

Title: Justice and Security Bill – Overarching IA Lead department or agency: Cabinet Office Other departments or agencies: Ministry of Justice, Home Office	Impact Assessment (IA)
	Date: 12/12/2012
	Stage: Parliamentary Stage – Third Reading
	Source of intervention: Domestic
	Type of measure: Primary legislation
Contact for enquiries: Email: justiceandsecurity@cabinet-office.x.gsi.gov.uk	

Summary: Intervention and Options	RPC Opinion: RPC Opinion Status
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?	
£-8m	N/A	N/A	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

Reform of the civil justice system so that relevant material can be considered by the court in order that judgments can be reached on their merits (this would reduce the number of cases struck out, or settled) and to provide reassurance to foreign intelligence-sharing partners of the UK's ability to prevent disclosure of intelligence material shared in confidence. Modernisation of judicial, independent and Parliamentary scrutiny of the security and intelligence agencies to improve public confidence that these agencies are held fully to account.

What are the policy objectives and the intended effects?

The Government's objectives are to: ensure that the independent and Parliamentary bodies that oversee the security and intelligence agencies are more credible and effective; ensure relevant information can be considered by the courts, in order that judgments can be reached on their merits; ensure that the security and intelligence agencies can continue to work to keep the public safe, without risk that vital intelligence information or essential international intelligence-sharing relationships will be compromised; and ensure that executive power can be properly held to account, whilst enabling the Government to properly defend its actions.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The Justice and Security Bill provides for extension of closed material procedures (CMPs) to civil cases in the High Court, Court of Appeal, Court of Session and UK Supreme Court; the transfer of some challenges to immigration decisions to SIAC; a restriction on the availability of the *Norwich Pharmacal* jurisdiction in cases in which sensitive information is sought; changes to the status of the Intelligence and Security Committee; and, a broadening of the remit of the Intelligence and Security Committee and the Intelligence Services Commissioner.

The base case against which the legislative package is examined is one in which there are no changes to how sensitive cases and intelligence oversight is currently handled in the United Kingdom

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY:  Date: 14/12/12

Summary: Analysis & Evidence

Policy Proposal

Description: Extend closed material procedures for civil cases in specified courts; restrict availability of the *Norwich Pharmacal* jurisdiction in cases in which disclosure of sensitive information is sought; make changes to the status of the Intelligence and Security Committee; broaden the remit of the Intelligence and Security Committee and the Intelligence Services Commissioner.

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -8

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate		2	20

Description and scale of key monetised costs by 'main affected groups'

There would be costs to making closed material procedures (CMPs) available more widely, including additional Special Advocates; and, judicial and representation costs. There would be new costs if *Norwich Pharmacal* applicants chose to challenge the Ministerial certificates issued in order to exempt sensitive information from disclosure. Broadening the remit of the Intelligence and Security Committee (ISC) and Intelligence Services Commissioner may lead to an increase in resource requirements.

Other key non-monetised costs by 'main affected groups'

Concerns have been expressed that any increase in the volume of cases heard by Courts under CMPs will have a consequential impact on the transparency of the judicial process, legal precedents contained in closed judgments and media reporting. Restricting *Norwich Pharmacal* applications where disclosure of sensitive information is sought may lead to negative impacts on UK nationals and residents; and, businesses seeking to use that information in foreign proceedings.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate		1	12

Description and scale of key monetised benefits by 'main affected groups'

The extension of CMPs would lead to a reduction in PII applications by HMG, which would lead to lower costs of hearing and preparatory work. There may be savings from a reduction in legal proceedings costs associated with *Norwich Pharmacal* proceedings as fewer *Norwich Pharmacal* cases seeking sensitive information would be heard in UK courts. The savings would include savings to the judiciary; special advocate cost savings and legal aid.

Other key non-monetised benefits by 'main affected groups'

The Government would no longer be forced to resort to settling cases which it believes have no merit because it cannot put its side of the case. The ability for the courts to take into account relevant sensitive information may lead to more informed judicial decisions on a greater range of Government activity, including matters of significant public interest. Limiting *Norwich Pharmacal* is likely to lead to greater certainty about how sensitive material is kept confidential. Improved protection of sensitive information may lead to resource savings for the intelligence agencies; and, improved international confidence as foreign Governments will have greater reassurance that their material is protected. Changing the status of the ISC and broadening the remit of the ISC and the Intelligence Services Commissioner may lead to wider benefits to society from enhanced accountability.

Key assumptions/sensitivities/risks	Discount rate	3.5
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The assessment of proposals related to treatment of sensitive information is sensitive to assumptions on volume of civil and *Norwich Pharmacal* cases; unit cost assumptions for legal representation and judges; and, responses of non-State party to new procedures. Analysis of oversight proposals is sensitive to assumptions on costs associated with premises; general staff and, pressures on intelligence agencies.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of	Measure qualifies
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

1. INTRODUCTION

- 1 This Impact Assessment (IA) accompanies the Justice and Security Bill. It assesses the proposals designed to respond to the challenges of how sensitive information is treated in a range of civil proceedings; treatment of *Norwich Pharmacal* cases seeking disclosure of sensitive information; and oversight of the security and intelligence agencies. The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the legislative proposals. It follows the procedures set out in the Impact Assessment Guidance and is consistent with the HMT Treasury Green Book
- 2 The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a Cost Benefit Analysis (CBA) of the proposals. CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and distributional considerations. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.
- 3 The CBA underpinning this IA rests on answering two basic questions: what is the problem that the proposals are seeking to address that has led the relevant sector not to function properly; and, in what way can Government intervention help mitigate this problem? What options are available to resolve the resultant problems, and would the available options recommended have the desired impact? To establish a case for Government action, an assessment of the possible costs and benefits of Government involvement must be made to show that benefits are likely to outweigh the costs
- 4 In addressing these questions, the IA has focussed mainly on key-monetised and non-monetised impacts, with the aim of understanding what the net social impact to society and how such impacts are distributed across the affected groups.

2. LEGISLATIVE PROPOSALS

- 5 This IA considers the overall effect of the Justice and Security Bill proposals on the basis that all measures are implemented in conjunction as a package. The individual legislative proposals are summarised below, with further detail set out in the individuals IAs.

Closed Material Procedures in civil proceedings

- 6 Under the current system, the only method now available to the courts (since the Supreme Court's ruling in *Al Rawi* in July 2011) to protect material such as intelligence from disclosure in open court in civil damages cases is through Public Interest Immunity (PII). A successful PII application results in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.
- 7 In order to address this problem, the Government is proposing to extend the availability of closed material procedure (CMPs) to the High Court, Court of Appeal, Court of Session and UK Supreme Court. Some claims relating to exclusion and naturalisation decisions will be transferred to the Special Immigration Appeals Commission (SIAC).
- 8 The proposals also allow for the use of intercept material as evidence under the Regulatory Investigative Powers Amendment (RIPA) amendments, and in Employment Tribunal CMPs.

Norwich Pharmacal

- 9 The aim of a *Norwich Pharmacal* application is to force a third party who is 'mixed up' however innocently in suspected wrongdoing, to disclose information which the claimant feels may be relevant to a claim they are bringing or wish to bring. It has historically only been used in the intellectual property sphere, however, since 2008 there have been no fewer than 9 attempts to use this jurisdiction in relation to secret intelligence which either belongs to the UK Government, or which our allies have shared with us. As the purpose of the proceedings is solely to gain disclosure of material, the Government does not have the option to withdraw from or settle these

proceedings. If a judge orders disclosure and a claim of PII does not succeed, then there is no option but for the Government to release the secret intelligence.

- 10 Therefore the Government intends to make the following changes:
- For intelligence service material: the Government intends to legislate to exempt material held by or originating from or relating to one of the intelligence services from disclosure under a *Norwich Pharmacal* application.
 - For national security or international relations material: the Government also intends to legislate to allow a Minister to sign a certificate in *Norwich Pharmacal* cases to protect non-agency material which would cause damage to national security or international relations if disclosed. That certificate can be reviewed on judicial review principles. If upheld, the information could not be disclosed.

Intelligence Oversight

- 11 The proposals aims to enhance the effectiveness and credibility of the oversight of the intelligence community in order to increase public confidence in its work and provide reassurance that its activities are reasonable, proportionate and compliant with legal obligations. The Bill extends the Intelligence and Security Committee's (ISC) remit, granting it additional investigative powers and resources, and changing its status to bring it closer to Parliament. It also extends the remit of the Intelligence Services Commissioner.

AFFECTED GROUPS

- 12 The following groups are likely to be affected by the proposals :
- the **judiciary**, as primary providers of justice, particularly in relation to civil court operations
 - **legal service providers**, both for government (e.g. legal support) and **private litigants** in civil proceedings that involves an element of sensitive information
 - **oversight bodies**, whose roles are being reviewed
 - **wider government**, including Government departments and security and intelligence agencies;
 - **overseas intelligence agencies**, who may routinely share sensitive information with the UK
 - **the general public**, as users of the justice system and beneficiaries of improved public safety and accountability of the security agencies

3. RATIONALE FOR PROPOSAL

Civil Proceedings

- 13 A problem arises with the system of PII when a case is so saturated in intelligence material that the PII procedure removes the evidence which one side requires if they are to make their case. In such circumstances, the only options available, even where a case may be speculative or have no merit, are:
- in compensation cases: to seek to settle the case by paying compensation (assuming the other side is willing to agree to settle) or ask the court to strike out the case as untriable.
 - in judicial reviews: the Government may have to withdraw an executive action because it is unable to explain why it is designed to protect the public, or to stop resisting a naturalisation or citizenship application; or the court may have to strike out the case as untriable.
- 14 These limitations of PII leave the public with no independent judgment on very serious allegations about Government actions.
- 15 This problem is rare but damaging. As of 31 October 2012 there are 20 live civil damages claims (including those stayed and at pre-action stage) in which sensitive national security information is centrally relevant. There are also a number of other live cases, including some judicial review

challenges in which national security information is also centrally relevant. A number of these cases relate to several individuals.

- 16 It is also clear that in some cases, the absence of CMPs is particularly unfair on the claimant. In a recent naturalisation case (AHK and Others) the judge ruled that without any means by which sensitive intelligence could be heard in court, “the Claimant is bound to lose, no matter how weak the grounds against him, there is obvious scope for unfairness towards a Claimant.”
- 17 The Government is strongly committed to open and transparent justice. However, sometimes justice is not being delivered in open court because highly relevant national security material is too sensitive to disclose. Where they are provided for in legislation, CMPs enable justice to be done and sensitive material to be safeguarded. 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 led to an out of court settlement, without the merits of the case having been argued.

Norwich Pharmacal

- 18 The aim of a *Norwich Pharmacal* application is to force a third party who is ‘mixed up’ however innocently in suspected wrongdoing, to disclose information which the claimant feels may be relevant to a claim they are bringing or wish to bring. It has historically only been used in the intellectual property sphere, however, since 2008 there have been no fewer than 9 attempts to use this jurisdiction in relation to secret intelligence which either belongs to the UK Government, or which our allies have shared with us. As the purpose of the proceedings is solely to gain disclosure of material, the Government does not have the option to withdraw from or settle these proceedings. If a judge orders disclosure and a claim of PII does not succeed, then there is no option but for the Government to release the secret intelligence.
- 19 We expect our allies to protect intelligence material we share with them from disclosure, and they expect the same from us. The inadequacies in our current ability to properly protect classified information provided by foreign governments has already seriously undermined confidence among our key allies, including the US. In some cases, measures have been put in place to regulate or restrict intelligence exchanges. Robust legislative measures are essential to restore confidence among our allies, which is vital to our national security.

Oversight of Agencies

- 20 Between 1989 and 2000 legislation was introduced which set a new, post Cold War framework for the operation and oversight of the intelligence and security agencies.
- 21 But since then, and particularly since 9/11, the public profile, the budgets, and indeed the operational demands on the agencies have all significantly increased and while the oversight system has continued to develop, it has done so on an ad hoc basis with the result that gaps in the framework have emerge. The present ISC has been criticised for being insufficiently independent of the Government and too removed from Parliament. The ISC’s current statutory remit is limited as are its powers to access information. The oversight work of the Commissioners is very important but they have a very low public profile.
- 22 It is vital that that our oversight system keeps pace with those changes and addresses the issues that have arisen to ensure it is fit for purpose for the current world, while still providing sufficient protection to sensitive intelligence material.

4. BASE CASE

- 23 IA Guidance requires that proposals are assessed against a defined ‘base case’. The base case for this IA is one in which there are no changes to how sensitive information and intelligence oversight is handled in the UK. This would mean that the current problems set out under **Section 3** would continue to persist with on-going impacts on the UK.

