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International Security Programme: Rapporteur Report

The Justice and Security Green Paper

A Consultation

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INTRODUCTION

The challenge of reconciling justice and security has long been debated and discussed. Finding the right balance between ensuring national security and safeguarding the liberties and freedoms of individuals has been an important consideration for governments all over the world, and particularly in the last decade this issue has manifested itself in new ways. After the attacks on 11 September 2001 in the US, and with the continued presence of the terrorist threat, many states have faced increased security challenges. In response to this many states have increased the role of their security and intelligence agencies. In the UK this has led to an increase in the involvement of these agencies in criminal and civil courts, which has brought about several problems relating to the disclosure of sensitive material. Questions have also been raised concerning the current oversight mechanisms available in the UK.

At an event at Chatham House on 9 December 2011 government officials, academics, civil society representatives and practitioners involved in security and justice came together to debate the Government's Green Paper on Justice and Security, published in October 2011. The Green Paper outlines three broad areas of consultation; enhancing procedural fairness, safeguarding material, and reforming intelligence oversight, and it sets out a range of questions on these issues. Over the course of five sessions, the participants discussed many of these, leading to lively debate amongst the participants.

The report on this discussion is divided into six parts following, wherever possible, the format and themes of the event. It starts with an analysis of the challenge of reconciling security and justice, identifying why this issue presents difficulties in the UK. The second section discusses the mechanisms of oversight in the UK and whether and how the current structures should be reformed. The third section focuses on Closed Material Procedures (CMPs), as well as on the role Special Advocates play therein. The fourth section discusses inquests, while the fifth section takes up the technical issue of Norwich Pharmacal requirements to disclose sensitive material for the purposes of overseas proceedings. The last section reviews the Public Interest Immunity provisions and how they could be used more effectively.

I. THE CHALLENGE

The Security Service Act in 1989[1] and the Intelligence Services Act in 1994[2] institutionalised the Security Service (MI5), the Secret Intelligence Service (SIS) and the Government Communications Headquarters (GCHQ), also known as the Agencies. The Acts increased the accountability of the Agencies, and also changed the way the Agencies thought about themselves and the way they handled their affairs. Although the Acts provided the Agencies with a legal personality, it was unforeseen at the time that they would feature in so many court cases and proceedings. They had to defend themselves in court, particularly in relation to terrorist suspects, but as was recently discovered during the Guantanamo cases, the Agencies had great difficulties in doing so because they were unable to present classified evidence in court. The Government found itself in a difficult position because it would not have been possible to defend the cases successfully without disclosing material that was sensitive in terms of national security. A decision was therefore taken by the Government to settle the cases although it was clear that the outcome was not in accordance with justice or security. The claimants were left unsatisfied because their claims had not been vindicated by a court of law whereas the Agencies in turn felt that they were deprived of an opportunity to defend their reputations. For the public, the situation was confused due to the lack of openness in relation to the cases. Neither the interests of justice nor those of security were satisfied and, as a result, there was a perceived need to find a more satisfactory solution.

Why now?

The reason that the Agencies have been involved in more cases is not a direct consequence of their institutionalisation following the 1989 and 1994 Acts, but more a consequence of a change in the nature of their work. The Agencies shifted their focus from (counter-) espionage to (counter-) terrorism, and whereas espionage remains largely outside the realm of international law, the issue of terrorism is regulated by both national and international law. The Agencies take their commitments under the law very seriously, but sometimes it is hard to identify what those obligations are when the Agencies are operating in areas for which the law was not specifically designed.

[1] The Security Service Act 1989 [27th April 1989]
[2] Intelligence Service Act 1994 [26th May 1994]

Another difficulty is the entanglement of the Agencies in the operations of others, including the US intelligence community. It is for these reasons that the issue seems more pressing now, but it was debated whether the real issue at hand is the particular issue of the Guantanamo-type cases, or whether there is a more general issue, that of the increasing number of national security cases making it into court, and how to deal with them?

