

## JUSTICE AND SECURITY GREEN PAPER

### RESPONSE

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#### 1. Introduction and authorship

- 1.1 This response addresses four of the consultation questions posed in Chapter Two. It does so with a particular focus on matters relating to open justice and the transparency and scrutiny commitments articulated in the second of the key principles,<sup>1</sup> though is of course mindful of the relationship between these and other matters identified in the key principles. We limit our scope in this way to pay most attention to the matters which closely match the areas our current research.
- 1.2 The lead author, Dr Lawrence McNamara, is Reader in Law and ESRC/AHRC Fellow at the University of Reading. He runs the ‘Law, Terrorism and the Right to Know’ (‘LTRK’) research project. This 3-year project is funded by Research Councils UK under its Global Uncertainties priority. LTRK examines how different arms of the state control and manage information about terrorism and security, how the media access that information, and how the media report that information. The research includes around 60 interviews with (among others) journalists, editorial decision makers, media lawyers, criminal lawyers, government departments and agencies, police, and the judiciary.
- 1.3 The second author, Mr Sam McIntosh is the Research Assistant on the LTRK project and is also a part-time PhD candidate in the Centre for Law, Justice and Journalism at City University, London. His doctoral project examines open justice

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<sup>1</sup> *Justice and Security Green Paper* (2011) at [10].

and investigations into deaths at the hands of the state. Prior to joining Reading University's School of Law in 2008 Mr McIntosh was a legal practitioner with experience in criminal defence, civil actions against the state, and representing families of the deceased at inquests.

## **2. The proposed to introduce closed material procedures (CMPs) generally**

- 2.1 The Green Paper is premised upon the Government's proposal to introduce CMPs and responses are sought regarding questions that arise in that light. Although responses are not sought with regard to the general nature of the proposal – i.e., whether CMPs are the best way to proceed – we will offer some brief comments in that regard because it helps contextualise our responses to the specific questions.
- 2.2 First, the Green Paper states that it is concerned with a law that is 'uncertain' and that reforms aim to 'bring clarity to this area of the law'.<sup>2</sup> The Supreme Court decision in *Al Rawi* left little doubt about the status of CMPs in civil proceedings; the Government's desire is not merely for certainty but for change. As such, it needs to be recognised and acknowledged that the Green Paper clearly proposes major changes in the law.
- 2.3 Secondly, the necessity of CMPs does not yet seem to have been clearly established. *Carnduff* appears to be the only case not to proceed and it is not clear that the decision to settle the recent claims by Guantanamo detainees can be sheeted home to the risks to intelligence sources, methods or relationships.<sup>3</sup> We accept that circumstances could possibly arise where CMPs would arguably be beneficial but it is not clear that the case for CMPs in civil proceedings generally has yet been made. For example, the possible dangers of withdrawing or settling a case are raised at [1.10] but it is not clear that those circumstances are so frequent and so demanding that surveillance is not an adequate solution. On the contrary, it appears quite possible that the detriments of a CMP regime may outweigh the benefits.
- 2.4 Thirdly, we are concerned that adopting CMPs would establish a regime of secrecy which has the clear potential to become widespread in a category of cases that is already beset by secrecy and which it is by no means clear would necessarily result in fairer trials. There is much in the observation made by Lord Brown in *Al Rawi* that closed procedures would damage 'the integrity of the judicial process and the reputation of English justice.'<sup>4</sup> We note that the Special Advocates' response to the

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<sup>2</sup> *Justice and Security Green Paper* [1.11], [1.12].

<sup>3</sup> *Carnduff v Rock* [2001] EWCA Civ 680.

<sup>4</sup> *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [83].

consultation is highly critical of the proposal to introduce CMPs and we find the arguments in that response very persuasive.<sup>5</sup>

- 2.5 With those reservations in mind, the following response is premised on the basis that CMP proposals will be introduced in some form as the Green Paper indicates. We do not make the claim that our suggestions would remedy the deficiencies in a general expansion, though we hope that they may offer some suggestions that work towards alleviating the many problems.
- 2.6 With regard to all that follows we are of the view that given the sweeping change that these proposed laws would represent and the risks they carry, a sunset clause should be included in any proposals.

### 3. Closed material procedures

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

- 3.1 We generally welcome the framing of the issues in terms of justice and security being ‘twin imperatives’ and the framing of the balancing as lying in ‘striking a balance between the transparency that accountability normally entails, and the secrecy that security demands.’<sup>6</sup>
- 3.2 In our view the proposals in the Green Paper provide more than adequately for managing the security side of that equation but there could be a number of ways to enhance the transparency dimensions without any detrimental effect on security. Maximising transparency is important because as secrecy becomes more extensive it will inevitably foster distrust of the state (including the courts) and, in turn, arguably become a contributing factor in radicalisation both in Britain and abroad.