5. IMPACT OF LEGISLATIVE PROPOSALS

- 24 This section sets out: the costs and benefits of the legislative proposal set out under **Section 2**, compared against the base case (“do nothing”) set out under **Section 4**. The general approach focuses on assessing the impacts for each affected group. The analysis also explains the associated assumptions, risks and sensitivities.

COSTS OF PROPOSALS

- 25 The proposals are likely to impose costs on courts; Government legal service provision; non-State parties in proceedings; oversight intelligence agencies; and, wider society.

Courts

- 26 There would be impacts on the judiciary and the administration of justice in relation to civil proceedings, including *Norwich Pharmacal* proceedings.

Civil Proceedings

- 27 Extending CMPs for civil cases would lead to additional judicial costs in cases which would otherwise have proceeded with PII claims for the sensitive elements. An outline of the possible outcomes under the PII system is above in **Section 3**. Under the CMP process the case would continue for a longer period in court relative to settling, resulting in additional judicial and court administration costs.
- 28 At Report stage the House of Lords voted for a number of non-government amendments to be included in the Bill. There could be some monetised and non-monetised costs associated with these changes on the civil justice system.
- 29 There has not been sufficient time to complete a full analysis of all the non-government amendments. Some amendments like court initiated CMPs could theoretically increase the number of CMPs, however, the cumulative impact of all the non-government amendments could be that there are fewer CMPs. The impact is unclear at present.
- 30 The extent of the additional judicial and administrative costs would depend, in particular, on how much of the case would use the CMP process; the costs to the judiciary of additional judicial and administrative staff time; and, the number of civil cases that would utilise CMPs.

Norwich Pharmacal Proceedings

- 31 The proposed framework may lead to new costs from potential legal proceedings associated with reviewing certifications. Such challenges will be based on judicial review principles and are likely to be very rare, as most of the material sought in sensitive NP cases is intelligence service material which will be absolutely excluded, meaning that the costs associated with reviewing certificates would not apply to those cases.
- 32 The nature of the judicial review process, which is dominated by written submissions, would suggest that the overall costs are likely be less than £0.10m per annum. These costs include Government and private legal costs; and, judicial expenditure. The overall costs over 10 years are estimated at no more £1m.

Government Legal Provision

- 33 There would be additional legal costs for Government in form of the following :
- *Special Advocates*: there would be additional costs from extending closed material procedures to more civil proceedings in terms of the costs associated with special advocates (SA). Government bear the cost of providing the SA legal support.
 - *Government Counsel*: *Norwich Pharmacal* proceedings may result in additional legal support where legal challenges are made to determine whether certified exemptions should apply.

Non-State party in Proceedings

- 34 Restricting *Norwich Pharmacal* applications seeking disclosure of sensitive information may lead to negative impacts on UK nationals, residents and businesses seeking to use that information in other proceedings, in particular, foreign proceedings. These measures may impact on those proceedings by limiting the availability of evidence for use in those proceedings. This may have consequential impacts for example on the length and cost of those proceedings. The extent to which the unavailability of such information through *Norwich Pharmacal* applications would impact on other proceedings is unclear, in particular, given that these measures will not affect other mechanisms which exist for obtaining such information.

Oversight Bodies

- 35 There would be costs for oversight bodies as follows :
- *Intelligence and Security Committee (ISC)*: the ISC already takes evidence from bodies beyond the agencies which are part of the wider intelligence community within Government. Therefore, formally recognising the wider role that the ISC plays in overseeing the Government's intelligence activities should not incur additional costs. However, over time there is a possibility that the formalisation of the ISC's extended role and power to require information may introduce an additional resource burden. Informal discussions with the ISC Secretariat have indicated that the additional resources required, could potentially be in the region of £0.5m per annum, though this should be treated as a highly tentative figure.
 - *Intelligence Services Commissioner*: it is not possible to quantify the costs of the proposal as it refers to unknown and unforeseeable actions. Moreover, the Intelligence Services Commissioner and his office are already undertaking some duties that would be covered by the proposal. However, it is foreseeable that in time, the proposal may require an increase in the resources of the Intelligence Services Commissioner's office. Broadening of the remit may also lead to the intelligence community devoting more staff time, including additional legal advice. The assessment assumes the cost may be in the region of £0.7m per annum, though this should be treated as highly tentative.

Wider Society

- 36 Concerns have been expressed that any increase in the volume of cases heard by Courts in closed proceedings will have a consequential impact on the transparency of the judicial process and the legal precedents contained in closed judgments. Consultees also note that it may lead to practical challenges for private parties in bringing forward claims, where information may be limited.

BENEFITS OF PROPOSALS

Courts

- 37 The proposals may lead to savings for courts services; Government; intelligence oversight bodies; and, wider society.

Civil Proceedings

- 38 Extension of closed material procedures and diverting some claims about naturalisation and exclusion decisions to SIAC would lead to a reduction in the use of PII certificates applications. This would reduce judges and court administration time concerning PII. The scale of the savings would depend on the volume and costs of the PII when CMPs are available relative to existing costs where there are no CMPs. PII would continue to exist for other aspects of the public interest such as international relations and it may continue to be used in relation to national security cases in some circumstances.

Norwich Pharmacal

- 39 The proposal would lead to a substantial reduction in *Norwich Pharmacal* applications. This would lead to judicial and court administrative savings.

Government

40 The reduction in *Norwich Pharmacal* cases would reduce government’s disclosure burden, including administrative and legal resources.

Wider Society

- 41 The proposals are predicated on wide and significant benefits to society from greater safeguarding of information. These benefits include :
- Greater information available to the courts, which would mean decisions would have the benefit of all relevant information and therefore better serve the interests of justice;
 - A reduction in reputation and political costs to the UK associated with the current system whereby the Government can be unable to defend itself from the serious charges of complicity in false imprisonment and mistreatment of individuals overseas.
 - Greater reassurance to the UK’s intelligence partners that their information can be protected leading to enhanced information sharing and cooperation. Though difficult to express in money terms, such cooperation is vital to UK safety and security.
- 42 Widening the remit of the ISC and Intelligence Services Commissioner may lead to wider benefits to society from enhanced accountability and increased transparency.

NET IMPACT OF PROPOSALS

43 The proposals would generate a net impact of around £-1m per annum. This equates to around £-8.3m over 10 years. **Tables 1 and 2** sets out the impacts.

Table 1 : Annual Costs and Benefits of Proposals (£m)			
	Benefits	Costs	Net
Civil CMPs	1	1	0
<i>Norwich Pharmacal</i>	0	0	0
Broaden Remit of ISC	0	0	0
Broaden Remit of Intelligence Service Commissioner	0	1	-1
Total	1	2	-1

Table 2 : Discounted Costs and Benefits of Proposals (£m)			
	Benefits	Costs	Net
Civil CMPs	8	9	-1
<i>Norwich Pharmacal</i>	4	1	3
Broaden Remit ISC	0	4	-4
Broaden Remit of Intelligence Service Commissioner	0	6	-6
Total	12	20	-8

Title: Impact Assessment for the Justice and Security Bill on Oversight Lead department or agency: Home Office / Cabinet Office Other departments or agencies: Ministry of Justice and Cabinet Office	Impact Assessment (IA)		
	Date: 12/12/2012		
	Stage: Parliamentary Stage – Transfer to second House		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
Contact for enquiries: justiceandsecurity@cabinet-office.x.gsi.gov.uk			

Summary: Intervention and Options **RPC Opinion:** RPC Opinion Status

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£10m	£0m	£0m	No
			NA

What is the problem under consideration? Why is government intervention necessary?
 There is a perception that oversight is not effective and that as a result the intelligence community is not properly held to account. The intelligence community needs oversight that is demonstrably independent and effective in order to retain the confidence of Ministers, Parliament and the Public. Oversight should also be sufficiently high profile so that stakeholders are reassured that the intelligence community is under proper scrutiny. For these reasons, it is necessary for the Government to review arrangements for the oversight of the intelligence community to ensure they are as effective, coherent and transparent as possible, and that they are in line with recent developments in the roles of the intelligence community.

What are the policy objectives and the intended effects?
 Regarding the oversight of the intelligence community, the principal objectives of the Bill are to: enhance the effectiveness and credibility of the oversight of the intelligence community in order to increase public confidence in its work and provide reassurance that its activities are reasonable, proportionate and compliant with legal obligations.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 The following options have been assessed against the base case of "no change" (Option 0):

 Element 1: Change the status of the Intelligence and Security Committee;
 Element 2: Broaden the remit of the Intelligence and Security Committee; and
 Element 3: Broaden the remit of the Intelligence Services Commissioner.

 The package comprising all three elements is recommended for implementation.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro No	< 20 No	Small No	Medium No	Large No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A	Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY:  Date: 14/12/12

Summary: Analysis & Evidence

Policy Option 1

Description: Change the status of the Intelligence and Security Committee

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

No costs are associated with this option.

Other key non-monetised costs by 'main affected groups'

None.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

No quantifiable benefits.

Other key non-monetised benefits by 'main affected groups'

The proposal may enhance the ISC's accountability to Parliament, strengthen the ISC's actual and symbolic connection to Parliament; increase transparency and parliamentary confidence in how the Committee is constituted; possibly lead to a greater diversity of members of the ISC, which in turn may improve the effectiveness of the ISC; and raise the ISC's profile and increase transparency.

Key assumptions/sensitivities/risks

Discount rate (%)

N/A

The running costs of secure premises may be higher on the parliamentary estate; potentially heightened risk of security breaches as the link to Parliament is strengthened; reform risks failing to generate expected increased confidence amongst public/Parliament/media; and there is a risk that because it will not be possible to make public, during the ISC public evidence sessions, material that could damage national security, the public sees public evidence sessions as a purposeless exercise.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Broaden the remit of the Intelligence and Security Committee

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: - £4.3m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	£510,000	£4.3 million

Description and scale of key monetised costs by 'main affected groups'

ISC staff costs: £510,000 p.a.

These are for illustrative purposes and do not form part of a formal resourcing proposal.

Other key non-monetised costs by 'main affected groups'

None.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

None.

Other key non-monetised benefits by 'main affected groups'

Formal oversight for non-Agency bodies and providing the ISC with a formal role overseeing operational matters retrospectively, enabling it to do its job more effectively.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Resources estimates are heavily dependent on the details of the proposal, which is still at the developmental stage; and potentially extra resourcing costs for the Agencies.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

Summary: Analysis & Evidence

Policy Option 3

Description: Broaden of the remit of the Intelligence Services Commissioner

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: - £5.7m

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	£690,000	£5.7 million

Description and scale of key monetised costs by 'main affected groups'

Intelligence Services Commissioner's office staff costs: £350,000 p.a.

Agencies staff costs: £330,000 p.a.

These are for illustrative purposes and do not form part of a formal resourcing proposal.

Other key non-monetised costs by 'main affected groups'

None.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

None.

Other key non-monetised benefits by 'main affected groups'

This proposal may increase the public's confidence in the Commissioner's work (by placing what the Intelligence Services Commissioner already does on a statutory basis), the effectiveness (by enabling the Intelligence Services Commissioner to review other areas of Agency business) and the visibility of the work of the intelligence community.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

Staff costs are very dependent on the details of the proposal, which is still at the developmental stage; risk of overlap with work undertaken by the Intelligence and Security Committee.

BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

Evidence Base

A. Strategic Overview

Background

This Impact Assessment (IA) accompanies the Justice and Security Bill. It assesses the proposals designed to enhance existing oversight of the intelligence community. The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the proposals. It follows the procedures set out in the Impact Assessment Guidance and is consistent with HM Treasury Green Book.

Analytical principles

The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a Cost Benefit Analysis (CBA) of the proposals. A CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and distributional considerations. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource Government would save from certain proposals. The CBA under this IA rests on answering two sets of questions:

- What is the problem that the proposals are seeking to address that has led to the relevant market or sector not to function properly?
- In what way can Government intervention help mitigate this problem? What options are available to resolve the resultant problems, and would the recommended options have the desired impact?

In addressing these questions, the IA has focussed mainly on key monetised and non-monetised impacts, with the aim of understanding what the net social impact to society might be from enhancing the oversight regime.

Groups affected

The proposals covered in this IA affect all in the United Kingdom, but particularly the following groups:

- The general public as consumers of justice and beneficiaries of wider security measures. This includes persons investigated by the intelligence community;
- The general public, as persons whose rights and freedoms are protected by the oversight regime;
- The oversight bodies, whose roles are being reviewed;
- Wider Government; and
- The intelligence community.

Consultation

Within Government, the following departments and bodies were consulted:

- Home Office;
- Cabinet Office;
- Ministry of Justice;
- Ministry of Defence; and
- The Security and Intelligence Agencies.

