JOINT COMMITTEE ON HUMAN RIGHTS

Inquiry into the Government's Justice and Security Green Paper

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Summary

1. This submission addresses the Committee's questions 1, 3, 7, 9, 13, 18 and 19.

2. Drawing on the author's recent empirical research in the UK and Australia, it pays particular attention to the press freedom issues at question 18. A copy of a key publication on the press freedom effects of closed court proceedings accompanies this submission.[1]

3. The Green Paper proposals are substantially at odds with open justice traditions. A commitment to open justice is absent from its statement of key principles.[2] Open justice warrants a place in those principles; it is a fundamental feature of common law trials and of British justice.[3]

4. The overarching recommendation of this submission is that CMPs should not be implemented in civil proceedings generally. Doing so would establish an unnecessary, unjustifiable and unwise regime of secrecy which has the clear potential to become widespread in a category of cases that is already beset by secrecy and in which it is by no means clear that CMPs 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.'[4]

5. If the proposals do proceed then there should be a sunset clause. Safeguards would be essential to limit damage to open justice, transparency and accountability. Specific recommendations are made on this basis. However, they should not be regarded as an endorsement of the Green Paper's proposals; rather, they seek to minimise the problems that would arise or are already evident.

The author and the research informing the submission

6. The author 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 (2009-12) is funded by Research Councils UK under its Global Uncertainties priority. LTRK

[1] L McNamara, 'Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?' (2009) 14 *Media & Arts Law Review* 1-30. The author's response to the Green Paper is available online: L McNamara & S McIntosh, 'Justice and Security Green Paper: Response' 6 Jan 2012 http://www.reading.ac.uk/web/FILES/LTRK/Green_Paper_response_McNamara_2012-01-06.pdf.
[2] *Justice and Security Green Paper* Cm 8194 (2011), Executive Summary at [10].
[3] See, for e.g., the comments of Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [10].
[4] *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [83].

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.

7. The LTRK project includes around 60 interviews with, among others, the judiciary (with the support of the office of the Lord Chief Justice), government (including the Home Office, RICU, OSCT, the Ministry of Defence, and the Cabinet Office), ACPO and police forces, the CPS and criminal defence lawyers, and journalists, media lawyers and editorial decision-makers.

Q 1: Does any evidence exist of the scale of the use of secret evidence in the 14 contexts the Government has identified in which CMPs are already provided for in legislation?

8. There does not appear to be any systematically compiled evidence of the scale of the use of secret evidence. There does not appear to be any publicly accessible formal or informal recording of the total overall use of CMP, or the total use within the different contexts identified by the Government. Nor is there any indication that such evidence exists out of the public eye.

9. Moreover, there does not appear to be any formal or informal systematic way of identifying the scale of its use on a case-by-case basis, from which a researcher might be able to identify the total use. Even though CMPs have been a regular and controversial feature of (for example) SIAC hearings, there still appears to be no systematic evidence base for assessing the scale of their use even in that jurisdiction.

10. This is a serious shortcoming in the existing regime and likely to be exacerbated if CMPs are extended generally to civil proceedings. At paragraphs 23-24, below, **recommendations B and C** suggest ways to remedy these problems.

Q 3: Has the Government demonstrated the necessity of legislating to make CMPs available in all civil proceedings?

11. No. The necessity for 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 attributed to risks posed to intelligence sources, methods or relationships.[5] It may be that circumstances could arise where CMPs would arguably be beneficial in individual cases, 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 in the Green Paper at [1.10], but it is not clear that those circumstances are so frequent and so demanding that there are not other adequate solutions. On the contrary, it appears quite possible that the detriments of a CMP regime may outweigh the benefits.

[5] *Carnduff v Rock* [2001] EWCA Civ 680.

Q 7: Do you agree with the Government that a hearing in which a judge has seen all the evidence is more likely to secure justice than a hearing where some evidence has been ruled inadmissible?

12. No. It may be more likely in some individual cases, but there is no evidence nor any reason to see it as being more likely as a general principle. This is especially so where the evidence is not adequately tested, and CMPs make it difficult, if not impossible, to test the evidence properly. This *will* have a consistently negative impact on the fairness of proceedings. The comments of Lord Kerr in *Al Rawi* are compelling in this regard: 'To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.'[6]

Q 9: Should the availability of a CMP be a decision for the Court, or for the Executive subject only to judicial review?

13. It should be a decision for the Court. One of the key issues surrounding sensitive evidence is that it remains within the control of the government and, as such, makes accountability and openness inherently difficult. If the Executive expands its control over decisions about how such evidence is to be managed then it will inevitably make unjustifiable and damaging inroads into the principles, practice and traditions of open justice. Moreover, there is no demonstrated reason for shifting that control. In addition, there does not appear to be any evidence that a shift towards the Executive is required. On the contrary, it can serve only to increase the scepticism and distrust of government, which, in turn, has the potential to fuel radicalisation both in Britain and abroad.

