JOINT COMMITTEE ON HUMAN RIGHTS INQUIRY INTO JUSTICE AND SECURITY GREEN PAPER

MINISTRY OF JUSTICE MEMORANDUM

EXECUTIVE SUMMARY

Sensitive information is becoming relevant in an ever-increasing range of cases and the Government wants to ensure access to justice for all parties, whilst also protecting that sensitive information.

2 We rely more than ever on the security and intelligence agencies to identify and counter threats. Success in uncovering and stopping these plots depends on the agencies being able to deploy all the covert sources, methods and techniques at their disposal, working closely with equivalent services in other countries, which must necessarily be protected from public disclosure. Intelligence sharing is now a vital component in our approach to protecting the public at home and abroad.

3 The Justice and Security Green Paper makes proposals to equip the courts with the tools to examine that sensitive information where it is relevant in a case. These issues could arise in an extremely wide range of civil proceedings. Without the right tools in place cases could be struck out as untriable, or the Government would continue to be left with the unwelcome and unacceptable choice of either disclosing the material in open court which could damage national security, attempting to defend the case whilst being unable to make available relevant sensitive information (which might therefore result in unfairness) or withdrawing an action, offering no defence or settling a case by paying compensation despite being convinced that its actions were lawful.

4 Public Interest Immunity (PII) is the current means of dealing with these challenges, but by its nature it involves the exclusion of material from consideration in court proceedings. The Green Paper seeks to ensure that the courts can take fair account of all relevant information, even where some of that information is too sensitive to be disclosed to the public. A key part of the proposals is a strong and independent judiciary as an effective safeguard of the freedom, rights and liberties of individuals. Empowering the judiciary to be able to hear cases more fully serves the interests and rights of those within the UK more effectively and more fairly.

5 The Committee's Inquiry into these issues is welcome. The Government will be interested to hear the Committee's views on the questions posed in the Green Paper, and its suggestions on how best to respond to the dilemmas faced.

Human rights analysis

6 The Government intends that any legislation giving effect to the proposals in the Green Paper should fully comply with all relevant international and domestic legal obligations. The Green Paper sets out the Government's reasons for considering that its proposals are compatible with fundamental rights.

7 As the Committee is aware, the European Court of Human Rights and the Supreme Court have recognised that it is compatible with Article 6 of the ECHR for civil claims to be heard in closed proceedings when it is necessary to protect the public interest. The relevant case law is set out in the Green Paper in paragraph 1.29 and footnotes 22 and 23 (and relevant case law in relation to inquest proceedings is set out in the box on page 16 of the Green Paper, and in footnotes 38-39). The same reasoning applies to the United Kingdom's other obligations under equivalent provisions, such as Article 14 of the International Covenant on Civil and Political Rights.

8 As the Committee is also well aware, the Supreme Court observed in the *Al Rawi* case that the common law right to a fair hearing and open justice may in principle go further than the ECHR in this respect. But the Supreme Court recognised that it is open to Parliament to enact legislation restricting that common law right. See paragraphs 1.32-1.33 of the Green Paper.

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 on question.

9 There is statutory provision for closed procedures in the following contexts:

- High Court reviews of control orders – in the Schedule to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules (similar provision is contained in the Terrorism Prevention and Investigation Measures Bill currently before Parliament).
- Special Immigration Appeals Commission (SIAC) hearings - sections 5 and 6 of the Special Immigration Appeals Commission Act 1997 and Part 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003
- Financial restrictions – Sections 66 and 67 of the Counter-Terrorism Act 2008 and Part 79 of the Civil Procedure Rules
- Proscribed Organisations Appeals Commission – Schedule 3 to the Terrorism Act 2000 and Part 2 of the Proscribed Organisations Appeals Commission (Procedure) Rules 2007
- Pathogens Access Appeal Commission (Proscribed chemicals) – Schedule 6 to the Anti-Terrorism, Crime and Security Act (ATCSA) 2001 and Pathogens Access Appeal Commission (Procedure) Rules 2002
- Employment Tribunal / Employment Appeal Tribunal – Section 10 of the Employment Tribunals Act 1996 and Schedules 1 and 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004
- The Fair Employment Tribunal, established under the Fair Employment and Treatment (Northern Ireland) Order 1998 and The Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005 [2005/151], which deals with claims of discrimination on the grounds of religious belief or political opinion.
- Production Order Hearings under Schedule 5 to the Terrorism Act 2000
- Release and recall of prisoners by the Sentence Review Commission under the Northern Ireland Sentences Act 1998 and Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 [SI 1998/1859]