The Government also conducted a public consultation and the following responded specifically on oversight:

Serious Organised Crime Agency	Government and public bodies
Police South West Regions	
ACPO Crime Business Area	
Chair, Committee of Public Accounts	Parliamentarians and parliamentary bodies
Chair, Foreign Affairs Select Committee	
Intelligence and Security Committee	
David Blunkett MP	
Lord Carlile	Regulatory bodies
Interception of Communications Commissioner	
Intelligence Services Commissioner	
Her Majesty's Chief Inspector of Constabulary	
Newspaper Society	Media
Guardian Media Group	
Peter Gill, University of Manchester	Academia
H. Bochel, A. Defty and J. Kirkpatrick, University of Lincoln	
Bingham Centre for the Rule of Law	Legal
Liberty	NGOs
Amnesty International	
Reprieve	
Justice	
Members of the public	Other

Summary of the responses to the Consultation

The Government sought views on proposals to improve the effectiveness of the existing oversight regime of the intelligence community.

On independent parliamentary oversight, a number of responses said that the Green Paper's oversight proposals for reform of the ISC did not go far enough and, in particular, did not address the fundamental reasons why reform was necessary. The general tenor of these responses was that the proposals in the Green Paper would make little difference in practice. A number of respondents made specific proposals as to how the ISC's status might be changed. Some said that the ISC's status should be aligned with that of a departmental select committee. They said that Parliament should appoint its members, the ISC should decide on its Chair and the Government's veto on the publication of sensitive material should be removed. A number of respondents said that the ISC should have access to all the information it needed to undertake its work. A number also raised the issue of resourcing, i.e. the ISC should be better staffed and financed.

Other respondents argued that the proposed reforms to the ISC would make a significant difference, arguing that they would considerably enhance the effectiveness and credibility of parliamentary oversight of intelligence work. In particular the proposals to extend the ISC's remit to include operational aspects of the work of the Agencies and to allow them to oversee the wider intelligence community were welcomed.

Changing the status of the ISC to make it a Select Committee was rejected because it was felt that this would increase the risk of unauthorised publication of sensitive national security information and could therefore lead to less information being shared with the Committee by the Agencies and the wider intelligence community, thereby leading to a reduction in the credibility and effectiveness of the oversight that the Committee currently provides. Removing the Government's veto on the publication of national security-sensitive material was rejected for the same reasons.

On the Commissioners, the Interception of Communications Commissioner saw no compelling reason to change the nature of the role or its boundaries. The Intelligence Services Commissioner argued that the present system of oversight should be retained but expanded to strike the right balance between Government, Parliament and judicial oversight. The Intelligence and Security Committee pointed out the potential issue of a blurring of boundaries, between their role and that of the Commissioners, implied by the proposal in the Green Paper to expand the Intelligence Services Commissioner's remit to include oversight of operational policies.

On the option of an Inspector General, some respondents were sceptical that it would add anything to current arrangements. Others supported the proposal.

The Inspector-General option was rejected because it would involve substantial structural reforms leading to significant upheaval in the current arrangements, without necessarily leading to any improvement.

B. Problem under consideration and rationale

This section explains the current problems regarding the oversight of the intelligence community and the basic rationale for Government intervention.

Background

Independent intelligence oversight was established by the Security Service Act 1989, Intelligence Services Act 1994 and Regulation of Investigatory Powers Act 2000. Oversight is provided through the following bodies:

The Intelligence and Security Committee

The Intelligence and Security Committee (ISC) is made of a group of parliamentarians, who provide politically independent oversight of the Agencies' activities. It has a cross-party membership of nine MPs, drawn from both Houses, appointed by the Prime Minister after consultation with the leader of the Opposition. The ISC's statutory remit is to examine the "expenditure, administration and policy" of the Agencies.

The ISC handles highly classified material, which means the Committee has a different status and operates under different safeguards than analogous departmental select committees. It reports annually to the Prime Minister on its work. These annual reports (redacted where required) are then laid before both Houses of Parliament, together with the Government's response, and debated. The Committee also produces ad hoc reports, such as its "Could 7/7 have been prevented – review of the intelligence on the London Terrorist Attacks on 7 July 2005" report, which was published in May 2006.

The Intelligence Services Commissioner and the Interception of Communications Commissioner

The Intelligence Services Commissioner and the Interception of Communications Commissioner (the "Commissioners") provide scrutiny on the intelligence community's performance of their statutory duties. The two Commissioners are appointed under the Regulation of Investigatory Powers Act 2000 (RIPA). They are required to hold, or have held, high judicial office. They must, by law, be given access to whatever documents and information they need and at the end of each reporting year they submit reports to the Prime Minister. Redacted versions of these reports are subsequently laid before Parliament and published.

The Commissioners' existing statutory remits cover monitoring compliance by the intelligence community 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.

The Investigatory Powers Tribunal

The Investigatory Powers Tribunal (IPT) investigates complaints by individuals about the use made by the intelligence community of investigative techniques against them or about allegations that their human rights have been breached by such actions. The Tribunal is made up of senior members of the legal profession.

Current problems

- The current arrangements lack credibility in some quarters. The Intelligence and Security Committee (ISC) is criticised for being insufficiently independent from Government, too removed from Parliament, and therefore for being unable to provide effective scrutiny.

The criticisms stem from the ISC's separate arrangements compared to parliamentary committees: members of the ISC are appointed by the Prime Minister and the ISC answers to the Prime Minister and not to Parliament; and the processes by which the ISC is appointed, operates and reports are perceived to be insufficiently transparent. These issues make the ISC appear not sufficiently independent of the Government and are contained in a quote from an article by Lord MacDonald: "*How could [the ISC] have any [credibility] when that same chairman is, in effect, appointed by the Prime Minister? Or when it conducts its meetings in secret and failed to uncover the very documents that led the Court of Appeal to criticise the security services?*"¹

Public criticism of the ISC's credibility has enabled further challenges of its work. For example parliamentarians have repeatedly criticised the Committee's ability to effectively scrutinise the Agencies and more recently, the Coroner for the inquiry into the 7 July 2005 bombings levelled a charge that the ISC's report into the events contained some inaccuracies, while others have claimed it lacked penetrating criticism. This undermines the ISC and has led to scepticism of the Committee's findings.

The 2007 Governance of Britain Green Paper acknowledged that there were concerns about the status of the ISC, how it operates, how it is constituted and how it reports.

- Current oversight arrangements are outdated in terms of the Agencies' activities and budgets.

It is vital that our oversight system keeps pace with changes, that it is fit for purpose for the current world, while still providing sufficient protection to sensitive intelligence material. Between 1989 and 2000 legislation was introduced which set a new, post Cold War framework for the operation and oversight of the Intelligence and Security Agencies. But since then, and particularly since 9/11, the public profile, the budgets, and indeed the operational demands on the Agencies have all significantly increased and while the oversight system has continued to develop, it has done so on an ad hoc basis with the result that gaps in the framework have emerged. For these reasons the public and parliamentary expectations of how the work of the Agencies is overseen have changed.

There have been significant changes in information technology and the way people communicate; and the level of terrorism threat has risen. As a result, the Agencies' budget has increased substantially since the 1990s. There is, therefore, a requirement to modernise oversight to make sure it is appropriate for the current role and budget of the Agencies.

There are specific areas where the nature of the Agencies' work has changed substantially and therefore where there is a lack of statutory locus for oversight of new techniques or areas. To illustrate, the ISC takes evidence from the wider intelligence community (including the Office for Security and Counter Terrorism, Defence Intelligence and the central government intelligence machinery in Cabinet Office) but this is not reflected in statute, and the Intelligence Services Commissioner has been given a number of extra ad hoc duties not reflected in legislation, such as monitoring 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".

As for the Commissioners, their mandates are limited and for example, do not include intelligence gathered by the Agencies other than by use of covert techniques authorised under RIPA and ISA. Also, their offices have limited resources (the Commissioners work part-time). This necessarily constrains the extent of their work.

- The Commissioners currently have a low public profile.

The Commissioners provide assurance to Ministers on the legality and proper discharge of the activities of the Agencies and other bodies. However, the Commissioners themselves and the work that they undertake have a low public profile, and although this is sometimes necessary due to the material they typically oversee and their historical desire to be perceived as independent from Government, there is no perceived increased public appetite for them to say more about how they

¹ [http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article7043140.ece]

conduct their oversight. They have provided and continue to provide assurance to the public, through their annual reports, that the activities of the Agencies are reasonable, proportionate, necessary and compliant with legal obligations. Whilst they are well respected and generally perceived to provide effective scrutiny, this isn't well recognised in public debates about the accountability of the Agencies. It is therefore necessary to consider whether reforms can be introduced to increase the visibility of the Commissioners. To an extent, this has been addressed through changes in the way in which their office communicates i.e. more transparent annual reports, a public-facing website, Commissioners undertaking speeches etc. however there is a general perception that more needs to be done in this sphere.

Policy rationale

In light of recent adverse agency publicity which has dented public confidence in the intelligence community, the intelligence community needs oversight that is demonstratively independent and effective in order to retain the confidence of Parliament and the public. Oversight should also be sufficiently high profile so that stakeholders are reassured that the intelligence community is under proper scrutiny. For these reasons, it is necessary for Government to review arrangements for the oversight of the intelligence community to ensure they are appropriate and up-to-date, that they are in line with recent developments in the role of the intelligence community and also meet the needs of the public.

C. Objectives

The objective of the proposals is to enhance the effectiveness and credibility of existing independent and parliamentary oversight bodies dealing with intelligence, in order to increase public confidence in the intelligence community.

In order to fulfil this objective, the Government has consulted on:

- changes to parliamentary oversight, particularly in relation to the oversight provided by the Intelligence and Security Committee (ISC); and
- changes to independent oversight of the intelligence community, particularly in relation to the Intelligence Services Commissioner.

These proposals are explored in more detail under Section D (“Analysis”).

D. Analysis

Introduction

This section sets out the costs and benefits of the elements, the underlying assumptions, and the risks associated with each element. It is not practicable to undertake a forensic assessment of each of the oversight proposals. As such the analysis has restricted itself to substantial social and economic impacts on the UK, and to impacts which are likely to be of interest to the public. The assessment does not explore elements which are not central to the Government's proposals.

All the elements are treated as independent but are not necessarily mutually exclusive; it is recommended that all elements of the package are accepted.

Assumptions

- For salaries, HO, FCO and Cabinet Office pay scales have been used; these have been used to calculate baseline staff costs as well as the resourcing estimates.
- Commissioners' remunerations were provided by their Secretariat.
- A discount rate of 3.5% was used for calculations of net present values, in accordance with HMT Green Book.

- Estimates of accommodation costs were provided by HO Property.
- Current travel costs were provided by the secretariats of the relevant bodies and used to make extrapolations, based on full time equivalents.
- Stationery costs were derived from the Office of Surveillance Officers' 2011 report and used to make extrapolations, based on full time equivalents.
- Wage and non-wage costs for the OSC were taken from the OSC's reports for 2010/11, 2009/10 and 2008/09.
- An uplift of 21% has been applied to salaries to take into account non-wage costs, as per HMT guidance and based on data from Eurostat.

Base Case (Option 0)

Description

The IA Guidance requires that all options are assessed against a common "base case" or "do nothing" option. The base case for this IA is that there will be no changes to the oversight regime in the United Kingdom. This means that the current problems set out in Section B would continue to persist. As the do nothing option compares against itself, its net present value is zero.

Elements 1: 'Change the status of the Intelligence and Security Committee'

Description

This proposal is to make changes to the status of the ISC to bring it closer to Parliament: the ISC would report formally to Parliament whilst also maintaining its existing reporting arrangements to the Prime Minister. Under this option, the Government plans to make the following changes:

- Appointment system: it is proposed that Parliament and not the Prime Minister as is currently the case, will make the final decision on membership of the ISC (members will have been nominated by the Prime Minister).
- Staff status: it is proposed that the ISC staff have the status of parliamentary staff, and not that of civil servants as is currently the case.
- Staff accommodation: the proposal is to move the ISC accommodations to suitably secure premises on the parliamentary estate.
- Funding: it is proposed to change the funding of the ISC from the Cabinet Office's departmental budget to funding from Parliament.
- Evidence sessions: the ISC may be able to provide public evidence sessions as well as its customary private evidence sessions; these sessions would have to be arranged so as not to compromise national security.
- Annual reports: Currently, the ISC has a duty to make an Annual Report to the Prime Minister on the exercise of its functions and may at any time report to him on any matter relating to the discharge of those functions. It is proposed that the ISC will also have a duty to make an Annual Report to Parliament on the exercise of its functions and may at any time make such other reports to Parliament as it considers appropriate concerning any aspect of its functions. The ISC will also retain the ability to make a report to the Prime Minister in relation to matters which would be excluded from any report to Parliament because the Prime Minister, after consultation with the ISC, considers that the matter would be prejudicial to the continued discharge of the functions of the Secret Intelligence Service, the Security Service, GCHQ, or any person carrying out any other activities of Her Majesty's Government in relation to intelligence or security matters that are set out in a Memorandum of Understanding.

