evidence from bodies beyond the three Agencies** which are a part of the wider intelligence community within government. These include Defence Intelligence in the Ministry of Defence (MOD), the Office for Security and Counter-Terrorism in the Home Office and the central government intelligence machinery in the Cabinet Office (including the Joint Intelligence Organisation). It has also, in its annual reports, made recommendations relating to those bodies. The ISC has proposed that this role should be formalised.

3.24 These bodies are part of larger departments (MOD, Cabinet Office and Home Office) which are overseen by the appropriate departmental select committee. However, where the work of these organisations relates directly to intelligence material, the relevant departmental select committees are not able to provide oversight. **The Government proposes formally to recognise the wider role the ISC should play in overseeing the Government's intelligence activities by enabling it to take evidence from any department or body in the wider intelligence community** about intelligence-related activity where to do so would help the ISC provides coherent intelligence oversight. This development would not affect the primary accountability of those bodies to the relevant departmental select committee of the House of Commons.

### Procedural and practical improvements to the ISC

#### Appointments to the Committee

3.25 The ISA specifies that Committee members are to be appointed by the Prime Minister in consultation with the Leader of the Opposition. Within that context, new processes for making appointments to the ISC were adopted by the two Houses of Parliament following the 2007 *Governance of Britain* Green Paper. This change resulted in, for the Commons, the Committee of Selection being permitted to propose nominations for the ISC; and, for the Lords, nominations being agreed through 'the usual channels'. The names



are agreed by the House before being sent to the Prime Minister to make the final appointments in consultation with the Leader of the Opposition. The Prime Minister nominates and appoints the Chair of the ISC, after consulting the Leader of the Opposition. The parliamentary process is not binding on the Prime Minister, who is free to reject the House's recommendation, or to appoint members to the ISC without a recommendation from the House at all.

3.26 The Government has looked at whether additional reforms could be made to further normalise ISC appointments, recognising that ensuring that the appointments process is as independent as possible strengthens the credibility of the Committee. In doing so we have had to be conscious of the need to retain some safeguards with regard to appointments: membership of the ISC confers access to highly sensitive information, disclosure of which could lead to damage to national security. It is important that any appointments process manages that risk.

3.27 The approach preferred by the ISC is that Parliament and not the Prime Minister should, in future, make the final decision on membership and the Chair of the ISC. This would not be unusual in the House of Commons where important committees such as the Standards and Privileges Committee have their membership chosen in this way. The names of proposed members of the Committee are put on the Order Paper but the House of Commons can reject them if it so wishes until it is satisfied as to the final membership.

3.28 Alternatively, the Government has considered adoption of the Reform of the House of Commons Committee (known as the Wright Committee<sup>2</sup>) proposals. Wright proposed that ISC membership nominees be elected by secret ballot from within party groups, that the Chairman should be held by convention by a member of the majority party and should be elected by a secret ballot of the whole House of Commons with a process for the Prime Minister to pre-approve any individuals wishing to stand.

3.29 In both these options Parliament would have the final word on the make-up of the ISC. In the ISC's preferred approach this would be expressed through an ability to reject the proposed membership. In the Wright Committee proposals Parliament would select the membership by vote from a list of candidates.

3.30 The Wright Committee's proposals, however, did not take into account that the ISC is a Joint Committee of the House of Commons and the House of Lords. The nearest current equivalent is the Joint Committee on the National Security Strategy whose membership, as with other Joint Committees, is determined on the same basis as is recommended by the ISC as regards its future membership.

#### Accommodation, staffing and budget

3.31 We are considering possible changes to the ISC's staffing, accommodation and funding with a view to strengthening both the ISC's actual and symbolic connection to Parliament. The most tangible physical demonstration of independence, and a natural consequence of the ISC becoming a Committee of Parliament, would be **to make arrangements with the parliamentary authorities for the ISC to be accommodated in suitably secure premises on the parliamentary estate**, rather than on the government estate. Similarly, **its staff could have the status of parliamentary staff** (rather than departmental civil servants based in the Cabinet Office), and **its budget funded directly from parliamentary appropriation** rather than the Cabinet Office's departmental budget.

3.32 The Government accepts that some of the proposals in this section, if implemented, would require a modest uplift in the Committee's current levels of resourcing. The ISC itself has made a case for an increase in its resourcing. Following decisions on next steps after this consultation, the Government – with the parliamentary authorities if the above plans are taken forward – **proposes to review the level of resourcing that the ISC requires to support it in the discharge**

2 The Wright Committee was appointed on 20 July 2009 to consider and report on four specified matters: the appointment of members and chairs of select committees; the appointment of the Chairman and Deputy Chairmen of Ways and Means; scheduling business in the House; enabling the public to initiate debates and proceedings in the House.

### of its functions and the nature of the skills the Committee requires to have at its disposal.

#### Production and publication of reports

3.33 The ISC deals with sensitive national security material and it is necessary that appropriate protection is given to that material especially with regard to publication of reports and papers. Not all of the ISC's work can be made public. The ISA prescribes how some aspects of ISC reporting should be handled; other practices have developed over time.

3.34 However decisions on publishable material are reached, it is important that the ISC does publish whatever is safe to publish in a form that is accessible to the general public. As much of the work of the Committee necessarily takes place in private, producing credible and accessible public reports is particularly important to give Parliament and the wider public reassurance that the Committee provides effective oversight.

#### Public evidence sessions

3.35 In order to fulfil its remit effectively, which requires it to have access to sensitive material, the ISC's meetings will still have to, as a rule, take place in private. However, as part of the *Governance of Britain* reforms, the Government committed to work with the ISC to provide **public evidence sessions** where this can be achieved without compromising national security or the safety of individuals. Previous Committees have chosen not to take this idea forward but **both the Government and the current ISC are committed to making this concept work.**

#### Access to information

3.36 Under current legislation the ISC requests information from the Heads of the three Agencies who can, in theory, decline to disclose information if it is 'sensitive' (as defined by ISA – which could include information about sources or methods or relating to particular operations or which has been provided by foreign partners who do not consent to its onward disclosure). An Agency Head's refusal to disclose such information to the ISC can be overturned by the relevant Secretary of State on public interest grounds. In practice,

Agency Heads have rarely refused an ISC request for information. The Government agrees with the ISC's proposal that the **Committee should be given the power to require information from the intelligence Agencies.** The Government also agrees with the ISC proposal that **this should be subject only to a veto exercisable by the relevant Secretary of State,** rather than by the Head of the individual Agency, as now.

3.37 In practice, the ISC, in common with departmental select committees, takes most of its evidence in the form of face-to-face sessions (in the case of the ISC with Ministers, Agency Heads and, where appropriate, senior officials) or in the form of prepared written material provided in response to specific requests for written evidence. The Government expects that this will be how the ISC will, in general, continue to operate but we recognise that the ISC will, depending on the nature of its inquiries, sometimes need to be able to access primary material. In such cases, the ISC will need to work with the Agencies or department in question to agree practical ways to manage the sharing of information.

3.38 The Government is keen to hear views on the various proposals for reforming parliamentary oversight. The Government itself supports most of the ISC's proposals for changing its status, remit and powers. Other proposals, most notably that which concerns oversight of operational work, will require very careful consideration for the reasons outlined above.