Do difficult cases make bad law?

The question was raised whether the UK was likely to see instances such as the Guantanamo cases again, because they were a very specific outcome of a particular time-period in the aftermath of 9/11. The level of threat that existed during that period was perceived to be beyond anything previously, leading to specific responses from the Agencies. The threat of Al-Qaeda is seen to be diminishing, and some participants argued that activities with detainees and foreign jurisdictions will decline. It was contended that it would make little sense to change the law just for the Guantanamo cases, and there is the clear pitfall that "hard cases make bad law." The starting point of the discussion was questioned; is the main reference point that of security, wherein an allowance is made for justice, or is the point of departure justice, with an allowance for security?

It was contended that the Green Paper appears to have a bias towards security, which will then shape the ensuing debate. Related to what the point of departure should be are the respective roles of the executive, legislature and judiciary. It was questioned whether the judiciary has encroached on what used to be a prerogative of executive and the legislature. For example, in the *Binyam Mohamed*[3] case a disclosure of sensitive material was ordered, which can either be seen as the proper functioning of judicial review or as an encroachment of the judiciary on the power of the executive to decide what information can be disclosed to the public. The limits of judicial review are determined by the legislature, and it was argued that if Parliament has a view on how the law should be upheld, for example by not allowing courts to see certain classes of intelligence, it can legislate but previous attempts to do so have proved unsatisfactory (see also part VI).

[3] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65

Justifications for reform

The debate shed light on different arguments for the justifications for reform. Two important but very different types of justifications were the concern that the Agencies cannot defend themselves in court, and secondly that the Agencies are worried about not having control over disclosure. Whereas the first argument appears a matter relating to fairness, the second argument appears a matter relating to secrecy and how much the Agencies are willing to disclose. From an operational point of view, it was contended that the Agencies are concerned that some of their capabilities might come to light, and that they cannot control the judicial investigations. They have to protect their informants as well as information that might have taken years to achieve. It was pointed out that intelligence is not only used to pursue the national security agenda, but it serves purposes of wider statecraft and national prosperity.

Necessity

Although many agreed that secrecy was a tool to ensure security it was questioned when secrecy is actually necessary in all cases. Up until today there have been no cases where *operationally sensitive* intelligence has been disclosed against the will of government, and although the *Binyam Mohamed*[4] case raised issues because the court ordered disclosure, this only concerned a brief summary of information rather than the intelligence itself. However, it could be questioned whether there is significant difference between actual evidence and a summary thereof, particularly when working with international partners.

Secrecy – or the exclusion of information from public consideration – is only used in rare cases, principally in certain areas of family law and commercial law. Some members were skeptical about why security related issues would deserve such a strong differential treatment as proposed in the Green Paper. It was contended that secrecy can only be tolerated where it is *necessary*, not where it is simply convenient for the Government. The notions of proportionality and necessity are enshrined in common law, and they will be important principles to take into consideration when the Government proceeds with the proposals of the Green Paper. In doing so all perspectives

[4] *Mohamed, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65

must be taken into account, not just the view of the Agencies and whether they can defend themselves in court, but also the view of the claimants and whether they will receive a fair trial. Finding this balance is no easy task.

II. OVERSIGHT REFORM

With the institutionalisation of the Agencies, several elements of oversight were introduced, some Parliamentary and some independent. The mechanisms were put in place, first to ensure that there would be a form of objective oversight, and secondly to reassure the public that the Agencies were indeed subject to objective oversight. Whether or not objective oversight has been achieved, there remains considerable public skepticism, especially in relation to high profile such as *Binyam Mohamed*.

Questions were asked as to whether Parliamentary oversight can be independent where the individuals conducting that oversight are appointed by the Prime Minister, and also report to the Prime Minister. Or whether it can be effective when, for example, the Commissioners assess the legal compliance of the Agencies, but not specific operations. The past decade has seen an increase in the Agencies activities, and also an increase in their public profile. This has contributed to a growing concern amongst those interested in security matters that the degree of oversight currently provided may need to be expanded. While the oversight system has evolved it has not always kept pace with the changes in the wider world, and therefore it is now necessary to look at reform.