#### Key concerns

- 3.3 The key principle commitments to transparency and scrutiny are framed primarily in terms of exposure to judicial assessment rather than to the public eye. We find it worrying that open justice is not listed among the key principles that have guided the development of the proposal, and in our view the substance of the proposals

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<sup>5</sup> ‘Justice and Security Green Paper: Response to Consultation from Special Advocates’, 16 December 2011 <http://adam1cor.files.wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf> (5 Jan 2012).

<sup>6</sup> *Justice and Security Green Paper* (2011) at [1.1], [1.6].

reflects that omission. Open justice warrants a place in those key principles; it is a fundamental feature of common law trials and of British justice.<sup>7</sup>

- 3.4 We disagree with the characterisation of CMPs in Appendix C as ‘reconcil[ing] the public interest in open justice and the public interest in safeguarding national security’. On the contrary, CMPs do not reconcile these interests, and certainly not in the form they are expressed in the Green Paper. At best, they seek to reconcile the safeguarding of national security and justice between the parties.
- 3.5 We agree with the general proposition in the Green Paper that there are circumstances in which open justice must yield so that justice can be done.<sup>8</sup> We note that a similar observation was also made by Lord Dyson in *Al Rawi* where it was stated that justice can be achieved even in the absence of open justice, though not in the absence of natural justice.<sup>9</sup> However, the fundamental nature of open justice means that any departures should occur truly in exceptional circumstances and with protections to prevent its creeping expansion.<sup>10</sup>
- 3.6 Undoubtedly, CMP hearings will be a minute proportion of all civil cases.<sup>11</sup> However, if read as an indicator that CMP proposals do not raise great concerns, reference to that proportion is misleading. The more relevant ratio concerns the category of cases where terrorism and security issues arise; here, CMP hearings are more likely to occur in a much higher proportion of these cases.
- 3.7 We note with some concern the Green Paper’s position that the current CMPs are essentially satisfactory (e.g., [1.53]), though this seems arguably at odds with trenchant criticisms that have been made by, for example, the Human Rights Joint Committee.<sup>12</sup>
- 3.8 Even if one were to accept that CMP hearings have been effective in the current framework, the proposed general expansion would inevitably make closed hearings a rule rather than an exception, in spite of the stated objectives that CMPs be used only in exceptional circumstances.<sup>13</sup> Experience suggests that once provisions are generally available then it is difficult to circumscribe their use.<sup>14</sup>

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<sup>7</sup> See, for example, the comments of Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [10].

<sup>8</sup> *Justice and Security Green Paper* (2011) at [1.56].

<sup>9</sup> *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [27].

<sup>10</sup> See, for example, Lord Hope in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [73].

<sup>11</sup> *Justice and Security Green Paper* (2011) at [2.8].

<sup>12</sup> E.g., Human Right Joint Committee, Nineteenth Report of 2006-7, [183]-[212]; Human Right Joint Committee, Ninth Report of 2009-10, [54]-[98].

<sup>13</sup> *Justice and Security Green Paper* (2011) at [2.4].

<sup>14</sup> See, for example, the comments of Lord Hope in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [73].

- 3.9 Of serious concern is that there is a distinct possibility that information in CMPs will never be revealed to the public even though it may not be damaging to national security. The simple fact of trial management can make closed hearings easier for judges and the parties may be less likely to object to CMPs for practical reasons. In Australia, the experience under the National Security Information (Civil and Criminal Proceedings) Act 2004 has been that once the options were available to limit the openness of proceedings then this happened consistently. As an Australian lawyer put it in research interviews, ‘The routine order being sought ... is that all security sensitive information be heard in closed court. That is now the default set of orders.’<sup>15</sup> The present LTRK research suggests that courts in England & Wales are more inclined to keep proceedings open wherever possible and have been more successful than Australian courts in ensuring that hearings are open to the media. This is the preferable position. Journalists in the LTRK interviews have noted that the courts are vitally important avenues for information to be exposed. The judicial interviews have suggested a strong preference for open hearings, while recognising that there may be some circumstances in which closed hearings are necessary. In this context, there is a strong need for mechanisms which best counter any trend towards normalising closed proceedings. Any such normalisation would fundamentally alter the nature and operation of open justice principles in national security cases. While justice may still be done in individual cases, there is a risk of systemic damage to the quality and openness of justice in this category of cases.
- 3.10 We propose two approaches to help alleviate this: the first concerns the triggers and the second concerns access to information.

Addressing the key concerns: the triggers for CMPs

- 3.11 CMPs must not be easily triggered if they are only to be used in exceptional proceedings. Four safeguards could be included in the mechanism outlined at [2.7].