*Question: What changes to the ISC could best improve the effectiveness and credibility of the Committee in overseeing the Government's intelligence activities?*

## The Commissioners

### The role of the Commissioners in intelligence oversight

3.39 Independent oversight of the Agencies is provided by the Intelligence Services Commissioner and the Interception of

Communications Commissioner. The Commissioners are appointed by the Prime Minister for a (renewable) period of three years and must hold or have held high judicial office. The Intelligence Services Commissioner's central function is to keep under review the issue of warrants by the Secretary of State, including those authorising intrusive surveillance (e.g. eavesdropping) and interference with property, in order to make sure that the Secretary of State's issue of the warrants was in compliance with legal requirements. The Interception of Communications Commissioner's central function is to keep under review the issue of warrants for the interception of communications. More details of the remits of the Commissioners can be found at Appendix G.

3.40 The Commissioners report to the Prime Minister and these reports are published and laid before Parliament. Certain information is excluded from the public report if it appears to the Prime Minister, after consultation with the relevant Commissioner, that publication of that information would be contrary to the public interest or prejudicial to national security, to the prevention or detection of serious crime, to the economic well-being of the UK, or to the continued discharge of the functions of any public authority whose activities are subject to the Commissioners' review. The practice of both Commissioners has therefore been to write the Report in two parts, one of which is a Confidential Annex that is not published.

3.41 The Commissioners provide assurance and challenge to Ministers and Heads of Agencies on the legality and proper performance of the activities of the Agencies. They advise on how Agencies can enhance their compliance with statutory obligations and ensure that new and existing capabilities are developed and used lawfully, proportionately and only where necessary. As such they provide advice of real practical and operational value and their role is therefore different from, and their work is complementary to, that of the ISC.

### The remit of the Commissioners

3.42 The Commissioners' existing statutory remits are focused on monitoring compliance

by the Agencies with the legal requirements in the exercise of their intrusive powers. The Government has occasionally asked the Commissioners to take on additional duties outside that remit. These have typically required an ongoing role in monitoring compliance with new policies or an intensive health check on a particular work area. Most recently, for example, the Intelligence Services Commissioner was invited by the Prime Minister to monitor the Agencies' compliance with the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*.

3.43 The Government proposes that the Commissioners' ability to discharge these types of duties is placed on a statutory footing, in order to ensure transparency, coherence and a clear basis of authority. This would need to be broad enough to cover current non-statutory duties and also a range of potential future duties. **The Government proposes that this is done by adding a general responsibility for overseeing the effectiveness of operational policies to the statutory remit of the Intelligence Services Commissioner, who would maintain responsibility for monitoring compliance by the Agencies with the necessary legal requirements in the exercise of their intrusive powers.** The specific areas on which the Commissioner focuses at any one time would need to be agreed, on an ongoing basis, with the appropriate Secretary of State.

3.44 The effectiveness and value of the Commissioners in providing assurance and challenge to Ministers is not in doubt. They are highly respected former members of the judiciary whose experience and insight is invaluable in checking the necessity and proportionality of the use of the Agencies' intrusive powers. However, their low public profile means that they play a lesser role in providing assurance to the general public that the activities of the Agencies are at all times reasonable, proportionate, necessary and compliant with all legal obligations. A number of steps have been taken recently to **increase the public profile of the Commissioners**. The Commissioners' most recent annual reports have

been revised to make them more readable and with the inclusion of more qualitative information of potential interest to readers. A new dedicated website for the Commissioners has been established and is expected to go-live around the time of publication of this Paper. These steps are important as they allow the Commissioners to explain to the public how their offices work, what they do and how they link into other elements of the oversight landscape. The Government considers that future appointments should bear in mind the importance of the public element of the Commissioner role.

### The Inspector-General model

3.45 In other jurisdictions, such as Australia, non-parliamentary independent oversight of security and intelligence agencies is undertaken by one single body. Such bodies are often known as Inspectors-General and usually have oversight of all of the Agencies' covert investigative techniques. However, their functions also tend to be broader than providing legal scrutiny and are more closely akin to those of an ombudsman with a regulatory function. Inspectors-General tend to have a more public-facing role, explicitly tasked to explain what they do and how they hold the Agencies to account, and also provide a response to public interest in, and criticism of, intelligence activity. In this way they are able to provide public assurance that the activities of the Agencies are at all times reasonable, proportionate, necessary and compliant with all legal obligations.

3.46 In the UK, an Inspector-General would differ from our current system in that more oversight functions would be concentrated in one body rather than split between different bodies with specific areas of expertise (although the ISC would continue to exist to provide separate parliamentary oversight). Having these functions carried out by one body carries the risk that the nominated Inspector-General can develop a more political relationship with government and thus potentially seem to provide less independent advice than, for example, the Commissioners do currently. This risk could be mitigated by a rigorous and open appointments process. The potential advantage, however, in having non-parliamentary independent oversight functions concentrated in a single public-

facing body is that the oversight system would work more transparently, be easier to understand and therefore have more public credibility.

3.47 Importing such a model into the UK system would require a major overhaul of the current Commissioner arrangements. It would also need to be managed in such a way that its remit did not overlap with that of the ISC. The Government is looking carefully at whether the benefits of such a major change would outweigh the costs. There are a number of different approaches that could be taken if a decision were taken to **create an Inspector-General**. One approach would be for the Inspector-General to be responsible for the oversight of all of the Agencies' covert investigative techniques, effectively subsuming the current roles of the Intelligence Services Commissioner and of the Interception of Communications Commissioner as they relate to the Agencies. Potentially, other functions not currently undertaken by either Commissioner could also be added to the remit, for example the ability to oversee the operational work of the Agencies.

3.48 A consequence of this approach would be to have an Inspector-General whose remit includes responsibility for oversight of Agency interception and another body responsible for non-Agency interception. This approach brings the risk that the two bodies would take different approaches to the oversight of interception and interpretation of the law, in a context of complex and rapidly evolving communications technology, and so the standards and practices of interception relating to the Agencies and non-Agency bodies could diverge. An alternative approach therefore would be for an Inspector-General to have responsibility for oversight of all interception, including by non-Agency bodies.

3.49 For illustrative purposes only, one potential model for an Inspector-General is set out at Appendix I.

**Question: What changes to the Commissioners' existing remit can best enhance the valuable role they play in intelligence oversight and ensure that their role will continue to be effective for the future? How can their role be made more public facing?**

**Question: Are more far-reaching intelligence oversight reform proposals preferable, for instance through the creation of an Inspector-General?**

### Ensuring a balanced system

3.50 The Government is committed to ensuring that any reforms achieve balance in the overall system and are sensitive to the potential for overlap between independent oversight provided by parliamentary and other independent bodies. The areas of greatest risk are likely to be oversight of operational policy and of operational activity more broadly. Any set of reforms should ensure that the functions and activity of the body or bodies responsible for independent oversight overlap as little as possible and that the appropriate functions are performed by the body most suited to that role. The same considerations are relevant in considering which bodies, existing or new, could be best positioned to enhance public understanding of and confidence in intelligence oversight. The Government would expect that the relevant independent oversight bodies might, as part of their existing functions, seek to periodically consider the effectiveness of any new closed material procedures arising from this Green Paper.