Reform of the Intelligence and Security Committee

Despite the apparent lack of structure the Green Paper proposes several measures of reform to be taken with regard to the ISC.

Established by the Intelligence Services Act 1994, the Intelligence and Security Committee (ISC) is not a Committee of Parliament although its members are all Members of the House of Lords or the House of Commons. Despite this, it largely acts as a Joint Committee. It was proposed in the debate that the ISC should become a Parliamentary Committee, because this would be an extra safeguard in the oversight system. Rather than simply being appointed by the Prime Minister and reporting to him, the ISC as a full committee of Parliament would fall under Parliamentary scrutiny. This would enable Parliament to have a stronger say in the appointment of the ISC's members. For example, the Prime Minister could propose a list of names that Parliament can accept or reject. There appeared to be agreement that the selection of the ISC should not resemble the form of elections used for Select Committees because ISC members have to be people who are used to

dealing with intelligence material, and who can be reliable and trusted to keep safe the information with which they are provided.

More generally the Green Paper was criticised for not detailing proposals concerning the ISC in a systematic overview that outlines what the problems are and then lists a number of potential solutions. It was contended that the Green Paper simply looks at extending the ISC, but it was stressed that the ISC is far from being the only committee that deals with sensitive information. For example, the Foreign Affairs and the Defence Committees also deal with sensitive information, and they can hear testimonies from SOCA and the police.

Request v. Require

Under the 1994 Act the ISC can only request information from the Agencies, who can subsequently decline such requests. That the Agencies have never used their power to decline information reflects the generally good relationship between the Agencies and the committee. Nevertheless there remained doubts about whether the ISC receives *all* the relevant information possessed by the Agencies. Over the last 10 years the ISC has sought to show its independence and has criticised the Agencies and the Government on several occasions. To ensure its independence the ISC proposes that its power to request information will be enhanced into the power to require information. The ISC has remarked that when the courts required information from the Agencies they worked twice as hard, resulting in more and better information coming out. Therefore, the ISC seeks the ability to require information. The Agencies would still retain the possibility to object, in which case they can refer the issue to the Prime Minister who can veto the requirement for information. The ISC recognizes the balance that needs to be struck and would only be able to request such information as was necessary for its investigations. The ISC can not simply require a list of all actions undertaken by the Agencies, because such a file will not be given.

The ISC proposed that in practice the change from request to require will involve staff answerable to the ISC going into the relevant Agency and having access to all the files. Contrary to the current procedure where the staff of the relevant Agency determines the summary and raw material that the ISC will get to see, this determination should be done by ISC-staff. This does entail an important change, and participants questioned the practicalities of it. Some

were worried that the ISC would have free reign into all materials, which leads to questions such as how to choose the ISC staff that would work at the Agencies, and how can it be ensured that they have the proper security clearance. It was suggested that the ISC needs input from independent legal advisers, and that the problem will not be a question of how much staff the ISC will have at its disposal, but what their predisposition and background will be. As a practical issue, a former practitioner brought forward that the way documents are stored and organised in the Agencies is highly complex, and it relies on a large system of interrelated digital files. It requires enormous familiarity with the system in order to operate it, and to get the material one is really looking for. If the ISC were to start sending staff to the Agencies this will require an enormous amount of extra training and it would take time before the staff will acquire the appropriate experience.

Oversight over operations

Oversight on operations was never prohibited by the 1994 Act and over the last 7-8 years the role of the ISC has evolved so that is has begun to become involved in operational oversight. The Green Paper suggests that this practice can be formally recognised, but oversight of operations will only take place if it is retrospective, on matters of significant national interest and does not interfere with the accountability of Ministers. It was made clear that the ISC will not attempt to scrutinise every operation, because this would not be relevant. It was stressed that the ISC only aspires to retrospective oversight, and it does not want advance notice of any operations. It does not want knowledge without the capability to act upon it, and the example was given of the Bin Laden raid, where 8 US Senators were aware of what was bound to happen beforehand, but they were not able to use this information. The proper function of oversight over operations according to the ISC is retrospective. It was made clear that the ISC retreats if it enquires about operations and the relevant Agency indicates the operation is still ongoing.