Costs of Element 1

The direct costs of this option are negligible as we assume that public evidence sessions will be held in Parliament (and not out of it as assumed in the earlier IA accompanying the Green Paper) and that annual reports for Parliament would be produced the same way as for the Prime Minister. The changes in staff status, funding arrangements and accommodation are currently regarded as cost neutral and therefore not included in the IA: changes in staff status and funding represent transfers from one department to another, whereas changes to accommodation are not included because moving to the Parliamentary estate is a transfer payment away from the Cabinet Office to Parliament.

Benefits of Element 1

The proposal may lead to the following benefits:

- Clear demonstration of the ISC's accountability to Parliament by making the ISC formally report to Parliament;
- Strengthening of the ISC's actual and symbolic connection to Parliament by making the ISC formally report to Parliament;
- Increased transparency and parliamentary confidence in how ISC members are appointed;
- Possible greater diversity of the ISC members, and therefore potentially increased effectiveness of the ISC, through the proposed change to the appointment system; and
- Public evidence sessions may raise the ISC's profile and increase transparency.

Risks and Sensitivities

The assessment has identified the following risks and sensitivities:

- The running costs of secure premises on the parliamentary estate may be higher than the current ones (though they may be also lower);
- Potentially heightened risk of security breaches as the link to Parliament is strengthened;
- The public may see public evidence sessions as a purposeless exercise because it will not be possible to make public, during these sessions, material that could damage national security;
- Reform risks failing to generate, amongst the public, Parliament and the media, the expected increase in credibility of the work of the ISC; and
- Public sessions may lead to an increase in public interest in the business of the ISC, thereby increasing the amount of work for the ISC.

Element 2: 'Broaden the remit of the Intelligence and Security Committee'

Description

Currently, the ISC takes evidence not just from the Agencies but also from the wider intelligence community (e.g. Defence Intelligence in the Ministry of Defence, the Office for Security and Counter-Terrorism in the Home Office, the central Government intelligence machinery in Cabinet Office, and SOCA). It has also, in its annual reports, made recommendations relating to those bodies which are part of larger departments and are also overseen by the appropriate departmental select committees.

The Government proposes to recognise formally the wider role the ISC play in overseeing the Government's intelligence activities by taking evidence from any department or body in the wider intelligence community about intelligence-related activity where to do so would help the ISC provide more coherent intelligence oversight.

The Government also proposes to expand the ISC's remit to encompass retrospective oversight of the operational activities of the Agencies on matters of significant national interest.

Currently, under ISA 1994, information requested by the ISC has to be supplied, subject to a veto exercisable where the information is considered sensitive (as defined) by an Agency Head or a Minister. It is proposed that the veto becomes exercisable only by the relevant Minister of the Crown. In practice, the Agencies have rarely refused an ISC request for information.

Costs of Element 2

The ISC already takes evidence from bodies beyond the Agencies which are part of the wider intelligence community within Government. Therefore, formally recognising the wider role the ISC play in overseeing the Government's intelligence activities should not incur additional costs. For background, the ISC's running costs (which include staff, accommodation, travel, IT, security and legal costs) are estimated at £1.1 million p.a.

However, over time it cannot be ruled out that the formalisation of the ISC's role may entail a necessity to increase its resourcing. Informal discussions with the ISC Secretariat have indicated that more resources would be needed to achieve the above. The Secretariat has suggested up to four senior researchers and £250,000 p.a. This equates to an additional average of £510,000 p.a. Important note: this is an estimate which will be refined after further discussions with stakeholders.

In total, an additional average £510,000 p.a., equivalent to a net present cost of £4.3 million over ten years may be required.

Benefits of Element 2

The proposal may lead to the following benefits:

- Enhanced credibility of the ISC through the formal provision of oversight to non-Agency bodies for their work directly relating to intelligence material;
- More coherent oversight through formal oversight of the wider Government's intelligence activities; and

Risks and Sensitivities

- The extent of the increase in staff costs (and associated costs) will depend on the details of the proposal, which have not been defined at this stage.
- Formal oversight could entail extra costs for non-Agency bodies such as the MoD.
- The expansion of the ISC's remit to encompass retrospective oversight of the operational activities of the Agencies on matters of significant national interest may entail costs extra costs to Agencies. It is not anticipated at this stage that these will be more than

under Element 3 where the extra resourcing costs to the Agencies have been estimated at around £330,000 p.a.

Element 3: ‘Broaden the remit of the Intelligence Services Commissioner’

Description

The Interception of Communications and Intelligence Services Commissioners’ existing statutory remits cover monitoring compliance by the intelligence community 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 been the monitoring of compliance with new policies or an intensive health check on a particular work area. The proposal is to confer responsibility on the Intelligence Services Commissioner for keeping under review the exercise by the intelligence services of such aspects of their statutory functions as the Prime Minister may from time to time direct, either of his own motion or on the recommendation of the Commissioner.

Costs of Element 3

It is not possible to quantify the costs of the proposal as it refers to unknown and unforeseeable actions. Moreover, the Intelligence Services Commissioner and his office are already undertaking some duties that would be covered by the proposal.

However it is foreseeable that in time, the proposal may require an increase in the resources of the Intelligence Services Commissioner’s office. At present, the Intelligence Services Commissioner’s office costs £320,000 p.a. This covers the salary of the Commissioner, who works 100 days per year, and two part time members of staff, as well as associated costs (e.g. accommodation and travel).

Discussions with the Intelligence Services Commissioner’s Office have indicated that the following may be required as a result of the implementation of the proposal:

- The Intelligence Services Commissioner to work 160 hours per year;
- The hiring of additional resources for the Commissioner’s office: one full time expert investigator, one full time SEO policy adviser, one part time HEO office manager and one part time Grade 7 private secretary, instead of the current two part time support staff.
- It is estimated that the illustrative set up described above would cost approximately an additional £350,000 p.a. Important note: this is an estimate which will be refined after further discussions with stakeholders.

An increase in the remit may also lead to an increase in the costs to the Agencies and a number of Government departments of complying with additional requests from the Intelligence Services Commissioner. Currently, we estimate the Agencies’ and OGDs’ compliance costs in terms of staff to be around £150,000 p.a.

Discussions with the Intelligence Services Commissioner’s Office have led us to estimate that a broadening of the remit may necessitate the intelligence community to devote more staff time, including additional legal advice, at an estimated additional total cost of £330,000 p.a. Important note: this is an estimate which will be refined after further discussions with stakeholders.

In total, an additional average £690,000 p.a., equivalent to a net present cost of £5.7 million over ten years may be required.

Benefits of Element 3

The proposal may increase the following:

- The public’s confidence in the Commissioner’s work;
- Effectiveness as the remit is broadened and if more coherent oversight is provided; and

- The visibility of the work of the intelligence community.

Risks and Sensitivities

- The extent of the increase in staff costs (and associated non-wage costs as well as resulting accommodation costs) will depend on the details of the proposal, which have not been defined at this stage.
- Formal oversight could entail extra costs for non-Agency bodies such as the MoD.
- As the remits of the ISC and the Intelligence Services Commissioner are both to be broadened, there is a risk of a blurring of the boundaries between them. However, the Commissioner has expressed in the Consultation that he would be interested in monitoring the legalities and compliance aspects of operational policies as opposed to the policies themselves, thereby reducing that particular risk.

E. Enforcement

Discussions will take place at the end of 2012 with the relevant parties to discuss the details and resourcing implications of the proposal.

F. Summary

The table below outlines the costs and benefits of the proposed changes.

Element	Costs	Benefits
1	0 (although there may be costs associated with the risks realising, in particular the risk to the costs of secure premises)	<ul style="list-style-type: none"> • Clear demonstration of the ISC's accountability to Parliament by making the ISC formally report to Parliament; • Strengthening of the ISC's actual and symbolic connection to Parliament by making the ISC formally report to Parliament; • Increased transparency and parliamentary confidence in how ISC members are appointed; • Possible greater diversity of the ISC members, and therefore potentially increased effectiveness of the ISC, through the proposed change to the appointment system; and • Public evidence sessions may raise the ISC's profile and increase transparency.
2	£0.5 million p.a. (although the increase in staff costs (and associated costs) will depend on the details of the proposal, which have not been defined at this stage)	<ul style="list-style-type: none"> • Enhanced credibility of the ISC through the formal provision of oversight to non-Agency bodies for their work directly relating to intelligence material; and • More coherent oversight through formal oversight of the wider Government's intelligence activities.
3	£0.7 million p.a. (although the increase in staff costs (and associated costs) will depend on the details of the proposal, which have not been defined at this stage)	<ul style="list-style-type: none"> • Increased public's confidence in the Commissioner's work; • Increased effectiveness as the remit is broadened and if more coherent oversight is provided; and • Increased visibility of the work of the intelligence community.

Source: Various.

The Government recommends the adoption of all the proposals as they all contribute towards the stated objective of enhancing the effectiveness and credibility of existing independent and parliamentary oversight bodies dealing with intelligence, in order to increase public confidence in the intelligence community.

G. Implementation

Some of the proposals contained in Element 1 would not require Legislation and therefore could be implemented before Royal Assent this session.

Element 2 would require legislation, therefore implementation would take place after Royal Assent this session.

For Element 3, assuming Royal Assent this session, recruitment of the staff to work for the Intelligence Services Commissioner will take place between September and December 2013. This will align with the appointment of a new Commissioner from January 2014 as Sir Mark's current term runs out in December 2013. The Prime Minister will write to the new Commissioner in November or December 2013 inviting him/her to take on the role and attaching his terms and conditions which should reflect any additions provided for through the legislation.

H. Monitoring and Evaluation

After implementation, the Government will review with key stakeholders, on a regular basis, to assess the realisation of the stated benefits.

I. Feedback

See section on monitoring and evaluation.

Title:
Justice and Security Bill –Closed Material Procedures

Lead department or agency:
Cabinet Office

Other departments or agencies:
Home Office and Ministry of Justice

Impact Assessment (IA)

Date: 12/12/12

Stage: Parliamentary Stage – **Transfer to second House**

Source of intervention: **Domestic**

Type of measure: **Primary legislation**

Contact for enquiries:
justiceandsecurity@cabinet-office.x.gsi.gov.uk

Summary: Intervention and Options

RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£-1m	N/A	N/A	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

The only current method available to the courts to protect sensitive material from disclosure in open court is PII, which can result in the complete exclusion of that material. Any judgment reached is therefore not informed by that material, however central or relevant it is. Some civil cases are so saturated in intelligence material that PII removes the evidence one side requires to make their case. This can lead to cases being settled, struck out as untriable or lead to the withdrawal of executive action.

Government intervention is necessary because the solution requires legislation. The UK Supreme Court in *Al Rawi* concluded in July 2011 that it was for Parliament, not the courts, to decide whether or not to make closed material procedures available in civil proceedings.

What are the policy objectives and the intended effects?

The Government's objectives are to: ensure that relevant information can be considered by the courts, in order that judgments can be reached on their merits; ensure that the security and intelligence agencies can continue to work to keep the public safe, without risk that vital intelligence information or essential international intelligence-sharing relationships will be compromised; and ensure that executive power can be properly held to account, whilst enabling the Government to properly defend its actions.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

An earlier Green Paper consulted broadly on proposals. The Bill provides for closed material procedures for civil proceedings in the High Court, the Court of Appeal, Court of Session, UK Supreme Court and the transfer of some challenges to immigration decisions to SIAC (a body which already makes use of closed material procedures).

The base case against which the proposal is examined is one in which there are no changes to how sensitive cases are currently handled in the United Kingdom.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY:  Date: 14/12/12

Summary: Analysis & Evidence

Policy Option 4

Description: Extend closed material procedures to certain specified civil courts

FULL ECONOMIC ASSESSMENT

Price Base Year 2010	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -11	High: 5	Best Estimate: -1

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	1	0	3
High	9	1	20
Best Estimate	4	1	9

Description and scale of key monetised costs by 'main affected groups'

There would be administrative costs to making closed material procedures (CMPs) available more widely, for example, through a requirement for additional specialist vetted lawyers ('Special Advocates') and physical infrastructure, such as safes, for handling sensitive material. It is possible that there may be potential for new generated demand (legacy cases), although the limitation periods for litigation would constrain the volume of cases. There may be further costs on government in form of judicial and representation costs (including legal aid where applicable) subject to the number of cases. At Report Stage the House of Lords voted for a number of non-government amendments to be included in the Bill. There could be some monetised costs associated with these changes on the civil justice system. There has not been sufficient time to complete a full analysis on all the non-government amendments.

