



# Joint Committee on Human Rights

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The Rt Hon Kenneth Clarke QC MP,  
Secretary of State for Justice and Lord Chancellor,  
Ministry of Justice,  
Selborne House,  
54 Victoria Street,  
London SW1E 6QW

Wednesday 9 November 2011

Dear Secretary of State,

## *Justice and Security Green Paper*

The Joint Committee on Human Rights is currently scrutinising the proposals in the Government's Justice and Security Green Paper for compatibility with the common law rights to a fair hearing and to open justice and with the UK's international human rights obligations. A number of issues have arisen from the Committee's first consideration of the Green Paper on which it would assist the Committee to have more detailed information than is available in the Green Paper itself.

The Committee would therefore be grateful to receive a fuller human rights memorandum assessing the compatibility of the proposals in the Green Paper with both the UK's international human rights obligations and the common law rights to a fair hearing and open justice. I would be grateful if your memorandum could include answers to the following questions.

### **Extent of the use of closed material procedures**

The previous Government provided this Committee's predecessor with a list of 21 different contexts in which it said it was "aware" that special advocates have been or may be used. The Green Paper (para. 2.37) states that "the Special Advocate system is provided for in legislation in 14 different contexts of civil proceeding".

**Q1: Please provide an exhaustive list of the 14 different contexts in which the Green Paper says that the special advocate system is provided for in legislation in civil proceedings, including the specific statutory provisions in question.**

The Committee's predecessor in the last parliament called for a comprehensive review of the use of secret evidence, with a view, amongst other things, to ascertaining the extent of such usage.

**Q2: Was the Green Paper preceded by a comprehensive review of the extent to which secret evidence is already being used in different contexts in the UK?**

### **The scale of the problem**

The justification for the proposal to extend the use of close material procedures to the full range of civil proceedings is that such procedures are an improvement on “Public Interest Immunity” (“PII”) because they mean that cases can be decided by courts on the basis of such material. Under the present system, the Government asserts, cases are too frequently either struck out because the case is not triable or settled because the defendant (usually the Government or a public authority) cannot defend themselves because they cannot put the sensitive material before the court without it also being disclosed to the other side. The Green Paper is not clear, however, about the evidence that exists about the scale of these problems.

**Q3: Apart from the case of *Carnduff v Rock*, is the Government aware of any other cases in which a civil claim has been struck out by the court because the determination of the claim would have required the disclosure of sensitive information and the case was therefore not triable?**

**Q4: Apart from the claims in the *Al Rawi* litigation, in how many civil claims has the Government settled the case because the only way to defend the claim would have been to disclose sensitive information?**

In the Green Paper the Government estimates that “sensitive information is central to 27 cases ... currently before the UK courts, and in many of these cases judges do not have the tools at their disposal to deliver justice based on a full consideration of the facts” (Appendix J, para. 11).

**Q5: Of the 27 cases concerning sensitive information which the Government says are currently before the courts, how many are cases in which the Government cannot defend itself against the claim because the sensitive information is central to the Government’s defence?**

**Q6: Does the Government intend to make closed material procedures available in civil proceedings which are already ongoing and, if so, why would that be compatible with the principle of non-retrospectivity?**

**Q7: Please explain why the common law of public interest immunity is inadequate to deal with the problem of disclosure of sensitive information. What is the evidence that the current system of PII is not working well?**

### **The scope of the proposals**

In your Foreword to the Green Paper you talk of the increasing numbers of cases challenging Government decisions and actions “in the national security sphere” and state that the proposals in the Green Paper aim to “protect national security by preventing

damaging disclosure of genuinely national security sensitive material." However, the Green Paper itself defines "sensitive material/information" as "any material/information which if publicly disclosed is likely to result in harm to the public interest". The "public interest" itself is not exhaustively defined in the Green Paper, but is said to have many different aspects, including "defence, national security, international relations, the detection and prevention of crime, and the maintenance of the confidentiality of police informers' identities", for example. Elsewhere in the Green Paper it is used to include "the economic well-being of the country".

**Q8: Why is it necessary to introduce closed material procedures in the full range of civil proceedings to protect sensitive information the disclosure of which would not be harmful to national security?**

**Q9: Would the disclosure of commercially sensitive information be harmful to the public interest within the meaning of the Green Paper? If so, is the Government proposing that closed material procedures would, in principle, be available in civil proceedings where there was a risk of disclosure of commercially sensitive information?**

#### **Judicial or executive control of disclosure**

The Green Paper proposes a mechanism for triggering closed material procedures in new contexts: the Secretary of State will decide if the disclosure of certain sensitive material would cause damage to the public interest and that decision of the Secretary of State's would be reviewable by the trial judge "on judicial review principles."

**Q10: What is the justification for moving from judicial control of disclosure to executive control, subject only to judicial review?**

The Green Paper also states that the number of cases in which closed material procedures would be used will be a very small percentage of the overall number of civil cases passing through the courts each year.

**Q11: How is it intended to ensure that closed material procedures would only be used in the most exceptional cases?**

One of the Government's concerns about the civil claims brought by the former Guantanamo detainees was that the disclosure process alone would have required the staff of the intelligence and security services to sift through tens of thousands of potentially relevant documents, a process which it was estimated would take at least three years. Under the proposals in the Green paper, however, it will still be necessary for the Government, or relevant agencies, to sift through all the material in its possession which is potentially relevant to the determination of the claim before deciding whether disclosure of such material would damage the public interest.

**Q12: Please explain precisely how the proposals in the Green Paper will reduce the amount of time and resources that would need to be spent sifting through potentially relevant documentation in response to civil claims.**

### **Impact of the proposals on press freedom**

The Green Paper does not contain any analysis of the implications of the proposals for the freedom of the press to report on matters of public concern.

**Q13: Please include in your response a detailed analysis of the compatibility of the proposals in the Green Paper with the freedom of the press, and Article 10 ECHR in particular.**

### **International comparisons**

The Green Paper includes a summary of the Government's survey of international practice, at Appendix J.

**Q14: Will the Government publish the full research report in order to ensure that scrutiny of the proposals in the Green Paper is as fully informed as possible?**

The Green Paper says (in Appendix J) that the UK "faces a unique and unprecedented set of circumstances", because "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."

**Q15: In what sense are the circumstances facing the UK "unique"?**

**Q16: Has the Government carried out a comparison of the volume of complex counter-terrorism-related litigation in the UK relative to other comparable jurisdictions, such as the U.S.?**

**Q17: Does the Government rely on any other justification for going further than other countries in its proposed use of secret evidence?**

The Green Paper states (para. 1.27) that "A number of other countries use CMPs in civil legal proceedings."

**Q18: Is the Government aware of any other common law jurisdiction in which closed material procedures are available in the full range of civil proceedings, other than for the purposes of determining disclosure questions? If so, please provide details of the specific legislative provisions in those jurisdictions.**

**Q19: What consideration has the Government given to relevant decisions of the European Court of Justice concerning the use of secret evidence, such as *Kadi* and *French Republic v People's Mojahedin Organisation of Iran*?**

It would be helpful if we could receive your reply by **22 November 2011**. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

I look forward to hearing from you.

*yours*

*Hywel*



Dr Hywel Francis  
**Chair**