Although confidence was expressed in the extension of the ISC remit to include operations, there was some debate as to its consequences for the effectiveness of the Agencies. Such an extension might endanger the functioning of operations, and the Government must also be careful not to give the public the idea that every action will be reviewed, because that would be misleading. It was questioned whether the extension will really increase

public confidence in the oversight mechanisms, and whether such a potential increase would weigh up to a potential decline in the effectiveness of operations. It was argued that while oversight provides certain benefits this should not impede on the operational capabilities of the Agencies.

Improving public confidence

With regard to public confidence it was proposed that rather than focusing on more oversight only there must also be attention for more transparency. The police and law enforcement agencies publicise their numbers on interception, but so far the Agencies have never done that. If the public does not know the figures it cannot make informed judgements on the performance of the Agencies, and it was stressed that transparency could increase public confidence.

A similar point was made concerning the Commissioners. The public does not know how many authorisations have been seen by the Commissioners or anyone other than the agencies, which is again an issue of transparency. There appeared to be an agreement that it was always in interest of Agencies to have oversight, be it Parliamentary or independent. Submitting them to oversight, it was argued, makes them more accountable and thus more credible in the eyes of the public.

Commissioner v. Inspector General

Under the current system there are two Commissioners, the Intelligence Service Commissioner and the Interception of Communications Commissioner. They share their oversight responsibilities over the Agencies and, as is the case of the Interception of Communications Commissioner has responsibility for a wider range of bodies, including the Police. Their role is to scrutinise the authorisations given by Secretary Of State, as well as to look at the statutory functions of the Agencies. In addition to formal scrutiny visits to the Agencies twice a year, overseas visits are also made where the Commissioners engage with staff in the field. Within the Agencies the Commissioners are highly regarded, and there exists an open sphere of communication. There is a considerable element of trust between the Commissioners and the Agencies, and the approach is not adversarial but constructive, which is of benefit for both parties.

The Inspector General (IG), an option considered by the Green Paper, would be a single body for the Agencies, so its function would be more focussed than that of the current Commissioners. It can also be foreseen that the IG would have a broader set of functions, including some sort of Ombudsman functions, and on the most extreme point of view some form of operational oversight. In relation to the option of an Inspector General, the Government has not indicated any preference in principle nor as to the precise role envisaged. A benefit of the IG would be that he/she would be a very public figure and he/she might assist in explaining oversight to the public, which is something the current Commissioners have been lacking. A risk for the system of an IG is that the oversight might create more adversarial relations, which would have a negative result on the effectiveness of the oversight.

No strong conclusions were drawn over whether an IG would be more advantageous than the system of Commissioners. Some participants saw no reason for change because the current system works. Oversight needs to cover legality, efficient management of resources, and it must not be overly burdensome to the intelligence community, which seems to be fulfilled at present. It was added that the criticism of public confidence was being dealt with, and that the Commissioners are working towards a better website, good annual reporting, and perhaps a blog to engage with the public more.

III. CLOSED MATERIAL PROCEDURES, SPECIAL ADVOCATE REFORM AND AF NO. 3 DISCLOSURE REQUIREMENTS

Closed material procedures (CMPs) are procedures where (part of the) hearings take place behind closed doors, and where the evidence is not shared with all the parties. It was argued that sometimes this means that the claimant or defendant does not have access to all or some of the material that they need to make their case or to build a proper argument for defence. Although CMPs have been part of the UK legal system since 1997, they are only used in rare cases, where secrecy is deemed to be of utmost importance. Whereas the benefit of the CMP would be that the courts can consider more sensitive material that is relevant to the case, thus reducing the likelihood that cases would have to be dropped or settled, the main controversy expressed regarding CMPs is the dangers they pose to procedural fairness and the principle of open justice.