Other key non-monetised costs by 'main affected groups'

As noted above, at Report Stage the House of Lords voted for a number of non-government amendments to be included in the Bill. There could be some non-monetised costs associated with these changes on the civil justice system. There has not been sufficient time to complete a full analysis on all the non-government amendments. Other non-monetised costs emerge from concerns expressed that any increase in the volume of cases heard by courts in private will have a consequential impact on the transparency of the judicial process. It may also lead to practical challenges for private parties in bringing forward claims, where information may be limited.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1	6
High	0	1	11
Best Estimate	0	1	8

Description and scale of key monetised benefits by 'main affected groups'

The extension of CMPs would lead to a reduction in PII applications by HMG, which would lead to lower costs of hearing and preparatory work.

Other key non-monetised benefits by 'main affected groups'

The ability for the courts to take into account relevant sensitive information may lead to more informed judicial decisions on a greater range of Government activity, including matters of significant public interest. The UK may also benefit from a reduction in reputational and political costs associated with settling cases where the allegations include complicity in false imprisonment and mistreatment abroad. It may result in increased international cooperation as partners could have confidence that the UK can protect information they share with the UK in confidence.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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The assessment is sensitive to assumptions on the volume of cases; and, the unit cost assumptions for legal representations and judges. The analysis is also sensitive to standard appraisal assumptions e.g. appraisal period. Where possible sensitivity tests have been undertaken.

BUSINESS ASSESSMENT (Option 5)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

1. INTRODUCTION

- 44 This Impact Assessment (IA) accompanies the Justice and Security Bill. It assesses the proposals designed to respond to the challenges of how sensitive information is treated in a limited number of civil proceedings. The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the Government's proposal. It follows the procedures set out in the Impact Assessment Guidance and is consistent with the HMT Treasury Green Book
- 45 The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a Cost Benefit Analysis (CBA) of the proposals. CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and distributional considerations. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.
- 46 The CBA underpinning this IA rests on answering two basic questions: what is the problem that the proposals are seeking to address that has led the relevant sector not to function properly; and, in what way can Government intervention help mitigate this problem? What options are available to resolve the resultant problems, and would the available options recommended have the desired impact? To establish a case for Government action, an assessment of the possible costs and benefits of Government involvement must be made to show that benefits are likely to outweigh the costs.
- 47 In addressing these questions, the IA has focussed mainly on key-monetised and non-monetised impacts, with the aim of understanding what the net social impact to society might be from improving the process by which sensitive material is handled in civil proceedings.

2. LEGISLATIVE PROPOSAL

- 48 Under the current system, the only method now available to the courts (since the UK Supreme Court's ruling in *Al Rawi* in July 2011) to protect material such as intelligence from disclosure in open court in civil damages cases is through Public Interest Immunity (PII). A successful PII application can result in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.
- 49 In order to address this problem, the Government is proposing to extend the availability of closed material procedure (CMPs) to the High Court, Court of Appeal, Court of Session and UK Supreme Court. Some claims relating to exclusion and naturalisation decisions will be transferred to the Special Immigration Appeals Commission (SIAC).
- 50 The Bill also allows for the use of intercept material as evidence under the Regulation of Investigatory Powers Act (RIPA) amendments, in the CMPs created by the Bill and in Employment Tribunal CMPs.

AFFECTED GROUPS

- 51 The legislative proposal covered in this IA affects all of the United Kingdom, with particular impacts on the following groups:
- **the judiciary**, as primary providers of justice, especially in respect to court operations;
 - **legal service providers**, both for government and the private sector;
 - **wider government**, including the security and intelligence agencies; and,
 - **overseas intelligence agencies**, who may routinely share sensitive information with the UK
 - **the general public**, as users of the justice system and beneficiaries of improved public safety and accountability of the security agencies

3. RATIONALE FOR PROPOSAL

- 52 A problem arises with the system of PII when a case is so saturated in intelligence material that the PII procedure removes the evidence which one side requires if they are to make their case. In such circumstances, the only options available, even where a case may be speculative or have no merit, are:
- in compensation cases: to seek to settle the case by paying compensation (assuming the other side is willing to agree to settle) or ask the court to strike out the case as untriable
 - in judicial reviews: the Government may have to withdraw an executive action because it is unable to explain why it is designed to protect the public, or to stop resisting a naturalisation or citizenship application; or the court may have to strike out the case as untriable.
- 53 These limitations of PII leave the public with no independent judgment on very serious allegations about Government actions.
- 54 This problem is rare but damaging. As of 31 October 2012 there are 20 live civil damages claims (including those stayed and at pre-action stage) in which sensitive national security information is centrally relevant. There are also a number of other live cases, including some judicial review challenges in which national security information is also centrally relevant. A number of these cases relate to several individuals.
- 55 The overall figure includes seven new civil damages cases (including those at pre-action stage) which were launched against the Government between October 2011 and 31 October 2012. Three civil damages cases have been settled in the last year.
- 56 The number of cases is small, but the issues they raise are disproportionately significant. The majority relate to allegations such as false imprisonment, mistreatment, misfeasance in public office and complicity in rendition.
- 57 It is also clear that in some cases, the absence of CMPs is particularly unfair on the claimant. In the naturalisation case of *AHK and Others* the judge ruled that without any means by which sensitive intelligence could be heard in court, “the Claimant is bound to lose, no matter how weak the grounds against him, there is obvious scope for unfairness towards a Claimant.”
- 58 The Government is strongly committed to open and transparent justice. However, sometimes justice is not being delivered in open court because highly relevant national security material is too sensitive to disclose. Where they are provided for in legislation, CMPs enable justice to be done and sensitive material to be safeguarded. 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 led to an out of court settlement, without the merits of the case having been argued.
- 59 Private hearings and confidentiality rings exist and operate effectively for less sensitive material, where the risks of leaking can be managed and contained. Where national security is at stake, private hearings (where the public – but not the parties – are excluded from court) and confidentiality rings (agreements not to disclose information further) do not provide sufficient protection.

4. BASE CASE

- 60 IA Guidance requires that legislative proposals are assessed against a defined ‘base case’. The base case for this IA is one in which there are no changes to how sensitive material is dealt with in civil proceedings in the United Kingdom. This would mean that the current problems set out under **Section 3** would continue to persist with on-going impacts on the United Kingdom.

4 IMPACT OF PROPOSAL

- 61 This section sets out the impact of introducing closed material procedures in civil proceedings focusing on: costs and benefits; associated assumptions and sensitivities; and, potential risks.

COSTS OF PROPOSAL

Monetised Costs

- 62 Extending CMPs would lead to additional costs of Court hearings in cases which would otherwise have proceeded with PII claims for the sensitive elements. An outline of the possible outcomes under the PII system is above in **Section 3**. Under the CMP process the case would continue for a longer period in court relative to settling, resulting in additional legal administrative costs.
- 63 For these cases, the additional costs (relative to the do nothing option), from the introduction of CMPs would depend on the following:
- how much of the case would use the CMP process ;
 - the level of legal support provided to Government and the non-state litigant for CMP purposes;
 - the costs to the judiciary of additional judicial and administrative staff time; and,
 - the number of civil cases that would utilise CMPs (the number of civil cases has been estimated based on the volume of cases across the UK at the time the Bill was introduced).
- 64 Full assessment of the monetised impacts of CMPs, including consideration of various sensitivity tests is set out under **Annex A**. The total monetised annual cost is estimated to range between £0m and £2m. This equates to a discounted estimate of £9m over the appraisal period (2013-2022), within the range of £3m to £20m.

Non-Monetised Costs

Costs of Non-Government amendments from House of Lords

- 65 At Report stage the House of Lords voted for a number of non-government amendments to be included in the Bill. There could be some monetised and non-monetised costs associated with these changes on the civil justice system.
- 66 There has not been sufficient time to complete a full analysis of all the non-government amendments. Some amendments like court initiated CMPs could theoretically increase the number of CMPs, however, the cumulative impact of all the non-government amendments could be that there are fewer CMPs. The impact is unclear at present.

Other Costs

- 67 A number of respondents to the consultation on the Green Paper that preceded the Bill highlighted some potential non-monetised costs of CMPs to society in general. The nature and extent of these costs are difficult to quantify. In particular it is difficult to assess the extent to which these impacts are significant relative to the status quo (base case).
- 68 The JCHR in particular has argued that these proposals carry non-monetised costs relating to the transparency of the judicial process.
- 69 The consultation responses also argued that CMPs represent a departure from the principle that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own.
- 70 Some responses noted that there may be practical challenges for private parties. The civil justice system relies on parties being able to assess the prospects of success. It is possible the use of CMPs may leave a party's legal advisers unable to assess the prospects of a claim and consequently being unable to access appropriate legal finance support.

BENEFIT OF PROPOSAL

Monetised Benefits

- 71 Extension of CMPs to civil proceedings in the High Court, Court of Appeal, Court of Session, and UK Supreme Court, and diverting some claims about naturalisation and exclusion decisions to SIAC would lead to a reduction in the use of PII certificates, as it would be necessary less often to seek to protect material that way. The scale of the savings would depend on the volume and costs

of the PII when CMPs are available relative to existing costs where there are no CMPs. PII would continue to exist for other aspects of the public interest such as international relations and it may continue to be used in relation to national security cases in some circumstances. The total savings per annum are estimated at £1m. The total discounted benefits over the 10 year appraisal period would range between £6m and £11m. The central benefit is estimated at just over £8m.

Non-Monetised Benefits

- 72 Extension of CMPs would lead to the following non-monetised benefits:
- Greater information available to the courts, which would mean decisions would have the benefit of all relevant information and therefore better serve the interests of justice;
 - Reduction in reputation and political costs to the UK associated with the current system whereby the Government can be unable to defend itself from the serious charges of complicity in false imprisonment and mistreatment of individuals overseas.
 - Greater reassurance to the UK's intelligence partners that their information can be protected leading to enhanced information sharing and cooperation. Though difficult to express in money terms, such cooperation is vital to UK safety and security.

NET IMPACT OF PROPOSAL

- 73 The proposal would generate a nearly neutral impact of around £-1m over the appraisal period (2013-2022), within the range of -£11m and £5m. The overall monetised outcome is therefore likely to be broadly neutral annually as the unit costs of a new CMP process would be broadly equivalent to the current PII process. The negative net present cost (£-1m) reflects the small transition costs of diverting the current pending cases and transferring naturalisation and exclusion judicial review cases to the Special Immigration Appeals Commission (SIAC).
- 74 The current analysis is based on volume of cases where Government would apply for CMPs. Further work will be completed on the costs of court initiated CMPs and the cumulative effect of all the non-government amendments.
- 75 The assessment has also identified that there would be other positive and negative impacts which are difficult to monetise, such as the impact from availability of greater information during proceedings; reputational costs and benefits; possible practical challenges for private parties; and effects on international cooperation as well as the wider benefits in protecting national security interests.

ASSUMPTIONS

Standing

- 76 An important consideration for any IA is the relevant scope of the assessment. The scope of this IA includes:
- Impacts that fall within the physical geography of the UK¹. This means focusing on assessing the impacts of the proposals on those in the UK e.g. the justice systems across the UK.
 - Impacts that fall on both present and future generations. In line with the HMT Green Book and IA Guidance, the appraisal assesses whether any of the options will yield a positive net social benefit to all who may be affected by it. As the Bill proposals will continue in the distant future, we have appraised the impacts between 2013 and 2022 (10 years), with a real discount rate of 3.5%.

Technical Assumptions

- 77 The monetised assessment is sensitive to the technical assumptions set at **Annex A**. These include assumptions relating to volume of cases; appraisal assumptions and policy scope. Where possible sensitivity tests have been undertaken to quantify the scale of uncertainty.

¹ The SIAC changes take into account the Channel Islands and the Isle of Man

APPRAISAL OF CLOSED MATERIAL PROCEDURES

- A.1 This Annex explains how the assessment of the impact of introducing closed material procedures (CMPs) in civil cases has been undertaken.