3.51 The Government's view is that some of the proposals considered above are incompatible with each other were they both (or all) brought forward together, both from the perspective of managing potential areas of overlap and from the equally important objective of ensuring the overall impact of oversight activity is proportionate and does not undermine the primary business of national security. So, for example, if a decision was made to have a parliamentary committee with significantly enhanced powers of oversight, particularly with regard to operational activity, then it would be inappropriate also to create a powerful Inspector-General. Equally, if a decision was taken to create an Inspector-General then it would be inappropriate to significantly increase the remit of the ISC, with particular regard to oversight of operational activity.

3.52 However, the Government believes that most of the reform proposals that the ISC has made, and which it supports, can be made regardless of the approach taken on the appropriate balance between independent oversight carried out by parliamentary and other independent bodies. These would include: making the ISC a Committee of Parliament; reforms relating to appointments; the ISC's accommodation, staffing and budget; the power to require information, with a veto resting with the relevant Secretary of State; and formalisation of the ISC's remit with regard to the wider intelligence community.

3.53 The Government is therefore keen to hear views on the issue of balance between the different elements of the oversight system. Assumptions that should be tested as these questions are considered include whether it is right to assume Parliamentarians will generally be better placed than other independent figures to engage with the general public and whether legal experts will generally be better placed to undertake detailed compliance monitoring?

**Question: What combination of existing or reformed arrangements can best ensure credible, effective and flexible independent oversight of the activities of the intelligence community in order to meet the national security challenges of today and of the future?**

**Question: With the aim of achieving the right balance in the intelligence oversight system overall, what is the right emphasis between reform of parliamentary oversight and other independent oversight?**



# Appendix A

## Secret intelligence, diplomacy and protecting the public

1. The National Security Strategy refers to the vital role that the security and intelligence agencies (the 'Agencies'), together with the intelligence gathering arms of the police and armed forces, play in delivering that strategy:

*to use all our national capabilities to build Britain's prosperity, extend our nation's influence in the world and strengthen our security...We will use all the instruments of national power to prevent conflict and avert threats beyond our shores: our Embassies and High Commissions worldwide, our international development programme, our intelligence services, our defence diplomacy and our cultural assets.*

2. Our Agencies do this work diligently and tirelessly 24 hours a day throughout the world; their work involves identifying, and containing and disrupting threats, investigating targets, recruiting and debriefing sources to inform this work, and providing assessments. They gather key secret information which enables the Government to stay one step ahead of those who would harm our security and our way of life. They gather this information by working with each other on an inter-Agency basis, through key intelligence sharing relationships with foreign partners and by working with domestic partners such as the police to deliver national security outcomes. An ability to protect and safeguard secret information and its sourcing is essential to their effectiveness. Their work requires the highest moral and ethical standards, aspects which are engrained in the Agencies' ethos.

3. Confidence in the integrity of the staff of the Agencies is paramount because they are required

to work covertly and out of the public eye. It is inherent in their work that most of it has to be done in secret in order to protect those who risk their lives for our security, to maintain the confidence and co-operation of partners overseas and to protect sensitive techniques, capabilities and relationships on which future security depends.

4. Secret intelligence allows the Government to monitor individuals, networks and events that pose a threat to national security and the economic well-being of the country. Secret intelligence is information obtained about individuals, groups or states without their knowledge. It may be acquired in many different ways, such as through the debriefing of human sources, interception of communications (for example telephone or email), or surveillance (both human and technical).

5. The UK is demonstrably a safer place as a result of the intelligence collected by the Agencies; governments have a right to use covert means to obtain intelligence in order to protect their citizens and defend their liberties.

6. Protection of intelligence sources is of paramount importance, never more so than in the case of human sources (also known as 'agents') – not only do the Agencies have legal obligations as well as fiduciary duties of care in this area, but the intelligence that flows from human source reporting is essential to the Agencies' operational effectiveness and is thereby essential to the protection of national security. The confidence of agents in the Agencies' ability to protect their identity is vital to the ongoing relationship and provision of information. Should that confidence be broken or eroded in any way, this will have a

serious deterrent or inhibitory effect on agent recruitment and retention, which in turn will have serious adverse consequences for the future flow of human intelligence, the Agencies' operational effectiveness and the protection of national security.

7. It is also vitally important to protect the secrecy of operations and investigations. If a hostile individual or group – for example a foreign intelligence service or terrorist group – were to become aware that they were the subject of interest to the Agencies, they could not only take steps to thwart any (covert) investigation or operation but also attempt to discover, and perhaps reveal publicly, the methods or techniques used or the identities of the officers or agents involved. Compromise of sources, methods, techniques or personnel affects both the individual investigation or operation and potentially all others, as the risk of deploying such sources, methods, techniques and personnel is increased.

8. Conversely, if a hostile individual or group were to become aware that they were not the subject of Agency interest, they would then know that they could engage or continue to engage in their activities with increased vigour and increased confidence that they will not be detected. So it is vitally important to protect the limit or the extent of the Agencies' coverage and capability. This is why Agencies have long relied on the principle of **'neither confirm nor deny'**.

### The role of the Diplomatic Service

9. Other areas of government activity also generate sensitive material, the protection of which is vital to the national interest. One such area is the conduct of the UK's diplomatic relations with other states and international organisations such as the United Nations and the European Union. Diplomatic relations cover a range of government business, including co-operation on issues such as trade and finance, energy, human rights, counter-terrorism and security policy. The transnational nature of these issues means that the UK is not able to respond to them alone, but must work with and through bilateral partners, i.e. other states and international organisations. In order for the UK to influence the international approach on

these and other issues, it must build and nurture relationships based on mutual trust and confidence with a wide range of partners, as a basis for frank dialogue and co-ordinated action.

10. The Government's ability to engage in this frank dialogue with other governments is built wholly on these partners' confidence that information they choose to share with the UK, which may for legitimate reasons not be in the public domain, will be treated in confidence, and the UK has a similar expectation of how other governments will treat information we choose to share with them. A loss of confidence in the UK's ability to protect sensitive diplomatic reporting would result in a gradual erosion of the Government's ability to gather the information and promote the sort of co-operation, through its diplomatic relations, that is essential to protect national security and promote the wider national interest.

11. Although the practical effect of any disclosure of sensitive information shared with the UK on diplomatic channels by another state is highly case specific, in the event of a failure to protect such information, the result is likely to be not merely embarrassment but potentially a real loss of trust and confidence by an international partner, which could overshadow diplomatic relations and adversely affect practical co-operation on important issues for some time. This could put the UK in a fundamentally weaker position – lacking the access to critical information and relationships, and correspondingly less able to influence – in protecting national security and promoting the wider national interest.



## Appendix B

# Public Interest Immunity

1. Public Interest Immunity (PII) is a mechanism for handling disclosure of sensitive information in litigation.

2. The courts have long recognised that evidence, while relevant to the issues between the parties in a case, must be excluded if the public interest in withholding the information outweighs the public interest in disclosing it. This involves the court balancing competing aspects of the public interest: the public interest in the non-disclosure of certain documents and the public interest in open justice. PII is a common law principle – that is to say, it has been established and developed through case law.