In order to provide an element of procedural fairness the current system relies on Special Advocates. These are highly qualified barristers who have undergone extensive security clearance, and who are subsequently allowed to inspect the closed material on behalf of the individual. Whilst they may take instructions in the normal manner prior to seeing the closed material, they may only receive written instructions from the individual after having seen the material. Any subsequent communication with the individual must be with written permission of the court. The Special Advocate system ensures an adversarial aspect in the proceedings, because they scrutinize the closed material, and they can argue that there should be disclosure. At times Special Advocates have been successful in challenging the secrecy of material and the court has ordered disclosure, but there remain several problems as to their effectiveness.

Open Justice

The principle of open justice means that proceedings before courts ought to be open to the public. This includes openness concerning the contents of court files as well as the possibility of public viewings of trials. CMPs challenge this principle in many ways, first of all because they close the proceedings to the public and secondly because the contents of certain material would remain secret. This runs contrary to the interest of the public, and there is a risk that public confidence in the justice system will be

undermined by CMPs. It was contended that here is also a problem in terms of outcome fairness because if the individual, and the public at large, do not know the court's reasoning, the evidence it has seen and so forth, it cannot be judged whether the outcome was fair or justified. Especially for the claimant, it could be the case that all they know is whether or not their claim is upheld or not upheld, which does not provide them with the justice they require.

The concerns for open justice were particularly stressed because what has been the exception up to now appears to be moving towards more accepted and standard practice. Whereas the procedure was designed for the narrow context of national security sensitive deportation cases through the Special Immigration Appeals Commission (SIAC), it has expanded into an increasing number of judicial contexts, and the Green Paper proposes a rather broader power to use CMPs. This was criticised because it was claimed that the Green Paper does not identify compelling reasons for introducing such a discretionary power.

These concerns also relate to the broad definition the Green Paper maintains for 'sensitive material'. In the glossary it is stated that all secret intelligence and secret information is necessarily sensitive, which might entail that any material held by the Security and Intelligence Services would be given a blanket claim to secrecy.

Procedural fairness

Several participants expressed the view that there are grave problems with CMPs in terms of procedural fairness, which challenges compliance with Article 6 of the European Convention on Human Rights. Article 6 requires that both parties should be able to see, hear and challenge the evidence which judges might rely upon. Procedural fairness entails that parties should be able to bring contrary evidence, in order to prove that material used is inaccurate or incorrect. If an individual has no access to the evidence this element is lost. Although Article 6 recognises certain exceptions to the requirement of disclosing all evidence to the parties (such as the interests of justice and national security) it also provides that proceedings that determine a significant matter such as the individual's liberty should have commensurate protections with the gravity of potential consequences. Such protections might come in the form of Special Advocates (see below) but even this can only be seen as

a compensation for the lack of procedural fairness. The Green Paper was criticised for stating that CMPs are capable of delivering procedural fairness, because in the views of several participants they inherently could not. One participant quoted a judge, Lord Kerr, who stated in the *al-Rawi* case that "the challenge that the Special Advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings"[5].

A point was made concerning the distinction between procedural fairness and outcome fairness. If outcome fairness is deemed as more important, CMPs might be favoured because they allow for some form of scrutiny rather than none at all. However, if the procedure is unfair this may also lead to substantive unfairness. The example was given of an individual accused of planning a terrorist action on particular date, but the individual is not told the date of the alleged action. This leads to substantive unfairness because the individual cannot put forward an alibi. If in a CMP the judge agrees that disclosing the date to the individual would damage national security (for example because this might give the individual information on how the Government obtained the information), there will still be no possibility of defence for the individual.