1. POLICY PROPOSAL

- A.2 The proposal is to make CMPs available in certain civil proceedings where the court considers that a party to the proceedings would be required to disclose material and such disclosure would be damaging to the interests of national security. These would mostly include judicial reviews and applications and civil damages claims. CMPs would also be available where there is an application to set aside the Secretary of State's certificate that certain information should not be disclosed after a *Norwich Pharmacal* application. Judicial reviews relating to certain naturalisation and exclusion decisions are also included in the analysis. These cases would be transferred to the Special Immigration Appeals Commission (SIAC) with associated additional impacts (further detail at para A17).
- A.3 Currently, if the case involves sensitive material, disclosure of which would be harmful to national security, there are the following courses of action: either a CMP is permissible where there is statutory authority; or the case is tried in open court, with Public Interest Immunity (PII) claims made concerning the sensitive material.
- A.4 CMPs are currently provided for in a limited range of proceedings, such as sensitive immigration and TPIMs hearings. The proposal is to extend this procedure to make it clear that it is available for civil proceedings in the High Court, Court of Appeal, Court of Session and UK Supreme Court, and that challenges to certain exclusion and naturalisation decisions can be dealt with by SIAC which already has a CMP procedure.
- A.5 The Bill also allows for the use of intercept material as evidence under the Regulation of Investigatory Powers Act (RIPA) amendments, in the CMPs created by the Bill and in Employment Tribunal CMPs.

CURRENT FRAMEWORK

- A.6 There are two elements under the current PII framework :
- a) In cases involving sensitive material, the Secretary of State must consider whether there is a real risk that harm to the national interest would result if the material was disclosed into an open court. The Secretary of State must then balance this against the public interest in the administration of justice. If the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld. These certificates are then put before the relevant court for consideration.
 - b) The court then considers afresh the balance between the public interest in withholding the evidence and the public interest in disclosing the information. The material cannot be admitted and the parties cannot rely on it if the public interest in withholding the information outweighs the public interest in disclosing it. However, if the public interest in disclosing the information outweighs the public interest in withholding it, then the document must be disclosed (unless the Government concedes the issue to which it relates or chooses not to rely on that material). Where material cannot be disclosed, it may be possible to summarise the material, to produce relevant extracts, or to produce the material "on a restricted basis"².
- A.7 The judge considers the PII certificates (in (b) above) in 'disclosure hearings' (in addition to non-sensitive hearings relating to other non-sensitive parts of the case) with potential for sensitive ex-parte hearings with Government alone, though in some cases Special Advocates (SAs) are

² See *R v Chief Constable, West Midlands ex p Wiley* [1995] 1 AC 274 at paragraphs 306H- 307 B.

appointed to join hearings if the judges deemed it necessary³. This can be a fairly protracted process until the judges decide which evidence may be withheld under PII.

- A.8 In the event that the judge disagrees with the Government about the balance of public interest, the Government may be forced to either release the information or drop the points pertaining to the material that is subject to the overturned PII certificate. In some instances litigants may disagree with the court decision and would opt to appeal to higher courts. The analysis presented here excludes the “appeals” element.
- A.9 A key source of costs under the current regime is the significant PII application hearings as part of the disclosure process, and the work necessary to prepare for them.

PROPOSED FRAMEWORK

- A.10 The Bill proposes legislation to make CMPs more widely available in civil proceedings in the High Court, Court of Appeal, Court of Session and UK Supreme Court.
- A.11 In instances where Government initiates the CMPs, the process would be as follows:
- Trigger: the Minister triggers the process by first considering whether to make a claim for public interest immunity, and then applying to the judge who determines whether it goes ahead on the grounds that there was some material relevant to the case, the disclosure of which would damage national security. The decision that in principle a CMP could be heard would be a judicial one. The Bill explicitly states that it makes no changes to the availability of PII – so PII could also be applied for at this stage.
 - Disclosure: The judge would then also decide how each individual piece of evidence should be dealt with – whether that be in closed session, or in open session. If the judge finds that the material should be dealt with in closed session, they will then decide whether a summary of the evidence must be made available to the other party (known as the gist).
- A.12 A key aspect of the proposed regime is that, where a CMP application is made, the CMPs application hearing and the subsequent decisions about the treatment of individual pieces of information is likely to replace prolonged PII application hearings. There would also be the potential logistical and cost impact of running concurrent closed and open hearing for the same legal proceeding.
- A.13 Following Report Stage in the House of Lords, there are two additional instances where the CMP process may be initiated in place of Government: courts could order the use of CMPs following a PII application; and, other parties may be able to ask the Court to order a CMP irrespective of the Government position. It is not yet known how this will effect the number of CMP cases when considered with the other non-government amendments.

2. COSTS OF PROPOSED FRAMEWORK

- A.14 Under the proposed system, some cases which currently are heard in open with elements of the relevant material excluded through PII would be heard instead in a combination of open and closed court.
- A.15 For these cases, the additional *cost per case* (over and above the ‘do nothing’) from the introduction of the CMPs would depend on the following :
- *The nature of the CMP process*. In particular, the length of hearings to determine whether the CMP is needed and how much of the case would involve the CMP process. This is likely to vary depending on the type and complexity of the case. It could range from 1 – 5 days of hearing before the judge with arguments and evidence presented. The CMP component of the main hearing is likely to mirror the actual length of open court component. It is assumed that in most instances such CMP cases may run for 5 days, with scope to last as much as double that (i.e. range up to 10 days, with a lower case of 2.5 days).
 - *The level of support provided to government and non-State litigant for CMP purposes*. It has been assumed that government counsel would be in the region of 3 for most cases. The non-

³ The assessment has assumed no such representations are made available.

State litigant Special Advocate representation would also depend on judicial decisions relating to the nature of the case. It is envisaged in most civil cases there would at least be 2-4 special advocates (Queen’s Counsel supported by Junior Barristers).

- *The costs to the judiciary in form of judicial and administration staff time.* Judicial time would in most cases not be limited to substantive hearings but also to administrative hearings.

A.16 **Table A1** sets out the unit cost inputs and the resulting cost per case assumptions respectively that underpins the assessment. It is assumed that costs per case would vary between £0.02m and £0.13m.

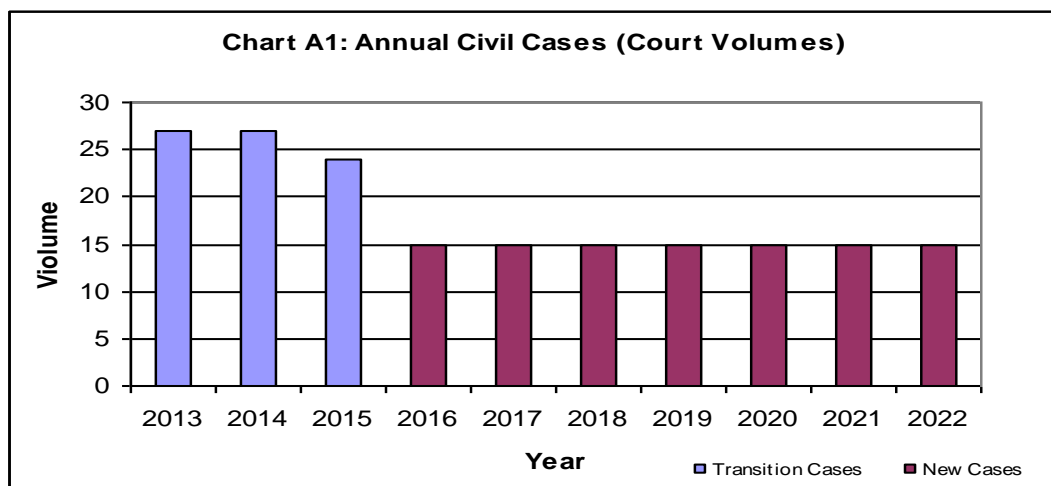
Table A1 : CMP Cost Per Case Assumptions			
	Central	Low	High
SA Support to Litigant	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Junior Barristers
HMG Counsel	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Barristers
CMP Application Hearings	3 days	1 day	5 days
CMP Main Hearings	5 days	2.5 days	10 days
Cost per case (£m)	0.06	0.02	0.13

A.17 The assessment of the total costs of introduction would depend on the volume of cases that would now utilise the CMPs. The volume of civil cases has been estimated based on the following :

- Current volume of pending and stayed cases. Due to the absence of a clear historic trend, we have taken the current “pending” cases as the best snapshot in time and assumed that these would decrease over time and stabilise annually in line with the current volume of PII certificates annually requested⁴.
- The majority of cases relate to judicial reviews, particularly exclusion and naturalisation cases, with a few cases related to civil claims and damages. Exclusion and naturalisation judicial review cases will be diverted to the SIAC with associated additional costs. These costs have been included in the assessment.
- All jurisdictions are included in the analysis, although Scotland and Northern Ireland are assumed to have substantially lower volume.

A.18 **Chart A1** sets out the current assumed profile of sensitive civil cases. This assumes current live cases would be dealt with in the first year, with stayed cases spread over the two years thereafter alongside other emerging cases. The cases are assumed to stabilise around current PII certificates applications. The figures in Chart A1 only relate to cases assumed to be brought by Government. It does not include case volumes which may be initiated by the Court or other party or otherwise take account of the non-government amendments. Case volumes at the moment are difficult to quantify without further analysis of all the non-government amendments,

⁴ The assessment assumes that the relevant national security cases would fall under CMPS though in practice the Secretary of State will consider whether PII or CMPS should apply. The analysis is therefore illustrative only by assuming all cases will go through CMPS, even though there will in practice be a mix of PII/CMPS. Varying the assumption would not substantially change the net impact though it would change the scale of costs and benefits.



A.19 The additional costs associated with the introduction of CMPs are set out in **Table A2**⁵. The undiscounted costs would range between £1m and £2m per annum. The total discounted cost over the 10 year appraisal period would range between £3m and £20m, with a central estimate of £9m. In the event that the non-government amendments changed the number of CMPs this could lead to lower or higher costs than those assumed in Table A2. The extent of the variation from those set out below is unclear.

Table A2: Civil CMPS Costs (£m) [Table A2]			
	Sensitivity Test Assumptions		
	Central	Low	High
Annul Aver (Und)	1	0	2
Appraisal Period (Disc)	9	3	20

OTHER CONSIDERATIONS

A.20 The Bill also allows for the use of intercept material as evidence under the Regulation of Investigatory Powers Act (RIPA) amendments, in the CMPs created by the Bill and in Employment Tribunal CMPs. The impact of intercept as evidence in this context is currently regarded as negligible.

A.21 The disclosure costs associated with intercept evidence in civil cases is low because there is no requirement to retain large amounts of extra intercept material as part of the disclosure process. There would be no consequent need for large amounts of transcribing. Under the Justice and Security Bill proposals the material to be heard under CMPs will be driven by what is already available. Under CMPs, if Government happened to have retained intercept and it is relevant, it will have to be disclosed in closed, but there will not be any need to change collection procedures or put in place new infrastructure in order to be compatible with ECHR requirements.

3. BENEFITS OF PROPOSED FRAMEWORK

A.22 The proposed system would lead to benefits from the reduction of potential PII costs for cases which are triggered by Government. There would be cases which in the absence of the CMPs would have gone to an open court, with PII certificates on sensitive material but would now utilise the CMP process for some part of the process with other elements continuing to proceed in open court.

A.23 The main additional benefit is the reduction in PII certificates applications as a result of reduced *need* to use such certificates concerning certain sensitive information. The benefits are likely to include avoiding the following costs which are incurred under the current PII system:

⁵ This does not include reduction in costs from less PII process which are examined under the benefits section

- i) Reduced PII application hearings currently held as part of the disclosure process. These currently can last for long periods. As many as 12 hearings can occur for a single case as various parties make their position known. For most of these hearings it is assumed that no special advocate is used by the non-State litigant.
- ii) Reduction in PII ex-parte hearings with HMG counsel. Under the current system, the judge may request ex-parte hearings with HMG counsel to help establish the sensitive nature of the material. Such hearings would usually last no more than 2 days of hearings.

A.24 The extent of the benefits would depend on the volume of PII cases. We have assumed that across the three UK jurisdictions there would be about 15 PII related cases annually⁶, with a lower and upper bound range of 10 – 20 cases annually.

A.25 **Table A3** sets out the unit cost inputs and the resulting PII savings per case assumptions respectively that underpins the assessment. It is assumed that costs per case would vary between £0.05m and £0.09m. The case volumes are based on the current estimate of annual PII cases (not certificates) that are issued across the three jurisdictions.