- Release and recall of prisoners by the Parole Commission under the Criminal Justice (Northern Ireland) Order 2008 [SI 2008/1216] and the Parole Commissioners' Rules (Northern Ireland) 2009 [SR 2009/82]
- Pre-charge detention hearings – Part III of Schedule 8 to the Terrorism Act 2000 enables a party and their legal representatives to be excluded from hearings, though there is no express statutory provision for special advocates (the NI Court of Appeal found in *Duffy & Ors* [2011 NIQB 16], following on from *Ward v PSNI* [2007] UKHL 50, that it is for the court in each case to make a judgment about the extent of procedural protection required).
- Planning inquiries – section 321 of the Town and Country Planning Act 1990
- Information Rights Tribunal – under the Freedom of Information Act 2000 the Information Rights Tribunal will consider whether material is exempt from disclosure without disclosing that material to the requestor. There is no express provision for special advocates but they have been used in the past.
- National Security Certificate Appeals Tribunal Northern Ireland - section 91 of the Northern Ireland Act 1998 and the Northern Ireland Act Tribunal (Procedure) Rules 1999 [SI 1999/2131]

10 In addition, there are non-statutory arrangements for closed procedures in various contexts. These include:

- The Secretary of State for Northern Ireland has delegated his functions under the Northern Ireland (Remission of Sentences) Act 1995 to a Commissioner under arrangements set out in a written statement to Parliament on 13 January 2003.
- The Security Vetting Appeals Panel, which is an independent body sponsored by the Intelligence and Security Secretariat
- Family proceedings – closed proceedings have been adopted in some wardship proceedings by consent.

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?

11 The Government rejects the suggestion that these proposals, or existing contexts where closed procedures exist, are designed to permit the use of 'secret evidence'. During the preparation of Green Paper, a lot of consideration was given to the current systems in place in certain contexts for protecting sensitive material through closed material procedures. Procedures such as those used in SIAC have been shown to deliver procedural fairness and work effectively. However, through detailed engagement with various stakeholders about the working of the current system and potential for improvement, it is clear (and acknowledged in the Green Paper), that there may be ways to improve the special advocate system. The Green Paper asks specific questions about this.

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?

12 We are not aware of any civil damages claims against the Government that have been struck out, however *Al Rawi* has only recently clarified the law in that

area. In the specific context of judicial review, we are aware of cases like *Shuker*[1] and *Arthurs*[2], where the court declined to allow certain grounds of challenge to proceed given in particular the sensitivity of the information likely to be needed in order properly to resolve them. We are not aware of any other reported cases that have been struck out for these reasons, but cannot comment on unreported cases in which the Government has not been involved.

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?

13 16 civil claims were settled in relation to the Guantanamo civil litigation. Since *Al Rawi* was decided by the Supreme Court, which clarified the law, no further cases have been settled.

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?

14 It would not be appropriate to comment on current court cases.

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?

15 The Government has not yet taken any decisions about the transitional arrangements for introduction of any new arrangements.

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?

16 PII is a well-established principle and operates effectively where sensitive information is not central to the case. The Green Paper does not propose removing or amending PII.

17 However, there are a growing number of cases in which national security sensitive information forms the majority of evidence relevant to the issues in the case. This was true of the Guantanamo civil damages claims, and is true of an increasing number of other civil proceedings brought against the Government. In these cases, the PII exercise would lead to such a large proportion of the relevant material being excluded from proceedings that the court would have to attempt to reach a judgment without taking into account the entirety of the evidence, and in some cases based on very little evidence. The greater the proportion of sensitive material excluded by means of PII, the less thorough the court's examination of the

[1] *In re Shuker* [2004] NIQB 20
[2] *Arthurs' Application* [2010] NIQB 75

case can be. We believe it is far better for a court to be able to consider *all* relevant material, than for large amounts of relevant material to be excluded from the case.

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?

18 The proposal in the Green Paper is that closed procedures should be available when disclosure of material would damage the public interest. The courts already recognise the need to protect this broader category of information in the principle of public interest immunity, and this forms the basis of existing statutory contexts for closed material procedures.

19 Clearly a key concern is to prevent damage to national security that could be caused by disclosure of sensitive material, but it is equally important to protect other aspects of the public interest, including the prevention and detection of crime (where, for example, it might be necessary to protect police intelligence material that forms part of serious crime investigations) and the need to protect the international relationships which are vital to the UK.