3. It used to be accepted that documents falling within a certain class of documents, such as

Cabinet documents, were immune from disclosure on that basis. However, since the statements made to Parliament by the Attorney General and the Lord Chancellor,<sup>1</sup> Ministers have focused directly on the damage which would be caused by disclosure and now claim PII only where the disclosure of the content of the document would cause real damage or harm to the public interest.

4. The areas of public interest which may be protected by PII include national security, international relations, and the prevention or detection of crime. The categories of PII are not fixed.<sup>2</sup> However, the courts will not recognise new classes of immunity without clear and compelling evidence.<sup>3</sup>

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<sup>1</sup> HC Debate 18 December 1996 vol 287 cc949–58 and 157 HL Official Report (5th Series) 18 December 1996, cols 1507–17. Note that these statements relate only to the operation of PII in England and Wales.

<sup>2</sup> Lord Hailsham remarked in *D v NSPCC* [1978] 2 All ER 589 that 'the categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop'.

<sup>3</sup> *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274

## Appendix C

# Closed material procedures

1. A closed material procedure (CMP), which involves the use of Special Advocates, is a procedure in which relevant material in a case, the disclosure of which would harm the public interest ('closed material'), can still be considered in the proceedings rather than being excluded as with PII.

2. It is designed to provide individuals with a substantial measure of procedural justice in the difficult circumstances where, in the public interest, material cannot be disclosed to them. It is therefore a mechanism for seeking to reconcile the public interest in open justice and the public interest in safeguarding national security.

3. The starting point in such proceedings is that the individual is given as much material as possible, subject only to legitimate public interest concerns. The disclosure process is designed to achieve this.

4. Proceedings have both 'open' and 'closed' elements. All the material – open and closed – that the Government relies upon in its case is laid before the court and the Special Advocate. The individual concerned and his legal representatives can be present at the open hearings, and see all the open material used in those hearings. They cannot be present at the closed parts of the proceedings, or see the closed material. The Special Advocate attends all parts of the proceedings, and sees all the material, including the closed material not disclosed to the individual. He can take instructions from the individual before he reads the closed material, and written instructions after he has seen the closed material. A Special

Advocate can also communicate with the individual after he has seen the material, provided it is with the permission of the court.

5. A Special Advocate is a security cleared barrister/advocate in independent practice who also receives special training for their role. The role of the Special Advocate is to act in the individual's interests in relation to closed material and closed hearings – although they do not act for the individual, nor is the individual their client.

6. Part of the function of Special Advocates is to ensure that the closed material is subject to independent scrutiny and adversarial challenge – including making submissions (in closed session) on whether or not the closed material should in fact be disclosed to the individual. Special Advocates can argue, and have successfully argued, that closed material should be disclosed in this way.

7. The judge in the case also has an important role to play in challenging the closed material and weighing the impact that non-disclosure has had on the fairness of the proceedings. It is not the Secretary of State but the court that determines whether or not material should be withheld. The disclosure process is designed to ensure that the maximum amount of material that can be disclosed to the individual without damaging the public interest is disclosed.

8. A CMP was first introduced in the context of immigration deportation decisions. Following the case of *Chahal v United Kingdom*,<sup>1</sup> the European Court of Human Rights acknowledged

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<sup>1</sup> 23 EHRR 413 (1996)

that reliance on confidential material might be unavoidable in cases where national security was at stake. The court cited with approval a system used in Canada which suggested that there could be procedures which 'both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice'.<sup>2</sup> The Special Immigration Appeals Commission Act 1997 introduced a CMP to remedy the deficiencies in the advisory panel system.

Other circumstances where statute provides for a CMP include:

- the Proscribed Organisations Appeal Commission
- proceedings in the Employment Tribunal concerning national security<sup>3</sup>
- control order cases under the Prevention of Terrorism Act 2005
- financial restrictions proceedings under the Counter-Terrorism Act 2008
- the Sentence Review Commission and Parole Commission in Northern Ireland.

## CMPs in Northern Ireland

9. CMPs in Northern Ireland are not unusual and generally take place in the context of prisoner release and recall hearings.

10. The Northern Ireland (Sentences) Act 1998 and associated rules provide for the early release of certain prisoners serving terms of imprisonment in Northern Ireland. Those released can be recalled to prison if they breach their licence conditions. This legislation allows the Secretary of State to certify information as 'damaging' and to present it to the Sentence Review Commissioners, the body which rules on prisoner release. In these circumstances the prisoner is provided with a 'gist' of the damaging information and is represented by a Special Advocate in the closed proceedings.

11. A similar process is provided for in the non-statutory additional safeguards to the Northern Ireland (Remission of Sentences) Act 1995, which allows prisoners convicted of certain offences under the Terrorism Act 2000 to be released on licence halfway through their sentence.

12. The Parole Commissioners' Rules (Northern Ireland) 2009 allow the Secretary of State to introduce 'confidential' information in release and recall cases considered by the Parole Commissioners. Confidential information may also be the basis for a decision by the Secretary of State to revoke a licence. The Special Advocate procedure applies.

<sup>2</sup> See [131] of *Chahal v United Kingdom* 23 EHRR 413 (1996)

<sup>3</sup> The Employment Tribunal has the power to hear closed information in cases involving Crown employment if it is 'expedient in the interests of national security' (see rule 54 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (S.I.2004/1861)).

## Appendix D

# *AF (No.3)* and the challenges of providing summaries of sensitive material

1. Following the European Court of Human Rights judgment in the case of *A and Others v UK*<sup>1</sup> (which related to the powers under Part 4 of the Anti-terrorism, Crime and Security Act 2001 to detain pending deportation foreign national suspected terrorists, even if deportation was not an option at that time), the House of Lords ruled, in *AF (No.3)*,<sup>2</sup> that for the stringent control orders before them, in order for control order proceedings to be compatible with Article 6, the controlled person must be given sufficient information about the allegations against them to enable them to give effective instructions to the Special Advocate in relation to those allegations. This means that, even where disclosure would be against the public interest (for example if disclosure could put the life of an informant at risk), the disclosure obligation set out in *AF (No.3)* now applies.

2. The Government faces difficult choices as to how best to protect the public interest following the *AF (No.3)* judgment. The Government must balance the importance of protecting the public from the risk of terrorism posed by the individual against the risk of disclosing sensitive material. Disclosing this material potentially reduces the Government's ability to protect the public from the risk of terrorism. Where the disclosure required by the court cannot be made because the potential damage to the public interest is too high, the Government must withdraw the information from the case. If the case cannot be sustained on the remaining material, the court will quash the control order because of this inability to disclose (which allows the individual to claim damages) even where we consider those orders

to be necessary to protect the public from a risk of terrorism. (The judgment caused particular difficulties in relation to control orders already in force at the time of the judgment, which had not been imposed with the new disclosure requirement in mind.) And the Government might not be able to impose a control order at all in a new case where it would otherwise wish to, because it may consider that the disclosure requirement could not be met.

3. Even where cases can be maintained, the Government may have to make damaging disclosure in order for the judge to uphold the order. Since 2009, some individuals have had their control orders revoked (and subsequently quashed) because the Government considered it could not make the disclosure required by *AF (No.3)*. However, other control orders have been upheld by the High Court when considered in light of the requirements of Article 6 following *AF (No.3)*. This demonstrates that the regime remains usable, notwithstanding the problems caused by *AF (No.3)*.