Table A3 : PII Savings Per Case Assumptions			
	Central	Low	High
HMG Counsel	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Barristers
Litigant – Private	1 QCs and 3 Junior Barrister	1 QC and 2 barrister	1QC and 4 barrister
Litigant – SA	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Junior Barristers
Judge Review of Case	2 day	1 day	3 days
PII Applications Hearings	7 days	5 days	10 days
PII Sensitive Case Hearings	1 day	1 day	2 days
Cases per annum	15 cases	15 Cases	15 cases
Total	0.07	0.05	0.09

A.26 The cost savings associated with the introduction of CMPs are set out in **Table A4**. The undiscounted benefits are estimated at £1m per annum. The total discounted benefits over the 10 year appraisal period would range between £6m and £11m, with a central estimate of £8m

Table A4: PII Savings Benefits (£m)			
	Sensitivity Test Assumptions		
	Central	Low	High
Annul Aver (Und)	1	1	1
Appraisal Period (Disc)	8	6	11

OTHER CONSIDERATIONS

A.27 In any proceedings, the requirement to utilise CMPs may have a financial saving to Government from a reduced need to settle cases out of court. Though this financial gain is counted as a benefit to Government (and taxpayer), it does not constitute an overall economic benefit in appraisal terms because such out of court settlement would essentially constitute a transfer of benefits from the litigant to Government⁷. It is therefore scored both as a cost to the litigant and a benefit to Government, which effectively translates as an overall zero impact on society⁸. It should also be noted that there is no certainty that Government would not still seek to settle even after going

⁶ The PII savings are therefore based on much lower volume than the CMPs costs. This is based on the assumption that many of the stayed and pending cases have already incurred PII costs and therefore there are no feasible savings from those cases beyond the annual PII certificate application costs. Changing this assumption may alter the results.

⁷ It is assumed that under most damages cases the litigants would be UK residents though not necessarily UK nationals.

⁸ This argument of course does not apply to non-State litigant representation costs because it is assumed such ultimately fall to Government through legal aid and Special Advocate costs.

through the CMP, although it would seem a less likely outcome, or that it might have to pay compensation.

4. NET IMPACT OF PROPOSED FRAMEWORK

A.28 The net present value has been assessed over the appraisal period. The proposed framework would lead to net present value of -£1m, within the range of -£11m and £5m. The overall monetised outcome is therefore likely to be broadly neutral annually as the unit costs of a new CMP process would be broadly equivalent to the current PII process. The net present cost (£-1m) is largely due to the “transition costs”. **Tables A5** provides further detail for various scenarios.

Table A5: Discounted Costs and Benefits (£m, 2013-2022)			
Scenario	Benefits	Costs	Net
Central Case	8	9	-1
Low Cost Per Case	8	3	5
High Cost per case	8	20	- 11
Low Benefits (PII savings)	6	9	- 3
High Benefits (PII savings)	11	9	2

A.29 However, the quantified result is sensitive to the volume of CMP cases that would be initiated independent of Government. The current analysis is based on volume of cases where Government would apply for CMPs. There could potentially be more CMPs which are initiated by Courts or another party. However, the cumulative impact of all the non-government amendments could potentially reduce the number of CMPs. More analytical work is required to consider all the amendments and the effects on the costs.

5. TECHNICAL ASSUMPTIONS

APPRAISAL APPROACH

A.30 The approach to appraisal that underpins the assessment is essentially an *economic* rather than a financial one. As such the economic appraisal seeks to compare the opportunity cost of the resources employed in the production of a good or service against the social benefits to society of producing the good or service. It therefore differs from a financial appraisal that seeks to measure where the financial burden lies.

A.31 In the context of justice the opportunity cost relates to the cost of an additional trial (case). That is to say by employing given resources in a particular trial (case), those resources are deprived from being used elsewhere. The opportunity costs would include the costs associated with the following - judicial time, defence and prosecution time. These costs are usually expressed in money values. The cost of legal aid by government and court fees paid to government are regarded as transfer payments and therefore unnecessary. In other words it relates to the distribution of the costs of producing justice and are therefore rightly ignored.

UNIT COSTS

A.32 The Unit Cost assumptions are set out in **Table A6**. The costs have been adjusted for non-wage labour costs.

Table A6 : Unit Costs Assumptions (All figures adjusted for non-wage labour costs at 21.2%)		
CMP Element	Description	Cost (£)*
Queens Counsel	Based on existing market rates	£241 per hour
Junior Barristers	Based on existing market rates	£121 per hour
Judicial Costs	High Court judge's time, which is estimated from the judicial wages and overheads to represent the opportunity cost of time spent hearing the case	£345 per hour
Court Courts	Court administration costs based on appropriate staffing levels as provide from court management systems data.	£145 per hour

*All figures adjusted for non-wage labour costs at 21.2%

A.33 The appraisal modelling assumptions used are: policy appraisal length 2013-22; real discount rate – 3.5%; price base (2010/11); and, non-wage labour cost adjustment – 21.2%.

Title: Justice and Security Bill – <i>Norwich Pharmacal</i> Lead department or agency: Cabinet Office Other departments or agencies: Cabinet Office and Ministry of Justice	<h2 style="margin: 0;">Impact Assessment (IA)</h2>
	Date: 12/12/2012
	Stage: Parliamentary Stage – Transfer to second House
	Source of intervention: Domestic
	Type of measure: Primary legislation
	Contact for enquiries: justiceandsecurity@cabinet-office.x.gsi.gov.uk
Summary: Intervention and Options	RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£3m	N/A	N/A	Yes/No	In/Out/zero net cost

What is the problem under consideration? Why is government intervention necessary?

In a landmark case in 1974 the House of Lords held that where a third party who had been mixed up (innocently or otherwise) in arguable wrongdoing by another held information relating to that arguable wrongdoing, a court could compel that party to disclose information in order to assist that person to seek redress in relation to that wrongdoing. This is now known as a *Norwich Pharmacal* Order. In recent years, the courts have considered applications for *Norwich Pharmacal* relief where the disclosure sought is sensitive information the disclosure of which would be damaging to national security and international relations. The Government assesses that the disclosure of such information in those proceedings – and the ongoing availability of *Norwich Pharmacal* as a possible route for claiming sensitive disclosure - is causing damage to national security.

What are the policy objectives and the intended effects?

The government proposes to legislate to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications seeking disclosure of “sensitive information”. This includes information held by, obtained from or relating to the intelligence services (including the intelligence activities of Her Majesty’s forces or the Ministry of Defence); and information specified in a judicially reviewable Ministerial certificate which may be issued where the Secretary of State considers disclosure of that information would be damaging to the interests of national security or international relations. The policy objective is to prevent the courts ordering disclosure of information where that disclosure would damage the interests of national security or international relations. The intended effect is to protect these national interests, including international cooperation to tackle terrorism and other threats.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

A legislative proposal to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications where information held by the intelligence services, and to permit judicially reviewable Ministerial certificated exemptions for other sensitive material (as defined in the Bill). The base case against which the proposal is examined is one in which there are no changes to how *Norwich Pharmacal* cases are handled in the United Kingdom. This would mean that the current problems would continue to persist with ongoing negative impacts on the United Kingdom – foreign partners that share sensitive information with the Government, and our intelligence agencies that generate sensitive information will continue to have inadequate confidence in the Government’s ability to hold that information in confidence and so may share or generate less sensitive information in the future, thus jeopardising our national security.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes/No	< 20 Yes/No	Small Yes/No	Medium Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions?		Traded:		Non-traded:	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: _____ *LC* _____ Date: 14/12/12

Summary: Analysis & Evidence

Policy Option 5

Description: Limiting *Norwich Pharmacal* Cases

FULL ECONOMIC ASSESSMENT

Price Base Year 2010	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 2	High: 3	Best Estimate: 3

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	0	1
High	Optional	0	1
Best Estimate			1

Description and scale of key monetised costs by 'main affected groups'

There would be new costs if *Norwich Pharmacal* applicants chose to challenge the Ministerial certificates issued to exempt non-intelligence service sensitive information from disclosure. Although likely to be rare, such challenges may still impose some costs. These impacts would be in form of private legal costs and general judicial time and expenditure.

Other key non-monetised costs by 'main affected groups'

Removing the possibility of *Norwich Pharmacal* applications seeking disclosure of sensitive information may lead to negative impacts on UK nationals, residents and businesses seeking to use that information in other proceedings, in particular, in foreign proceedings. These measures may impact on those proceedings by limiting the availability of evidence for use in those proceedings. This may have consequential impacts for example on the length and cost of those proceedings. The extent to which the unavailability of such information through *Norwich Pharmacal* applications would impact on other proceedings is unclear, in particular, given that these measures will not affect other mechanisms which exist for obtaining such information.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	0	3
High	Optional	0	4
Best Estimate			4

Description and scale of key monetised benefits by 'main affected groups'

The proposal may ultimately lead to savings from a reduction in legal proceedings costs. Fewer *Norwich Pharmacal* cases seeking sensitive information would be heard in UK courts. The savings would be in the form of reduced judicial and government counsel time; government officials (policy / lawyers); and potential special advocate cost savings where special advocates might have been appointed; and legal aid costs

Other key non-monetised benefits by 'main affected groups'

The proposal would lead to greater certainty about the extent to which there can be disclosure of sensitive material for the use in other proceedings; improved protection of sensitive information; *resource savings* as fewer cases will go to court, because *Norwich Pharmacal* relief will not be available for certain categories of material, some resource savings for the intelligence agencies; and there would be improved international confidence as foreign governments will have greater reassurance that their material will be appropriately protected.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

The assessment is sensitive to assumptions on the volume of cases; and, the unit cost assumptions for legal representation and judges. The analysis is also sensitive to standard appraisal assumptions e.g. appraisal period, where possible sensitivity tests have been undertaken.

BUSINESS ASSESSMENT (Option 6)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

1. INTRODUCTION

- 78 This Impact Assessment (IA) accompanies the Justice and Security Bill. It assesses the proposals designed to respond to the challenges in cases where a claimant seeks disclosure of sensitive material in order to assist another set of proceedings, usually taking place abroad. The IA presents the evidence base supporting the rationale for intervention and estimates of the costs, benefits, risks and wider impacts attached to the Government's proposal. It follows the procedures set out in the Impact Assessment Guidance and is consistent with the HMT Treasury Green Book.
- 79 The IA aims to identify, as far as possible, the impacts of the proposals on society. A critical part of the process is to undertake a Cost Benefit Analysis (CBA) of the proposals. CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic, social and where possible seeks to show how those impacts are distributed across the affected groups. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.
- 80 The cost benefit analysis underpinning this IA rests on answering two basic questions: what is the problem that the proposals are seeking to address that has led the relevant sector not to function properly; and, in what way can Government intervention help mitigate this problem? What options are available to resolve the resultant problems, and would the available options recommended have the desired impact? To establish a case for Government action, an assessment of the possible costs and benefits of Government involvement must be made to show that benefits are likely to outweigh the costs
- 81 In addressing these questions, the IA has focussed mainly on key-monetised and non-monetised impacts, with the aim of understanding what the net social impact to society might be from restricting the jurisdiction to obtain disclosure of sensitive information known as "*Norwich Pharmacal*" relief.
- 82 A *Norwich Pharmacal* order is an equitable remedy developed by the courts in England and Wales (with an equivalent jurisdiction in Northern Ireland), requiring a respondent to disclose information to the applicant, for use in another set of proceedings. There is no equivalent remedy in Scotland. The respondent must be mixed up in arguable wrongdoing by another, whether innocently or not, and is unlikely to be a party to the other set of proceedings. An order will only be granted where the court exercises its discretion to grant this equitable relief.
- 83 *Norwich Pharmacal Co & Others v Customs and Excise Commissioners* was the first case of this kind. It involved 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 Co. was unable to identify the importers. They wished to do so as they wanted to bring legal proceedings against those infringing their patent. The Commissioners held information that would identify the importers but would not disclose this, claiming that they had no authority to give such information.
- 84 The House of Lords held that where a third party who had been mixed up in another's wrongdoing had information relating to that wrongdoing, the court could compel the third party to assist the person suffering damage by giving them that information. This is known as a '*Norwich Pharmacal* Order'. In recent years, such applications have been made against Government for sensitive information.

2. LEGISLATIVE PROPOSAL

- 85 The Government is proposing to legislate to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications in respect of "sensitive information". This is (a) information (i) held by an intelligence service, (ii) obtained from, or held on behalf of, an intelligence service, (iii) derived in whole or part from information obtained from, or held on behalf of, an intelligence service, or (iv) relating to an intelligence service, or (b) information specified or described in a certificate issued by the Secretary of State, in relation to the proceedings, as information which the respondent should not be ordered to disclose. Where such a certificate is issued, the party seeking disclosure may apply to the court for a review. The review would be conducted on judicial review principles.