First, the media (and the public generally) should be notified of the Secretary of State’s decision. A subscription-based email alert would be a possible method. Notice of seven days may be appropriate; for example, that period is prescribed under the Criminal Procedure Rules, Rule 16.10.

Secondly, standing to challenge the decision should not be limited to other parties in the case. Significantly, media organisations should have a right to challenge the decision. It cannot be left to the parties alone to agree to a CMP.<sup>16</sup>

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<sup>15</sup> L McNamara, ‘Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?’ (2009) 14 *Media & Arts Law Review* 1 at 15.

<sup>16</sup> Cf. *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [46].

Thirdly, in hearing arguments about the how material should be used, media organisations should again have a right to be heard. While this is of course troubling because of the lack of substantive information they may have about the matter – and inevitably it would seem difficult to make informed submissions – it would at least provide some input which may draw attention to the open justice issues. If practical, the ability to use a special advocate may be valuable at this point.

Fourthly, the criteria for determining the appropriate treatment should expressly include not only the assessment of harm caused by open disclosure but also (a) benefits of open disclosure and (b) harm caused by the absence of open disclosure. Such factors would better achieve the stated aim of ‘ensur[ing] that as much material as possible can be considered in open court’. In particular, given that non-parties would be inherently limited in their ability to make informed submissions (as mentioned above), open justice criteria are vitally important.

#### Addressing the key concerns: access to information

- 3.12 The second approach is to ensure that where CMPs are used there is a high level of openness about the nature and extent of their use.
- 3.13 We agree with the need to provide (at least) closed headnotes for judgments (as indicated in Appendix F) but more information about the use of proceedings would be essential. In addition, open headnotes to closed judgments would also be appropriate.
- 3.14 Although the Green Paper states that a CMP ‘will represent a part, possibly only a small part, of the overall case, the rest of which will be heard in an open court’, it would be essential to establish a record of how much CMPs are used.<sup>17</sup> For example, in each matter where a CMP is used there should be at least a requirement that a judgment provide a clear and perhaps template-form statement of at least: (1) the duration of open hearings and closed hearings; (2) the number of witnesses heard in closed proceedings and the nature of those witnesses; (3) the length of a closed judgment; (4) whether national security was in issue in the proceedings. Given the length of time that a civil action may take, it could be appropriate to have ongoing records of these matters available online. It would be appropriate to have annual or quarterly reports on the total use of CMPs.

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<sup>17</sup> *Justice and Security Green Paper* (2011) at [1.28].

## 4. Closed material procedure in inquests

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

- 4.1 We welcome the Green Paper's recognition that there are differences between the issues relating to sensitive evidence in inquests and in civil proceedings. Similarly, the Justice Secretary's statement that this is a 'genuinely green part of the Green Paper' is welcome.<sup>18</sup> While some of the observations that follow are applicable to all inquests, the focus will be on inquests and inquiries which engage the State's procedural obligation under Article 2 to initiate an independent, effective and public investigation into deaths involving agents of the state.
- 4.2 The Green Paper's lack of emphasis on open justice is as concerning in coronial proceedings as it is with regard to civil proceedings. However, there is a distinction of note that perhaps makes it an even greater problem in inquests: whereas in civil proceedings open justice is instrumental to the ends of a fair trial, in Article 2 related inquests and inquiries, open justice is arguably an end in itself. The European Court of Human Rights in *Ramsahai v Netherlands* has rightly stated that where there is an investigation into a death at the hands of the state, 'what is at stake ... is nothing less than public confidence in the State's monopoly on the use of force.'<sup>19</sup> Public scrutiny is therefore particularly important. In *Amin*, Lord Bingham summarised the purposes of Article 2 compliant investigations as including the need to ensure that so far as possible the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; and that suspicion of deliberate wrongdoing (if unjustified) is allayed.<sup>20</sup> Openness is vital in order for any of these purposes to be met.
- 4.3 In meeting the concerns underlying the Green Paper, inquests are very different from civil proceedings. With respect to civil proceedings, a central premise of the Green Paper is that the Government may have to settle defensible civil claims in order to avoid sensitive evidence being revealed in court. Even if one accepts that claim, and even if one accepts that it follows that there is a case for changing the way sensitive evidence is managed in civil proceedings, it does *not* follow that a change is warranted in inquests.

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<sup>18</sup> Parliamentary Debates, HC, 19 Oct 2011, col 903, Mr Clarke.

<sup>19</sup> [2007] ECHR 52391/99 at [325].

<sup>20</sup> *Amin v Secretary of State for the Home Department* [2003] UKHL 51 at [31].