4. The Government has announced that it will be repealing control orders legislation and replacing it with a new system of terrorism prevention and investigation measures (TPIM). The disclosure requirements required by the judgment in *AF (No.3)* will be applied as appropriate by the courts in TPIM proceedings.

5. Since judgment was given in *AF (No.3)*, there has been ongoing litigation about the reach of that judgment to other proceedings that use sensitive material.

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1 [2009] ECHR 301

2 [2009] UKHL 28

## Appendix E

### Section 2(2) of the Security Services Act 1989 and sections 2(2) and 4(2) of the Intelligence Services Act 1994

1. The Head of each Agency has a duty to ensure that there are arrangements in place for securing that information is only obtained to the extent necessary for the proper performance of that Agency's functions and that no information is disclosed by that Agency except to the extent that it is necessary:

- for the proper discharge of its functions
- in the protection (or in the interests) of national security
- for the purpose of preventing or detecting serious crime, or
- for the purpose of any criminal proceedings.

2. Although the wording of section 2(2) of the Security Service Act 1989 and sections 2(2) and 4(2) of the Intelligence Services Act 1994 differ slightly, there is considered to be no material difference between them in their practical operation or effect.

3. The arrangements for which the Head of each Agency is responsible are thus drawn tightly around that Agency's statutory functions, and Parliament has very narrowly drawn the lawful scope for disclosure.

4. Decisions on disclosure covered by these provisions are routinely taken at all levels within an Agency on a day-to-day basis. Important decisions on disclosure, particularly where there are significant legal and/or political implications, are taken at a senior management level, and sometimes by the Head of the Agency.

## Appendix F

# Further analysis on Special Advocates

1. Since Special Advocates were introduced in 1997, various select committees and non-governmental organisations have raised concerns about their operation. Special Advocate arrangements have changed over the years to address many of these concerns – for example, the Special Advocate Support Office was set up, training sessions were introduced and the system for appointing Special Advocates was amended.

2. Many further arguments for change have been made before the courts in litigation, and (excluding the disclosure requirement in some contexts as a result of *A and Others v UK*<sup>1</sup>) the courts have so far not accepted that changes to the system need to be made in order for it to be compliant with the European Convention on Human Rights (ECHR). However, in light of our consideration of extending the use of closed material procedures (CMPs), we have looked again at many of these concerns. A principal concern relates to the limitations on communication between the Special Advocate and the individual after they have seen the closed material. This is addressed in the main body of this Green Paper (see paragraphs 2.28–2.36). Other concerns include:

### Reporting of closed judgments

3. In cases involving sensitive material, the judge is under a duty to put as much of his judgment into open court as possible, including statements of legal principle that are most likely to have cross-case relevance. However, there may be the need for a closed judgment. These judgments contain highly sensitive material and so cannot be openly published. Special Advocates are able to make requests to see closed judgments relevant to their case. However, concerns have been raised that Special Advocates face difficulties in establishing whether or not closed judgments relevant to their work have been handed down by the courts. As recommended in the Review of Counter-Terrorism and Security Powers, the Home Office is taking forward work to develop closed head notes for closed judgments to summarise the broad subject of the judgment and to include key words for search purposes, in order to assist Special Advocates in accessing relevant case law.

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<sup>1</sup> (2009) 49 EHRR 29

### Ability of Special Advocates to call expert witnesses

4. Special Advocates have raised concerns about their ability to call witnesses to challenge the Agencies on sensitive material. Special Advocates are now open to call experts and adduce evidence.<sup>2</sup> However, it would not be appropriate for serving or former employees of the Agencies to take on such a role, and in any case, Special Advocates may not view Agency employees as impartial. If the Special Advocate identifies another suitable witness, either the witness would have to be subject to rigorous security vetting or the questions would need to be posed in an open hearing following notification being given to the Secretary of State. We recognise that in some cases these options may not be practicable, and that is why we are recommending providing further training to Special Advocates (as outlined in paragraph 2.24), to ensure that they are able to understand and challenge sensitive material themselves. In addition, the Agencies are keen to help Special Advocates with specific or general enquiries where possible.

### Late service of material in proceedings

5. Special Advocates have raised concerns that the closed material is often provided to them very late, hindering their ability to function effectively. The Government always seeks to ensure that service of closed material is achieved according to the directions set by the court wherever possible and we reject the allegation that there is a systemic problem of late service of closed material by the Secretary of State. It is the courts who are responsible for setting the timetable for service of material and it is open to the judge to adjourn the proceedings if any real prejudice has been caused to the individual represented by the Special Advocate.

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2 The Government changed the rules governing control order and asset freezing proceedings in 2009 to make clear that Special Advocates can call expert witnesses and adduce evidence. While it was already open to the Special Advocates to do so, this brought this element of the rules formally in line with those for the Proscribed Organisations Appeal Commission and the Special Immigration Appeals Commission, which were changed in 2007.

# Appendix G

## Remit of the Commissioners

### Interception of Communications Commissioner

1. The main functions of the Interception of Communications Commissioner, appointed under section 57 of the Regulation of Investigatory Powers Act 2000 (RIPA), are to keep under review:

- the Secretary of State's role in authorising warranted interception
- the operation of the regime for the acquisition of communications data by public authorities
- the Secretary of State's role, in relation to intercepted material or communications data, in authorising the giving of notices imposing disclosure requirements in respect of encrypted information
- the adequacy of the arrangements in force for restricting the use of intercepted material and protecting encryption keys for intercepted material and communications data.

### Intelligence Services Commissioner

2. The main functions of the Intelligence Services Commissioner, appointed under section 59 of RIPA, are to keep under review:

- the exercise of the Secretary of State's powers to issue, renew and cancel warrants for entry on or interference with property or with wireless telegraphy
- the exercise of the Secretary of State's powers to authorise acts done outside the UK, which may be unlawful without such an authorisation
- the exercise and performance of the Secretary of State's powers and duties in granting authorisations for intrusive surveillance and the investigation of electronic data protected by encryption
- the exercise and performance by members of the intelligence services of their powers and duties under Parts II and III of RIPA, in particular with regard to the grant of authorisations for directed surveillance, and for the conduct and use of covert human intelligence sources and the investigation of electronic data protected by encryption.



## Appendix H

# The Intelligence and Security Committee

1. The Intelligence and Security Committee (ISC) examines the expenditure, administration and policy of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (GCHQ). It has nine members drawn from both Houses of Parliament.

2. Members are appointed by the Prime Minister in consultation with the Leader of the Opposition. The ISC makes an annual report to the Prime Minister on the discharge of its functions. The Prime Minister lays this report before Parliament.

3. If it appears to the Prime Minister that the publication of any matter in a report would be prejudicial to the continued discharge of the functions of the security and intelligence agencies, the Prime Minister may exclude that

matter from the copy of the report laid before Parliament. Heads of Agencies may decline to disclose information to the ISC on the basis that it is sensitive information. The relevant Secretary of State has the power to overrule this decision if they decide it is in the public interest.