20 As the Committee has noted, the Green Paper does not attempt to provide an exhaustive definition of the term "the public interest", which is not defined in legislation; we do, however, give examples of the aspects of the public interest which have been recognised by the courts as warranting protection by PII in some cases, and which may be relevant to the types of cases with which the Green Paper is concerned. In the model proposed by the Government, once closed material procedures are triggered, the judge would hear arguments 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 judge will have the final say in this process. The need to protect these aspects of the public interest, though it will arise only in a very small percentage of civil cases, could conceivably arise in a wide range of different types of case.

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?

21 Commercially sensitive information is outside the scope of the Green Paper. Confidentiality rings and existing powers to exclude the public and media from court hearings appear to be working well in commercial cases, and the Government is not aware of any pressure to change those arrangements.

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

22 It is important to distinguish between two aspects of the mechanism proposed in paragraph 2.7 of the Green Paper: the decision whether a CMP should be triggered in the first place, and decisions about how material will be handled in the subsequent proceedings. The Green Paper proposes that only the first decision would be made by the Secretary of State, subject to review on judicial review principles. Decisions about whether material should be disclosed to the claimant or be dealt with in closed sessions would be entirely a matter for the judge, with the full involvement of the Special Advocate.

23 A ministerial decision whether closed material proceedings should be triggered is very different from the court's decision in relation to public interest immunity. When considering applications for public interest immunity, a judge is assessing whether the interests of justice in including relevant material in the proceedings outweigh the public interest in excluding material whose disclosure would damage national security. That balancing test is extremely important when the consequence is the potential exclusion from proceedings of relevant material that could materially affect the outcome of the case and the fairness of the overall proceedings, particularly if it is material that would assist a claimant in bringing a case against the Government. It is therefore appropriate that the court is able to consider whether the balance has been struck appropriately.

24 In the mechanism proposed in paragraph 2.7 of the Green Paper, the question is not whether evidence should be excluded altogether, but whether some part of it should be dealt with in closed session. The question is solely whether there is information that would damage the public interest if it were openly disclosed. The courts have long accepted that the Government is best placed to make those assessments.

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

25 The Green Paper proposes one possible model for triggering a CMP. In that model, CMPs could only be used where there was a risk of damage to the public interest and the decision could be challenged on judicial review principles. The operation of the closed procedure would be subject to the control of the court.

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.

26 Draft Impact Assessments dealing with these issues were published for consultation with the Green Paper.

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.

27 The Government acknowledges that when closed material proceedings are used, the ability of the press to report on those proceedings is correspondingly limited. The Government considers that this restriction is permitted by Article 10(2) of

the ECHR, bearing in mind that throughout the proceedings the judge would be in a position to ensure that closed proceedings were only used to the extent necessary to protect the public interest.

28 Like Article 6, Article 10(1) protects the public's right to know what happens in court proceedings, as the Court of Appeal recognised in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [180]. However, the courts have long recognised that it may be legitimate to restrict the right to freedom of expression in Article 10 to protect national security: see e.g. *Vereniging Weekblad Bluf! v Netherlands*, App. No. 16616/90, (1995) 20 EHRR 189, at [35] and [40], *R v Shayler* [2002] UKHL 11 at [26], and *A v B (Investigatory Powers Tribunal)* [2009] UKSC 12 at [26].

29 As always with the qualified rights in the Convention, whether a restriction on the right is proportionate will depend on all the circumstances of each case. Under the proposals in the Green Paper, when the closed material procedure was used, the judge would be able to decide how the interests of open justice and national security should be balanced in the case of each part of the evidence before the court. In many cases, it would be compatible with Article 10 as with Article 6 to prevent the publication of certain evidence in the interests of national security (see, for instance, the decision of the Employment Appeal Tribunal in *AB v Ministry of Defence* [2010] ICR 54 at [15]-[23]). But the final decision would always be for the judge.

30 The Government therefore considers that the proposals in the Green Paper concerning closed material proceedings are compatible with the freedom of the press, and with Article 10 of the ECHR, as they are with Article 6.

Q14 – Will the Government publish the full research report [into international practice] in order to ensure that scrutiny of the proposals in the Green Paper is as fully informed as possible?

31 In the preparation of the Green Paper, the Government drew on a range of expert input on how other jurisdictions handle sensitive material in civil judicial proceedings, rather than a single research report. The key findings from these various sources are available in Appendix J of the Green Paper.

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

32 As set out in the Green Paper [in appendix J], a wide range of international partners face a similar fundamental challenge of protecting sensitive information while ensuring the courts have the tools available to reach decisions based on the entirety of the evidence. However, 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[3] for terrorism offences. But prosecution is not always possible and other actions are also important. This includes the security and intelligence 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 terrorism-related activity.