It was furthermore questioned whether there will truly be a fairer outcome if the judge can look at all the material, when this material is not subject to the same level of scrutiny as in normal proceedings. Because of the potential problems raised for Special Advocates in terms of challenging evidence (see below) the capability of judges to come to the right conclusions was discussed. Because the UK legal system is an adversarial one, several participants doubted whether CMPs would actually deliver fairness. Another participant also quoted Lord Kerr, who stated in the *al-Rawi* case that 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].

It was pointed out that fairness is not a binary distinction; one can only speak of a certain *degree* of fairness. This is also what Article 6 of the ECHR envisages in that there are degrees of fairness and sometimes different

[5] Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34 (para 94)
[6] A Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34 (para 93)

standards for what constitutes a fair trial. Positions remained divided however about whether or not CMPs would enhance fairness. According to some the degree of fairness was delivered by CMPs because they are only used in very limited cases, but this was rebutted by the argument that the Government now proposes a much wider use of CMPs. Some participants maintained that even if the Special Advocate mechanisms were fully implemented (see below) it would be very difficult to achieve fairness with CMPs.

Balancing

Related to the idea of degree was the discussion on balancing the various different interests in different cases. The Government has an interest in keeping certain material classified, in the interest of national security. But against this concept of national security there must be a balancing of the individual's right to know the evidence, and a public interest in the fair and open administration of justice. This balancing takes on a further element in cases where the allegations concern the involvement of the UK Government in human rights violations such as torture. Some participants argued that exceptional weight must be given to the disclosure of material concerning violations in such cases. They argued that securing accountability for alleged human rights violations committed in the context of counter-terrorism operations has often been hampered by claims to secrecy on national security grounds, and the proposals in the Green Paper were criticised for appearing to stimulate more secrecy. Evidence concerning human rights violations should not be considered to require such levels of secrecy, and this should be taken into account when balancing different considerations. One participant remarked that the Government should consider how the Wiley balance (assuming it were retained although this is not currently discussed in the Green Paper) would be affected if the courts and Government knew that the material could simply be put into a closed procedure. There were concerns that this might tip the scales further towards non-disclosure.

Trigger mechanism for CMPs

The Green Paper proposes that the Secretary of State will determine whether to resort to a CMP. This was criticised because it was seen to mean the Government has an advantage in cases to which it is a party. This argument was countered on the basis that there exists the possibility of judicial review

to scrutinise whether the decision of the Secretary of State is necessary and justified, and even when a CMP is adopted it is the judge that decides whether specific (sets) of documents will be considered in open court or closed hearing. However, it is questionable how practicable such a judicial review will actually be. It was proposed that the Government should look at possibilities to improve the possibilities for review, for example with statutory standards and an in-camera procedure that allows the judges to see all the material so as to determine whether there is compliance with the statutory standards. Some participants held that the decision to move to a CMP should be determined by the court and not the executive.

Special Advocate Reform

In the Green Paper the Government has proposed that more use should be made of Special Advocates if CMPs will be expanded. Through the discussion it was suggested that there are considerable problems for Special Advocates to properly fulfil their tasks, and that the expansion of Special Advocates will not improve the procedural fairness of CMPs. It was contended that the structure of existing CMPs makes it difficult for Special Advocates effectively to challenge evidence and/or to call evidence themselves. This difficulty is seen to be exemplified by the lack of strong rules of evidence, which has apparently led to cases where second or third hand information was relied upon, with the primary source unattributed and unidentifiable, making it therefore impossible for the evidence to be tested. A further problem is seen to be the prohibition of direct communication with the individual and the open representatives after the Special Advocate has seen the closed material. While some communication is allowed through the Court and relevant Government bodies, it was argued that Special Advocates should be permitted to communicate with the open representatives on matters which relate to the substance of the closed material. It was proposed that there should be the possibility of communication which is controlled by the Court but which is not disclosed to the Government.