Q 13: Does any jurisdiction provide particularly pertinent comparative lessons?

14. The Australian experience and that country's National Security Information (Criminal and Civil Proceedings) Act 2004 warrant attention. This is discussed under question 18, below, with regard to the press freedom issues and my empirical research on the effects of those laws.

Q 18: What will be the impact of the proposals on freedom of the press?

15. A general CMP regime would have a significant detrimental impact on the ability of the press to access and report information and, consequently, on the public's right to know. That right to know extends to both the accountability of the state and the activities of those who have been subject to the coercive powers of the state. Given that the media is effectively the eyes and ears of the public in courts, a general CMP regime represents a major retreat from open justice traditions.

[6] *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [93].

16. Under a CMP regime where the parties are able to agree to CMPs, it is especially concerning that information which is *not* potentially prejudicial to national security may be considered under a CMP and therefore may never be revealed to the public or the press. For trial management reasons, closed hearings easier for judges and parties to proceedings may also not object to CMPs for similarly practical reasons. Australian research shows that under the National Security Information (Criminal and Civil Proceedings) Act 2004, 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.'[7] It is an example of the kind of concern Lord Hope raised in *Al Rawi* that it becomes difficult to circumscribe the use of general provisions once they become available.[8]

17. The present LTRK research suggests that the 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. In LTRK interviews, journalists 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.

18. If CMPs are introduced and are only to operate in exceptional circumstances then there must be safeguards within the triggers and other processes, so that press freedom and open justice are considered and given sufficient priority. **Recommendations D – F** suggest several safeguards at paragraphs 25-27, below.

19. Open justice is not among the Green Paper's proposed criteria for determining how sensitive evidence should be managed.[9] Should CMPs be introduced then open justice should be an express criterion. In this respect, Australian legislation is *not* an appropriate model: that country's Act does not include open justice as a criterion and that is a significant weakness.[10] Notably, the legislation does not follow the Australian Law Reform Commission's recommendation that open justice be a consideration in national security laws.[11] **Recommendation G** addresses this issue at paragraph 28, below.

20. If CMPs are introduced then access to information is essential. At paragraphs 23-24 below, **recommendations B and C** suggest strategies for improving that access.

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[7] 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.
[8] Lord Hope in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [73].
[9] *Justice and Security Green Paper*, Cm 8194 (2011) at [2.7, third bullet point].
[10] Cf. National Security (Criminal and Civil Proceedings) Act 2004, ss 31, 38L.
[11] Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC Report 98 (2004), Recommendation 11-19 and generally [7.15]-[7.41]; see also recommendation 7-1 on non-party access.

Q 19: Does the courts' power to order the disclosure of material to a claimant to assist in other legal proceedings (the so-called *Norwich Pharmacal* jurisdiction) risk the disclosure of material which could damage national security?

21. No. Although there is a very real interest in maintaining the confidentiality of intelligence provided by foreign agencies - and the LTRK interviews have borne this out – it does not mean that the *Norwich Pharmacal* jurisdiction poses a danger and nor does it mean CMPs need to be implemented. 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 in this case would not have occurred but for its disclosure in US litigation.[12] In the eyes of Lord Neuberger MR, it appears that even a slender risk to national security would be sufficient to prevent disclosure.[13]

Recommendations

22. **Recommendation A – sunset clause:** 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.

23. **Recommendation B – recording of use of CMPs:** In each matter where a CMP is used there should be 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.

24. **Recommendation C - reporting on use of CMPs:** There should be annual or quarterly reports on the total use of CMPs.

25. **Recommendation D - triggers and notice:** The media (and the public generally) should be notified of any decision to seek a CMP. 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.

26. **Recommendation E - triggers and standing:** 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.[14]

27. **Recommendation F – hearings and standing:** In hearing arguments about how material should be used, media organisations should again have a right to be heard, or should at least be

[12] *R (Binyam Mohammed) v Sec of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [191], [295].
[13] Ibid at [191].
[14] Cf. *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [46].

acknowledged to be representative of a particularly important public interest. While it will be difficult for them to make informed submissions given the lack of background information available to them, it would at least provide the court with some input which may draw attention to open justice issues in ways the parties are unlikely to do. If practical, the ability of media organisations to be represented by special advocates may also be valuable at this point.

28. **Recommendation G - hearings - criteria should include open justice:** The criteria for determining the appropriate treatment of sensitive material should expressly include not only the assessment of harm caused by open disclosure but also (a) the benefits of open disclosure and (b) the harm caused by the absence of open disclosure. An explicit requirement that such considerations should inform any decision 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.

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