4. The appropriate Secretary of State also has a separate power to determine that information should not be disclosed to the ISC. This power cannot be exercised on national security grounds alone, and subject to that, the Secretary of State shall not make a determination not to disclose unless the information appears to them to be of such a nature that, if they were requested to produce it before a Departmental Select Committee of the House of Commons, they would think it proper not to do so.

# Appendix I

## Possible model for an Inspector-General

1. An Inspector-General (IG) could oversee the powers and policies of the security and intelligence agencies and retrospectively review their operational activity. An IG for the Agencies could replace the Intelligence Services Commissioner and part of the remit of the Interception of Communications Commissioner.

2. An IG could be responsible for oversight of all the Agencies' covert investigation techniques, including the use of authorisations under the Intelligence Services Act 1994, and use by the Agencies of powers under the Regulation of Investigatory Powers Act 2000 (RIPA) Part I Chapter I (interception) and Chapter II (communications data), Part II (surveillance and CHIS) and Part III (encrypted data). It could also be responsible for oversight of requirements arising out of new government policies or legislation or the development of new practices. The IG could also provide legal advice and guidance to the Agencies on the use of their covert investigative techniques.

3. An IG could review the policies and procedures of the Agencies that relate to operational activities, including ethical matters. Ethical matters could be referred from, and reviewed, in close co-operation with the Staff Counsellor.

4. An IG could have a retrospective review function that would include the ability to launch its own enquiries into past Agency operational activity. It could have a right to request intelligence, subject to Ministerial veto.

5. This would create two distinct oversight bodies: one focused on the Agencies, and one on all other public authorities with RIPA powers.

The risk of this approach is that oversight of interception would be split between two different bodies, possibly leading to different standards or approaches emerging. This would need to be managed and would not necessarily be straightforward.

6. The IG could have a statutory duty to consult the Prime Minister on its annual work programme. It could produce an annual report for the Prime Minister, and publish reports on the outcome of the retrospective enquiries into Agency operational activity and reviews into operational policies. The IG could have a duty to develop an effective public profile for its work.

7. An IG could be appointed by, and answerable to, the Prime Minister. The post could have some form of pre-appointment scrutiny by Parliament and/or could be advertised publicly. The role could be filled by a suitably experienced judge. If this was not a judicial appointment, the IG could be a senior civil servant but would need to be supported by a legal adviser with the appropriate legal and/or judicial experience. The IG could head up a team which would include a Secretariat and specialists with responsibility for aspects of the work of the IG (e.g. interception).

## Appendix J

# Use of sensitive information in judicial proceedings: international comparisons

1. In preparing this Green Paper, the Government has surveyed a range of international practice in order to understand how other governments address the challenge of handling sensitive material in judicial proceedings. We have developed the proposals following full and careful consideration of the experience and approaches of other governments – including those who are signatories to the European Convention on Human Rights (ECHR) and those who are not, and both common law and civil law systems – and seeking to learn from their experience.

### Summary of international comparisons research

2. The use of sensitive material in court proceedings relating to national security is a live issue and the subject of public debate in many countries. We believe that the large volume of complex counter-terrorism-related litigation in the UK has created a particularly acute set of pressures on the Government and the court system, which is not necessarily the case everywhere. Nonetheless, since 2001, many countries, including the Netherlands, Australia and Canada, have passed legislation in order to enhance their ability to rely on and protect sensitive information in hearings relating to national security. Provisions akin to Public Interest Immunity (PII), allowing the court to balance the public interest in disclosure against the public interest in non-disclosure, are very widely used, but have been supplemented in many jurisdictions by more tailored approaches in the national security context.

3. Several jurisdictions make use of **closed material procedures (CMPs)**, either in an immigration context or with wider application in civil and criminal procedures. In Canada, legislation provides for the use of CMPs and Special Advocates in certain circumstances, such as where a security certificate has been issued under the Immigration and Refugee Protection Act 2001 (IRPA). In 2009, the Danish Parliament passed legislation providing for the Justice Minister to request use of CMPs and Special Advocates in national security deportations. The arrangements in both Canada and Denmark, designed to protect information and ensure procedural fairness where the government is defending an appeal against an immigration decision which was based on sensitive information, bear some similarities to the UK's Special Immigration Appeals Commission (SIAC).

4. The Netherlands and Australia make limited use of CMPs in different contexts. In Australia, under the National Security Information (Criminal and Civil Proceedings) Act 2004, the Attorney General may issue a non-disclosure certificate for the purposes of a proceeding to which the Act applies, where there may be a disclosure of national security information, and if the Attorney General considers that the disclosure is likely to prejudice national security. The certificate provides for a closed hearing to determine if the information may be disclosed and in what form. Under this Act, national security information refers to information that relates to national security, or the disclosure of which may affect national security, defined as Australia's defence, security, international relations or law enforcement interests. In the Netherlands,

the Intelligence and Security Services Act 2002 allows the government to refuse to disclose sensitive material if disclosure would damage national security. With the claimant's consent, the material may be shared with the judge, who balances the claimant's interest against the public interest in non-disclosure in deciding whether to admit it as evidence. If the judge assesses that the public interest in non-disclosure is stronger than the information may, with the claimant's consent, still be admitted as evidence and be disclosed only to the court.

5. In Canada, **Special Advocates** have been a feature of the legislative immigration framework since 2008, as part of the IRPA. IRPA provides for use of CMPs and Special Advocates when the Government has issued a national security certificate on a case, indicating that the immigration decision was taken using sensitive information. In terms of communication between the Special Advocate and the individual(s) they represent, there have been more such attempts in Canada than in the UK, although the number is not high. We judge that higher levels of communication probably arise out of both legislative provisions and case law, as well as the practical approach to case management that has developed in Canada.

6. The Government considered the operation of systems based on an **inquisitorial model** of justice, to assess whether such systems reduced the risk of disclosure of sensitive information more effectively than adversarial systems. Our goal was to establish whether enhancing the case management powers of judges in the early stage of a case would result in cases being streamlined consistently and consequently fewer issues being contested during later stages of proceedings. Based on our research, we do not believe that any of the predominantly inquisitorial jurisdictions we surveyed have had to handle the volume of national security litigation we have seen in the UK, in particular anything on the scale of the Guantanamo civil damages claims. As such, it is difficult to draw direct comparisons and conclusions as to whether the active involvement of judges in case management is a significant factor in reducing their resource burden. As we have noted elsewhere in this Green Paper, a greater role for judges would likely mean a reduced role

for Special Advocates, and moreover a judge may conclude, based on initial fact-finding work, that the scope needs to be broadened rather than narrowed. It is also noteworthy that civil law systems with a largely inquisitorial heritage do feature adversarial elements after the initial stages of the case have been completed, and the trend has been for this to increase in recent years in response to the ECHR. Our consideration of international practice in this area thus supports our conclusion that there would be no clear benefits, but instead significant costs, from introducing more active case management powers for judges.

7. Similarly, no country we surveyed had established a **specialist court** to hear cases in which sensitive information would be considered, or had actively promoted judicial specialisation. In the Netherlands, most terrorist criminal cases are heard before the Rotterdam District Court, but this is for practical reasons, because the National Public Prosecutor on Counter-Terrorism is based in Rotterdam. As discussed elsewhere, we judge that sensitive information may arise in a broad range of types of case – many will be related to action the Government has taken as part of its approach to counter-terrorism, but this is not exclusively the case and moreover may change over time in response to real-world developments. We have therefore proposed that the Government work with existing judicial case-allocation systems, which over time should allow cases using sensitive material to be allocated to a judge with experience in the particular requirements of handling such material, but also with an appropriate specialist legal background. Our survey of international practice did not provide a compelling case for going beyond this.