There are further problems with the way in which the Government shares information with the Special Advocates in CMPs. Often the Government discloses the material to the Special Advocates at a very late stage in the process, and the material they are allowed to see is strongly redacted. The

Government resists requests for the production of documents to the Special Advocates (i.e. as closed documents) and they are unable to challenge this.

Several suggestions were made to improve the way the current system with Special Advocates works. First of all it was pointed out that Special Advocates will need more resources at their disposal, including well trained support staff. It was conceded that the Government would provide more detail on point 2.27 of the Green Paper, where it is stated that Special Advocates will be provided with more independent junior legal support. Secondly, it was put forward that communication between Special Advocates and the individuals they represent could be improved. A comparison was made with the Canadian system, where Special Advocates are also an important part of closed procedures, except that in Canada there is more free communication. Although the Canadian system has evolved slightly, the original system could provide a baseline for consideration by the UK. The Government was criticised for resisting the Canadian model in *AF No 2*, whereas it now says it will look into this more.

In Canada, it was claimed that Special Advocates have better access to documents, despite the fact that Canada is considered a net-importer of intelligence. One participant stressed that in Canada there is a key consideration not to upset international intelligence partners too, and judges are cautious in this regard. Judges can appoint a government officer to ensure there is no disclosure of information that relates to national security.

Finally, wider options than simply expanding the Special Advocates system were discussed. One representative suggested that the Government should consider the creation of so-called Special Solicitors, who should get the task of investigating the material the Government wants to keep in a closed procedure, so as to examine whether or not it should be disclosed. It was raised that such an option may be very costly, because it would require the training and security-clearance of a large group of people. It was also discussed whether the Investigatory Powers Tribunal (IPT) could play a role, for example by investigating documents that are otherwise closed, and reporting to a judge who does not have that investigatory power himself. This would remove the issue of new people, because the members of the IPT already perform tasks such as inspecting secret material.

AF No 3 Disclosure Requirements

A standard feature of CMPs is 'gisting', which means the individual is provided with the 'gist' or a summary of the closed material where it is possible to do so without jeopardising the public interest. In the case *AF No 3* the court went further and decided that even if disclosure of certain information is damaging to the public interest, the Government still has to give the individual sufficient information concerning the allegations they face, so that they can give effective instructions to the Special Advocate. The court came to this conclusion based on Article 6 of the ECHR, but the reach of that judgement remains uncertain and there have been further cases concerning proceedings that depend on sensitive material. It was discussed that this remains a problematic feature of the *AF No 3* ruling. It is unclear in which cases it should apply (*AF No 3* was a control order case) and it was contended that the Government still seems unwilling to apply it. One participant stated that if an individual has given no statement in their proceedings they are declared as 'not engaged with the process' and therefore they are not allowed to see the material, but that could be seen as compelling the individual to make a statement.

IV. INQUESTS

Inquests are the public, inquisitorial investigations into the cause and circumstances of violent or unnatural deaths, sudden deaths of unknown cause and deaths in custody. They differ from other forms of civil proceedings because they are a form of public inquiry, but similar to civil proceedings it can be difficult for inquests to proceed if relevant sensitive material cannot be disclosed because of security imperatives. This situation will only exist for a small number of inquests, but in these cases it must be ensured that the public has trust and confidence in the inquest.

An important recent inquest concerned the London bombings that took place on 7 July 2005. Some of the material that was relevant to the investigation was not disclosed to the coroner because it was deemed too sensitive. The inquest was able to proceed however without the material, and Lady Justice Hallet decided there was no need for a further public inquiry. Despite the fact that, in this high-profile inquest, these difficulties were satisfactorily resolved, there could still be cases in the future where this is not the case, and therefore it is necessary to ensure that all relevant information can be taken into account and whether possible improvements could be found. It was questioned why the issue should be discussed at all, since even in an inquest where not all relevant information could be disclosed the Coroner was still able to proceed with it successfully. However, there might be cases where the amount of sensitive material that is relevant will be larger, and non-disclosure could prevent the coroner from conducting an adequate investigation. This problem is enhanced because inquests make use of juries, which means that there is potentially a larger number of people engaged with the sensitive material.