AFFECTED GROUPS

- 86 The legislative proposal covered in this IA will affect all of the United Kingdom, with particular impacts on the following groups:
- **the judiciary**, as the body which developed this common law jurisdiction, and as the body before which any legal challenges in relation to the legislation will be brought;
 - **legal service providers**, both for government and private litigants;
 - **Government**, including in particular the security and intelligence agencies; and,
 - **foreign governments in particular their intelligence agencies**, who share sensitive information with the UK.
 - **the general public**, as users of the justice system and beneficiaries of national security measures;

3. RATIONALE FOR PROPOSAL

- 87 Relief under '*Norwich Pharmacal*' principles is intended to be exceptional. Until recent years it had not been used to obtain information, the disclosure of which would cause damage to national security and international relations. Nonetheless, it has been a growing area of litigation, with the Government having defended no fewer than nine such cases since 2008.
- 88 The problem of the extension of the *Norwich Pharmacal* jurisdiction in this way has hitherto been generally confined to cases where disclosure of sensitive material is required in order to assist in proceedings 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.
- 89 Cases of this kind have had a disproportionate impact on our international, diplomatic and intelligence relationships with foreign governments. Those governments, in particular the US government, have expressed concern about the UK government's ability to protect sensitive intelligence information shared by it in confidence.
- 90 The Government is concerned that sensitive information, including that belonging to our intelligence partners may be obtained by individuals through this recent development in our justice system. If the situation is allowed to continue, this has the potential to further undermine the trust and confidence our liaison partners have in our ability to protect their sensitive information and damage efforts to protect the public. There is also concern that the disclosure of domestic intelligence material held by or relating to the intelligence services under *Norwich Pharmacal* is and would cause damage to national security.

4. BASE CASE

- 91 IA Guidance requires that all options are assessed against a common 'base case'. The base case for this IA is one in which there are no changes to how *Norwich Pharmacal* cases are handled in the United Kingdom. This would mean that the current problems set out under **Section 3** would continue to persist with on-going impacts on the United Kingdom. As the base case compares against itself, the net present value is zero¹.

5. IMPACT OF PROPOSAL

- 92 This section sets out: the costs and benefits of the legislative proposal, as compared against the base case ("do nothing") set out under Section 4. It also explains the associated assumptions and sensitivities and associated risks and sensitivities.

¹ However, it should be noted that certain drivers / factors are likely to change over time and may amplify the profile of impacts within the base case over time relative to the current year.

COSTS OF PROPOSAL

Monetised Costs

- 93 The proposed framework may lead to costs from potential legal challenges associated with reviewing certificates. Such challenges will be based on judicial review principles and are likely to be very rare, as most of the material sought in sensitive *Norwich Pharmacal* cases is intelligence agency material which will be absolutely excluded.
- 94 The nature of the judicial review process, which is dominated by written submissions, would suggest that the overall costs likely be less than £0.10m per annum. These costs include HMG and private legal costs; and judicial expenditure. The overall cost over 10 years is estimated at no more £1m.

Non-Monetised Costs

- 95 Removing the possibility of *Norwich Pharmacal* applications seeking disclosure of sensitive information may lead to negative impacts on UK nationals, residents and businesses seeking to use that information in other proceedings, in particular, in foreign proceedings. These measures may impact on those proceedings by limiting the availability of evidence for use in those proceedings. This may have consequential impacts for example on the length and cost of those proceedings. The extent to which the unavailability of such information through *Norwich Pharmacal* applications would impact on other proceedings is unclear, in particular, given that these measures will not affect other mechanisms which exist for obtaining such information.

BENEFIT OF PROPOSAL

Monetised Benefits

- 96 The proposal would lead to a reduction in *Norwich Pharmacal* applications. This would potentially lead to annual savings of between £0.4m and 0.5m. The total discounted saving over the full 10 year appraisal period would range between £3m and £4m. The central benefit is £4m. A full assessment is set out **Annex A**.

Non-Monetised Benefits

- 97 There would be non-monetised benefits including the following:
- *Greater certainty* about how sensitive material is handled.
 - *Resource savings* - fewer court hearings resulting in time savings for employees of the agencies and the Secretary of State. Though some of these benefits are monetised, other aspects are not – see **Annex A**.
 - *International confidence* – foreign relations. Foreign agencies will have greater reassurance that their material is protected

NET IMPACT OF PROPOSAL

- 98 The legislative proposal would generate a net positive impact of around £3m over 10 years (2013-2022). Table 1 provides the full range of sensitivity tests results.
- 99 We have also assessed the non-monetised impacts of the proposal. In general limiting *Norwich Pharmacal* cases would lead to certainty that intelligence services material will not be disclosed pursuant to this jurisdiction. It will give international partners greater reassurance that their material is protected which may further strengthen UK security efforts. However, this has to be balanced against the possibility of some negative impacts on individuals in those instances where the disclosure being sought would be beneficial in other proceedings, in particular, foreign proceedings.

Table 1 : Discounted Costs and Benefits of Removing Norwich Pharmaceutical Provision (£m, 2013-2022)			
Scenario	Benefits	Costs	Net
Central Case	4	1	3
Test 1: Low Cost Per Case	3	1	2
Test 2: High Cost Per Case	4	1	3

ASSUMPTIONS

Standing

100 An important consideration for any IA is the relevant scope of the assessment. The scope of this IA includes:

- Impacts that fall on UK residents and nationals. This means focusing on assessing the impacts of the proposals on those in the UK and UK nationals abroad who may be affected by the proposals.
- Impacts that fall on both present and future generations. In line with the HMT Green Book and IA Guidance, the appraisal assesses whether any of the options will yield a positive net social benefit to all who may be affected by it. As the Green Paper proposals will continue in the distant future, we have appraised the impacts between 2013 and 2022 (10 years), with a real discount rate of 3.5%.

Technical Assumptions

101 The monetised assessment is sensitive to the technical assumptions set at **Annex A**. These include assumptions relating to volume of cases; appraisal assumptions and policy scope. Where possible sensitivity tests have been undertaken to quantify the scale of uncertainty.

APPRAISAL OF NORWICH PHARMACAL CASES

A.34 This Annex assesses the impact of the legislative proposal to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications in relation to sensitive material.

CURRENT FRAMEWORK

A.35 The usual *Norwich Pharmacal* procedure is as follows, though in many instances the differences across cases means that there's no one size fits all:

- a) A claim for *Norwich Pharmacal* relief against the Government is issued (although a claim may also be issued against a non-Government party holding Government originated sensitive information). The court hears the *Norwich Pharmacal* application. This has, historically, usually been a closed material procedure (with special advocates representing the interests of the individual in the closed proceedings) and the individual and his lawyers being present during the open parts. The judge would consider each limb of the *Norwich Pharmacal* test if all of the limbs were in dispute.
- b) If after hearing the case, the court is minded to order disclosure, then HMG may seek PII protection of that material. As part of that process, the Minister states, in a PII certificate, that it is in the public interest that the material be withheld. These certificates are then put before the relevant court for consideration.
- c) The court will then determine the balance between the public interest in withholding the evidence and the public interest in disclosing the information. The material cannot be released to the individual if the public interest in withholding the information outweighs the public interest in disclosing it.

A.36 In the event that the judge disagrees with the Government about the balance of public interest, the Government would have no choice but to release it having exhausted the existing processes. In most cases the likely result is an appeal to higher courts.

PROPOSED FRAMEWORK

A.37 The legislative proposal is to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications where information held by the intelligence services, and to permit reviewable Ministerial certificated exemptions for other sensitive material.

A.38 A certified exemption is a certificate signed by a Secretary of State that disclosure of material would be contrary to the interests of national security or international relations and therefore determining that the material should be exempt from a *Norwich Pharmacal* application. This certificate could be judicially reviewed by the party seeking disclosure.

BENEFITS OF PROPOSED FRAMEWORK

A.39 The proposed framework would lead to savings from reduction in legal proceedings costs, including in relation to PII costs. Fewer sensitive *Norwich Pharmacal* cases would be heard in UK courts. The main elements of the savings are likely to include the following :

- i) Potential reduction in government workload from the need to review *Norwich Pharmacal* applications. This is likely to include coordinating across government. However, any potential savings in this area are difficult to determine.
- ii) Reduction in *Norwich Pharmacal* hearings before the court, since the jurisdiction would be limited to disclosure of material that is not sensitive information. This will reduce judicial and government counsel time² and the time of officials.
- iii) Reduction in PII certification and hearing costs where the HMG has been directed to release the information but wishes to claim PII.

² The benefits associated with reduced case congestion (positive externalities) are not included.

- A.40 The quantification of impacts has focused mainly on (ii). The analysis has also assumed that all cases proceed through a direct *Norwich Pharmacal* rather than alternative routes. This offers an approximate quantification of potential savings. Potential savings related to reduction in government coordination workload and reduced PII certification are noted in the main section of the IA, but not quantified. The extent of the benefits would depend on the volume of *Norwich Pharmacal* cases. We have assumed there are currently around 4 cases per year, with a potential to rise to as many as 10 cases per year (2015 onwards).
- A.41 **Table A1** sets out the unit cost inputs and the resulting savings per case assumptions respectively that underpins the assessment. It is assumed that the savings per case would vary between £0.03m and £0.05m.

Table A1 : Norwich Pharmacal Per Case Assumptions			
	Sensitivity Test Scenarios		
	Central	Low	High
HMG Counsel	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Barristers
Litigant – Private	1 QCs and 3 Junior Barrister	1 QC and 2 barrister	1QC and 4 barrister
Litigant – SA	1 QC and 2 Junior Barristers	1 QC and 1 Junior Barrister	1 QC and 3 Junior Barristers
Judge Review of Case	2 day	1 day	3 days
Court Hearings	7 days	5 days	10 days
Cases per annum	4 rising to 10 by 2015	4 rising to 10 by 2015	4 rising to 10 by 2015
Cost per case	0.04	0.03	0.05

- A.42 The cost savings associated with proposals are set out in **Table A2**. The undiscounted benefits are around £0.4m per annum. The total discounted benefits over the 10 year appraisal period would range between £3m and £4m.

Table A2: Norwich Pharmacal Disclosure - Direct Savings (£m)			
	Sensitivity Test Scenarios		
	Central	Low	High
Annual Average (Undiscounted)	0.4	0.4	0.5
Appraisal Period (Discounted)	3.6	2.9	4.3

COSTS OF PROPOSED FRAMEWORK

- A.43 The proposed framework may lead to a new costs from potential legal challenges associated with challenges to any Ministerial certificates. We have assumed that such challenges are likely to be very rare, as most of the material sought in sensitive *Norwich Pharmacal* cases is agency material which will be absolutely excluded.
- A.44 The nature of the judicial review process, which is dominated by written submissions, would suggest that the overall costs likely be less than £0.1m per annum. These costs include HMG and private legal costs; and, judicial expenditure. The overall costs over 10 years are estimated at no more £1m.

NET IMPACT OF PROPOSED FRAMEWORK

- A.45 The net present benefit has been assessed over the appraisal period. The proposed framework would lead to net present benefit of £3m. **Tables A3** provides further detail.

Table A4 : Discounted Costs and Benefits of Removing Norwich Pharmacal Provision (£m, 2013-2022)			
Scenario	Benefits	Costs	Net
Central Case	4	1	3
Low Cost Per Case	3	1	2
High Cost Per Case	4	1	3

TECHNICAL ASSUMPTIONS

Appraisal Approach

- A.46 The approach to appraisal that underpins the assessment is essentially an *economic* rather than a financial one. As such the economic appraisal seeks to compare the opportunity cost of the resources employed in the production of a good or service against the social benefits to society of producing the good or service. It therefore differs from a financial appraisal that seeks to measure where the financial burden lies.
- A.47 In the context of justice the opportunity cost relates to the cost of an additional trial (case). That is to say by employing given resources in a particular trial (case), those resources are deprived from being used elsewhere. The opportunity costs would include the costs associated with the following - judicial time, defence and prosecution time. These costs are usually expressed in money values. The cost of legal aid by government and court fees paid to government are regarded as transfer payments and therefore unnecessary. In other words it relates to the distribution of the costs of producing justice and is therefore rightly ignored.

Unit Cost Assumptions

- A.48 The unit cost assumptions are set out in **Table A5**. The costs have been adjusted for non-wage labour costs.

Table A5 : Unit Costs Assumptions		
CMP Element	Description	Cost (£)*
Queens Counsel	Based on existing market rates	£241 per hour
Junior Barristers	Based on existing market rates	£121 per hour
Judicial Costs	High Court judge's time, which is estimated from the judicial wages and overheads to represent the opportunity cost of time spent hearing the case	£345 per hour
Court Courts	Court administration costs based on appropriate staffing levels as provided from court management systems data.	£145 per hour

*All figures adjusted for non-wage labour costs at 21.2%

- A.49 The appraisal modelling assumptions used are: policy appraisal length 2013-22; real discount rate – 3.5% ; price base (2010/11); and, non-wage labour cost adjustment – 21.2%.