8. We noted a range of practice in terms of the use of specific provisions, in legislation or elsewhere, to guide the **handling of foreign-sourced material**. Some countries make explicit provision for how foreign-sourced material should be handled, for example the law may set out the steps the UK Government is expected to take with the other government in order to seek permission to disclose the document. In other cases, foreign-sourced material is treated as one type of sensitive material and treated implicitly within the same

framework. In practice, the practical operation of either system and its ability to safeguard sensitive material from disclosure will depend to a great extent on the approach taken by the courts.

9. The only exception to the exercise of judicial discretion in the disclosure not only of foreign-sourced material but of any sensitive material, would be where the Government has in place some form of '**executive veto**' on disclosure. Of the countries we surveyed, we understand provisions akin to an executive veto to exist only in Canada and the US, although some role for judicial challenge remains. In the US there are various mechanisms for the protection of classified information, principally but not limited to state secrets privilege (SSP), under which the relevant US Government agency or department, with the Attorney General's approval, may assert that information may not be disclosed where there is a reasonable expectation of significant harm to national security. These measures combine to provide effective safeguards against disclosure of sensitive information. Assertions of SSP, and the legal consequences of such claims, have been challenged in the US courts, most recently in the case of *Binyam Mohamed et al. v Jeppesen Dataplan, Inc.* However, where the privilege is properly asserted, the courts have generally upheld the claim, deferring to Executive assessments of the risk to national security. In Canada the power has never been used, but the Attorney General may, in certain limited circumstances, personally issue a certificate under the Canada Evidence Act 1985 prohibiting disclosure following a court order that it should be released. This veto is not unconditional and is subject to limited review by a judge, under the Canada Evidence Act 1985.

## Conclusion

10. A wide range of international partners face the same fundamental challenge of protecting sensitive information while ensuring that the courts have the tools available to deliver high standards of justice. However, as set out elsewhere in this Green Paper, the UK faces a unique and unprecedented set of circumstances. We face a high threat from terrorism. The Joint Terrorism Assessment Centre (JTAC), whose role is to provide independent assessments of the threat to the UK from international terrorism, has assessed the threat as at least severe between 2006 and 2009, and no lower than substantial since 2006. This threat demands a comprehensive and sophisticated response. The cornerstone of this response will always be police-led work to prosecute terrorists, and the Government has prosecuted 241 individuals since September 2001<sup>1</sup> for terrorism offences. But prosecution is not always possible and other actions, which support and complement prosecution, are equally important. This includes the Agencies' vital work to gather information on threats by working with foreign intelligence services, as well as a limited number of non-prosecution tools that enable Ministers to disrupt suspected terrorist activity.

11. The wide scope of this counter-terrorist activity has given rise to a range of legal challenges – including statutory appeals against executive action, civil claims for damages, judicial reviews and requests for 'Norwich Pharmacal' relief – which we believe is unusual internationally and exceptional among ECHR signatory states. We estimate that sensitive information is central to 27 cases<sup>2</sup> (excluding a significant number of appeals against executive actions) currently before the UK courts, and in many of these cases judges do not have the tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts. In the case of 16 civil claims brought by former residents of Guantanamo Bay, the sensitivity of the centrally

1 Home Office statistical bulletin 30 June 2011, Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop and searches, Quarterly update to December 2010

2 According to current records of the Treasury Solicitor's Department

relevant documents meant that the Government did not feel the court process would be able to deliver a judgment based on all the facts, and had little choice but to propose a mediated settlement in late 2010, with all the attendant disadvantages for the public purse and for the administration of justice.

12. In developing the proposals in this Green Paper we have given full and careful consideration to the approaches used by other countries. We have also been mindful of the specific circumstances we face in the UK, and the need to put forward proposals that are tailored to these circumstances and that will respond to the opportunity we now have to put the judicial system on a stronger long-term footing in meeting the needs of both justice and national security. The proposals build on other countries' experience where possible, and where necessary they propose more fundamental and far-reaching reform than has been attempted elsewhere – for example legislation to provide for the extension of CMPs to the range of civil proceedings. We believe that this is a proportionate and balanced response to the challenges we face, and that it will allow us to deliver standards of procedural fairness consistent with both our values as a nation and our international legal obligations.

# Appendix K

## Equality duties and impact assessments

### Equality

Under the Equality Act 2010, when exercising its functions, the Government has an ongoing legal duty to pay 'due regard' to:

- the need to eliminate unlawful discrimination, harassment and victimisation
- advancing equality of opportunity between different groups
- fostering good relations between different groups.

The payment of 'due regard' needs to be considered against the nine 'protected characteristics' – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender identity, and pregnancy and maternity.

The Government has a legal duty to investigate how policy proposals are likely to impact on the protected characteristics and take proportionate steps to mitigate the most negative ones and promote the positive ones.

Many of the most recent cases that illustrate the challenges of using sensitive information in civil proceedings have been taken by men from the following racial groups: Asian (British and South East), Arab (Middle Eastern) and North African; and the following religion: Islam.

At this stage, while this demonstrates a differential impact, the Government does not believe that there will be an adverse impact on any individual from any of these groups. The proposals on CMPs made in the Paper seek to improve fairness by

ensuring that all relevant information can be taken into account by the courts and will be available across the civil justice system generally. No firm proposals have been made in respect of inquests, but it is clear that changes could have a significant impact in Northern Ireland, affecting inquests into the deaths of a broad range of individuals from across the community, including members of the security forces, civilians and paramilitaries.

Given that the conclusions above are based on a small sample of cases and that the proposals have a potentially very broad application, it is unclear at this stage whether the patterns of impact identified above will continue. During the consultation period the Government will consult widely on the proposals, including with representative groups, and seek further views and evidence of the impact of the proposals on the protected characteristics.

**Please provide details of any evidence you are aware of which indicates that any of the proposals outlined will have either a positive or negative impact on any of the protected characteristics.**

## Impact assessments

The Government has carried out separate impact assessments in support of this Green Paper. The impact assessments present the evidence base supporting the rationale for government intervention and estimate the costs, benefits, risks and wider impacts associated with the proposed options. They follow the procedures set out in the *Impact Assessment Guidance* and are consistent with the HM Treasury *Green Book*.

**In addition to responding to the consultation questions within the Green Paper, readers are also invited to comment on the analysis contained within the impact assessments.**



# Glossary

Below is a list of key terms found in this Paper and how they are used in this particular context.