- 4.4 First, individuals do not *bring* and the government does not *defend* inquests or inquiries. As such, the settlement of or withdrawal from actions is not in issue.
- 4.5 Secondly, coroners already have much greater case-management powers in inquests than judges do in civil actions. They determine the scope of the investigation and have much greater control over what can and will be disclosed to any interested persons. Certainly there seems no need to increase case management powers for coroners. The success of the 7/7 inquests illustrates the ability of coroners (or judges appointed in their place) to deal with complex scenarios involving sensitive intelligence and national security issues without significantly undermining the quality of the public investigation into the circumstances of a death.
- 4.6 The results of procedural compromises that exist in order to balance the interests of national security, justice and openness may not be ideal. But this will always be the case when there is a tension between the competing needs of justice, national security and openness. The issues which face coroners today have not changed significantly in recent years. Indeed there is nothing to suggest a radical overhaul of inquest procedure is necessary in order to deal with a potential influx of cases of the type experienced in the civil courts. That is not to say that issues surrounding the admission of sensitive evidence is a problem which is alien to inquests, but the nature of the problem has not changed since the height of the troubles in Northern Ireland – and certainly not so as to require *more* secrecy in coronial or inquiry proceedings.
- 4.7 We support the suggestion in the Green Paper that in sensitive circumstances it may be more appropriate to have judges conduct inquests. The present system allows for this and it should continue.
- 4.8 In our view there is no case for introducing measures to increase the potential for evidence to be held behind closed doors in Article 2 related inquests or inquiries. On the contrary, the current legislation which allows inquiries to be set up under the Inquiries Act 2005 in the place of inquests should, if anything, be shored up to ensure that such proceedings are only used in truly exceptional circumstances where there is a genuine risk to the public interest in conducting proceedings in open court.
- 4.9 The possibility raised in the Green Paper that families and interested persons could be subjected to voluntary security checks should be rejected. Allowing full or light touch security checked public juries to see evidence not shown to families of the deceased (and the general public) would be similarly inappropriate. Neither of these approaches would meet the obligations of openness discussed above. We can, however, see the benefit in ‘gisting’ in limited circumstances.



- 4.10 With regard to inquiries under the Inquiries Act 2005 it should be pointed out that the Green Paper's reference to the £300 million cost of the four inquiries into deaths arising from the Troubles in Northern Ireland is not representative of the cost of inquiries generally. The cost of individual inquiries will depend on the nature of the issues being investigated rather than the simple fact that an inquiry is used instead of an inquest.
- 4.11 Overall, decisions to use exceptional procedures for consideration of sensitive evidence in inquests should always be made on a case-by-case basis. They should look at the specific circumstances and facts in any matter, rather than using a category-based approach to managing sensitive evidence. Due weight must always be given to open justice in inquests and inquiries, particularly where they are investigating deaths where there is alleged involvement by the state. As much evidence as possible should be considered in open court in the presence of the families of the deceased and, where relevant, the jury.

## 5. Public Interest Immunity (PII)

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

- 5.1 The use of PII appears to us to provide a better reconciliation of the difficulties faced by the state than does the use of CMPs. Here, we refer back to some of the points made in section 2 of this response (above). The established principles do not prevent the state meeting its responsibility to protect the public and the risks of adopting CMPs broadly seem to make PII the better mechanism. This is especially so with the use of gisting or other summaries. These points are expanded on below in section 6.

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

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

- 6.1 The management of inter-agency intelligence relationships and the control principle are obviously of great importance. There is a very real interest in maintaining the confidentiality of intelligence provided by foreign agencies and the LTRK interviews have borne this out. However, this does not mean that CMPs need to be implemented.
- 6.2 The existing PII processes seem to provide an adequate basis on which to manage and secured the evidence and relationships in question in *Norwich Pharmacal* cases. The decision in *Binyam Mohammed* made it clear that there is still a very strong judicial deference to the executive on these matters and the disclosure of material there would not have occurred but for its disclosure in US litigation.<sup>21</sup> In the eyes of Lord Neuberger MR, it appears that even a slender risk to national security would be sufficient to prevent disclosure.<sup>22</sup>
- 6.3 The international relationships in question should be longstanding and robust enough to enable management through a range of means to minimise any unlikely detrimental effect of decisions by the courts. In addition, it is not clear (and difficult to test the claim) that there is a material effect on the flow of intelligence.<sup>23</sup>
- 6.4 While PII would enable secrecy to be maintained, in what position would it leave the claimants? It is not clear that the claimants would be in a better position under a CMP regime, given the secrecy required and the already troubling use of special advocates.

## 7. Conclusion

- 7.1 In all, we are not supportive of the proposal to adopt CMPs generally in civil proceedings. In the event that proposals are introduced our view is that far greater attention needs to be paid to open justice considerations in at least the range of respects we have outlined.

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<sup>21</sup> *R (Binyam Mohammed) v Sec of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [191], [295].

<sup>22</sup> *R (Binyam Mohammed) v Sec of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [191].

<sup>23</sup> *Justice and Security Green Paper* (2011) at [1.22]