33 The wide scope of this counter-terrorism activity has given rise to a range of legal challenges - including statutory appeals against executive action, civil claims for damages, judicial reviews and novel application of 'Norwich Pharmacal' relief - which we believe is unusual internationally and exceptional among ECHR signatory States. In many of these national security relevant cases judges do not have the tools at their disposal to reach a judgment based on a full consideration of the all the relevant evidence.

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 US?

34 The Government is aware from ongoing discussions with Governments in comparable jurisdictions, including the US, that they face a significant volume of terrorism-related litigation. We are not aware that any European jurisdiction has faced litigation on the scale of the Guantanamo civil claims, and as noted in Appendix J of the Green Paper, the Treasury Solicitor's Department considers that sensitive information is central to 27 cases currently before the courts (not including appeals against executive action). Our consultations with other Governments focused primarily on how their legal framework provides for the use of sensitive information in the civil context, and the interplay between the executive and the judiciary in making decisions on disclosure of sensitive information. This framework will be determined by a range of factors, including whether the country is a signatory to the European Convention on Human Rights (ECHR).

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

35 It cannot be right that the UK's courts are not able to consider all the relevant evidence when ruling on cases that raise issues of significant public interest. The Government strongly believes that an individual's rights are best served by allowing more cases to be heard, more fully; therefore, the proposals set out in the Green Paper are designed to ensure that as much relevant material as possible can 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 may have to be settled or dropped.

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,

[3] Home Office statistical bulletin 30 June 2011 – Operation of police powers under TACT 2000 and subsequent legislation: Arrests, outcomes and stop and searches' quarterly update to December 2010: Great Britain.

other than for the purposes of determining disclosure questions? If so, please provide details of the specific legislative provisions in those jurisdictions.

36 As far as the Government is aware, there are no other common law jurisdictions in which closed material procedures are available in the full range of civil proceedings, other than for the purposes of determining disclosure. As stated in Appendix J of the Green Paper, whilst building on other countries' experience where possible, the Government proposes more fundamental and far-reaching reform than has been attempted elsewhere where this is a proportionate and balanced response to the specific challenges we face in the UK.

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 Mujahedin Organisation of Iran*?

37 The Government intends that any legislation giving effect to the proposals in the Green Paper should be fully compatible with all of the United Kingdom's human rights obligations, including those deriving from European Union law. That applies equally to the proposals in paragraphs 2.39-2.46 concerning the 'gisting' requirement.

38 The Government recognises that the fundamental rights protected by EU law will be relevant in cases falling within the scope of EU law, as defined in the case law of the European Court of Justice such as Case 5/88 Wachauf [1989] ECR 2609, and as now codified in Article 51(1) of the Charter of Fundamental Rights.

39 The fundamental right to a fair trial restated in Article 47 of the Charter of Fundamental Rights is in substance identical to that in Article 6 of the ECHR, as the accompanying explanation makes clear. The right in EU law is wider than that in Article 6 only in that it applies also in cases that do not 'determine a civil right or obligation' within the meaning of Article 6 (reflecting the long-standing case law of the Court of Justice in cases such as Case 294/83 Les Verts [1988] ECR 1339). It follows that it is in principle consistent with fundamental rights in European Union law, as it is with the ECHR, for closed material proceedings to be used in domestic legal proceedings when it is necessary to protect the public interest.

40 Questions concerning the relationship between the public interest and the right to a fair trial have come before the European Court of Justice in cases such as Case C-402/05 P Kadi v Council [2008] ECR I-6351, Case T-284/08 People's Mojahedin Organisation of Iran v Council [2008] ECR II-3487 (under appeal as Case C-27/09 P France v People's Mojahedin Organisation of Iran), Case T-85/09 Kadi v Commission (judgment of 30 September 2010, under appeal as Case C-584/10 P), and the reference to the Court of Justice from the Court of Appeal in Case C-300/11 ZZ. In particular, the Court has had to consider the extent to which the 'gisting' requirement set out in the case law concerning Article 6 applies to asset-freezing decisions (see e.g. Kadi v Council at [349], Kadi v Commission at [174], and the Advocate General's Opinion in Case C-27/09 P at [240-[245]).

41 Much of this litigation is continuing, so many of the questions remain unresolved. In formulating any provisions concerning the limits of the obligation to

‘gist’, the Government will of course take full account of relevant judgments of the Court of Justice of the European Union as well as the judgments of the European Court of Human Rights and the domestic courts.