Term	Summary
<p><b>Active case management</b></p>	<p>A civil court in England and Wales is required under Rule 1.4 of the Civil Procedure Rules to further its overriding objective of hearing cases justly by actively managing cases. Active case management is defined in Rule 1.4(2) as including, but is not limited to, early identification of the issues, deciding the order in which issues are to be resolved, fixing timetables and controlling progress of the case. For the purposes of managing a case, the court has a wide range of general case management powers, listed in Rule 3, but those powers are not exclusive and are in addition to any other powers that the court may otherwise have. In the context of this consultation document, references to more active case management powers for judges mean giving the court such other, greater powers to determine the issues in the case and the relevance of certain evidence, which might, for example, include the power for the judge to cross-examine witnesses or order expert reports.</p>

Term	Summary
<b>Civil proceedings</b>	<p>For the purposes of this Green Paper any court or tribunal proceedings which are not criminal in nature are referred to as civil proceedings. Civil proceedings include, but are not limited to, areas such as public law (i.e. judicial review), negligence, family law, employment law, property law and commercial law.</p> <p>By contrast, criminal proceedings involve an accusation by the state (or in England, Wales and Northern Ireland, occasionally by way of a private prosecution) that the accused has committed a breach of the criminal law which, if proved, would lead to conviction and the imposition of a sentence. Crimes are generally wrongs which affect the public as a whole, so that the public has an interest in their detection and punishment.</p> <p>The proposals outlined in this Paper do not affect criminal proceedings.</p>
<b>Confidentiality ring</b>	<p>A confidentiality ring is an arrangement in England and Wales which may be agreed between the parties to civil litigation or ordered by the court whereby documents are disclosed only to a party's legal representatives but not to the parties to the litigation themselves. A confidentiality ring may be used in intellectual property or commercial cases where open disclosure would render the proceedings futile. A failure to abide by the agreement may amount to contempt of court.</p>
<b>Control order</b>	<p>The Prevention of Terrorism Act 2005 provides the Home Secretary with the power to impose a control order on an individual whom they reasonably suspect is or has been involved in terrorism-related activity and where they consider it is necessary for purposes connected with protecting members of the public from a risk of terrorism. A control order may impose any obligation on the individual that is necessary to prevent or restrict that individual's involvement in terrorism-related activity. Under the Terrorism Prevention and Investigation Measures (TPIM) Bill currently before Parliament, control orders are to be replaced by TPIM notices.</p>

Term		Summary
<b>CPR</b>	Civil Procedure Rules	<p>Consolidated rules of court governing (since 1999) the practice and procedure in civil proceedings in the Court of Appeal, High Court and County Courts in England and Wales.</p> <p>The courts in Scotland and Northern Ireland operate under their respective rules of court.</p>
<b>Disclosure</b>		The act of providing documents or information (sensitive or otherwise), whether under the relevant procedural rules or following a court order.
<b>ECHR</b>	European Convention on Human Rights	An international agreement drafted after World War II by the Council of Europe (a separate body from the European Union). The UK ratified the Convention in March 1951, and it came into force in September 1953. The Convention is made up of a series of articles, each of which is a short statement defining a right or freedom, together with any permitted exceptions. The rights in the Convention apply to everyone within the jurisdiction of the states that are parties to the Convention.
<b>ECtHR</b>	European Court of Human Rights	A court established by the ECHR to hear cases where individuals or states assert that a state party to the ECHR has violated rights under the Convention. The Court is based in Strasbourg, France. States party to the ECHR are bound by the Court's judgments.
<b>Gisting</b>		A feature of closed material procedures: a summary of closed material is provided to the individual whenever it is possible to summarise that material without disclosing information contrary to the public interest. The AF (No.3) disclosure requirement (also sometimes referred to as 'gisting') goes further than this and requires Government to give the individual sufficient information about the allegations against them to enable them to give effective instructions to the Special Advocate, even if disclosure of that information is damaging to the public interest.

Term		Summary
<b>IAE</b>	Intercept as evidence	The use of intercept material (e.g. telephone calls, emails and other internet communications) as evidence in criminal proceedings. Though this is not currently available, the Government is committed to seeking a practical way of allowing the use of intercept as evidence in court.
<b>IPT</b>	Investigatory Powers Tribunal	An independent tribunal through which individuals can raise allegations against the security and intelligence agencies of misuse of the powers set out in the Regulation of Investigatory Powers Act 2000 and complain about any other conduct by the security and intelligence agencies.
<b>Judicial review</b>		The procedure by which the decisions of a public body can be reviewed by the courts.
<b>Ministerial responsibility</b>		The ultimate responsibility for the actions of the security and intelligence agencies lies with their Secretaries of State: the Foreign Secretary for the Government Communications Headquarters and the Secret Intelligence Service, and the Home Secretary for the Security Service.
<b>Natural justice</b>		A term used to describe the need for fairness or 'due process' when a court or tribunal is determining the rights and obligations of parties.
<b>Neither confirm nor deny</b>		The policy of successive governments and of the security and intelligence agencies to neither confirm nor deny the veracity of claims or speculation about sensitive national security matters and to avoid comment on such matters generally.
<b>Open court</b>		The general rule is that a court hearing is to be in public, or 'open court', and may be attended by members of the public and the media (in England and Wales, see Civil Procedure Rules, Rule 39.2). In addition, judgments are made public and the media are permitted to report any open aspect of the proceedings
<b>Private hearings</b>		A private (or <i>in camera</i> ) hearing is part or all of a civil hearing from which the press and public are excluded but not the litigants and their legal advisers. (In England and Wales the circumstances in which a private hearing may be held are set out in the Civil Procedure Rules, Rule 39.2.)

Term	Summary
<b>Public interest</b>	‘Public interest’ is not defined in legislation. It signifies something that is <b>in the interests of</b> the public as distinct from matters which are <b>of interest to</b> the general public. There are different aspects of the public interest, such as the public interest that justice should be done and should be seen to be done in: defence; national security; international relations; the detection and prevention of crime; and the maintenance of the confidentiality of police informers’ identities, for example.
<b>Rule 43 Report</b>	A report written by a coroner pursuant to Rule 43 of the Coroners Rules 1984. The report is made to persons or organisations following the coroner’s investigation, where the coroner feels that actions could potentially be taken by those persons or organisations to avoid future deaths, by using the lessons identified from the facts heard at the inquest. In Northern Ireland, a similar power exists in Rule 23(2) of The Coroners (Practice and Procedure) Rules (Northern Ireland) 1963.
<b>Special Advocate Support Office</b>	The office which provides support and instructions to Special Advocates in England and Wales.
<b>Sensitive material/information</b>	Any material/information which if publicly disclosed is likely to result in harm to the public interest. All secret intelligence and secret information is necessarily ‘sensitive’, but other categories of material may, in certain circumstances and when containing certain detail, also be sensitive. Diplomatic correspondence and National Security Council papers are examples of other categories of material that may also be sensitive.

Term		Summary
<b>SIAC</b>	Special Immigration Appeals Commission	The Special Immigration Appeals Commission was created by the Special Immigration Appeals Commission Act 1997. It deals with appeals in cases where the Home Secretary exercises their statutory powers to deprive an individual of their British citizenship, deport an individual from the UK, or revoke an individual's immigration status (which allows for an individual's exclusion from the UK) where there is reliance on information the disclosure of which would be contrary to the public interest on the grounds of national security, in the interests of the relationship between the UK and another country or for other public interest reasons.
<b>Strike out</b>		A court may strike out a claim if it decides that the claim has no reasonable prospect of success, or is an abuse of process, or would be against the public interest to proceed, and that it cannot be allowed to continue. In Scotland such a claim would simply be 'dismissed'.



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