The role of jurors

The Green Paper proposes that jurors undergo extensive security clearance, but it was pointed out in the discussion that vetting jurors would be intrusive for the jurors and expensive for the Government. Moreover, it was contended that it would be relatively pointless, because the process of security vetting is aimed at long-term benefits. Security vetting takes a long time, and while it is appropriate for a lifetime of secret work, such a level of vetting would not be possible for jurors. Even if some form of ‘light-touch vetting’ would take place this would remain superficial, and the most that would be done for a juror

would be quick background enquiries so as to exclude any terrorist links and suchlike, but this will not determine the reliability of the juror.

It was questioned whether jurors are at all necessary for the proper functioning of the inquests. They fulfill a certain adversarial element in the investigations, but it was proposed that inquests are about getting above the truth, and not about claims, so therefore this adversarial component might be less relevant. On the other hand it was pointed out that juries are important for public engagement.

The role of the family

For inquests where the death occurred in state custody or was caused by a state agent there is an important role to be played by families. Article 2 of the European Convention on Human Rights determines that the deceased's next of kin is involved in the proceedings, but as in other instances this might prove problematic if sensitive material plays a large part of the evidence. There is the possibility of vetting family members in the same way as has been discussed for jurors but the same objections exist. There is also the additional difficulty of family members not passing the security clearance. It was proposed that families can be represented by Special Advocates, but they do not exist in unlimited numbers, so if the Government considers increasing their role additional costs are to be expected. Another option would be to install a confidentiality ring for families. A confidentiality ring is an arrangement (either agreed by the parties or court-ordered) that documents can only be disclosed to the legal representatives. However, this would not solve the issue of family engagement however, and it would leave the families feeling that the Government is withholding information.

Managing the emotions of family members is a delicate issue, and can sometimes be exacerbated by the media, who might encourage families to believe that there is information that the Government is withholding. Alternatively, in the absence of relevant intelligence material, families might feel that the Agencies should have had such material which may have prevented the death.

The issue of Northern Ireland was shortly discussed in relation to families, where certain families were particularly distrustful of the Government. Part of the cause for such feelings might be that an inquest is often the first moment

where families speak to Government officials about the death, because the police have adopted a no-speaking policy. Such a policy was installed in order to prevent what is said by police-officers being turned into findings which might lead to civil damages claims. However, this remains a matter of trust and the Government needs to take into account these matters at an early stage of any proceedings.

V. NORWICH PHARMACAL REFORM

The principle of Norwich Pharmacal was developed in the civil courts during the 1970's, and it enables a claimant to obtain disclosure of information from a defendant who is mixed up, whether innocently or not, in arguable wrongdoing of a third party. Such instruction by the court is also known as a 'Norwich Pharmacal Order'. The principle was formed in relation to trade, but has been applied subsequently to other areas of law.

The principle has been problematic in relation to cases involving sensitive material because it requires the disclosure of information, which may be sought in order to assist the claimant in proceedings he/she faces in foreign jurisdictions, thus risking the material being disclosed to non-UK-security-cleared individuals.

The Control Principle

A prime concern for the UK Government is that the information sought for disclosure might have been obtained through information sharing with other partners, which violates the Control Principle. Although not a principle of law, this principle was recognised by the participants as a principle of international relations. It was codified after the Second World War, but it never amounted to a Treaty in any shape or form. The principle basically means that if the UK wants to maintain the trust of its foreign partners in intelligence sharing, it must be able to ensure that there will be no disclosure of the content or fact of the intelligence exchanged with them without their consent. This principle is of particular importance to the UK Government which has many bilateral, trilateral and even multilateral engagements in sharing intelligence.

An opposing view is that any foreign Government should be aware of the risk that UK courts may require the disclosure of sensitive material, and that the Control Principle should not be assumed to be absolute. Many countries have independent scrutiny (including the US, which complained about the Control Principle in relation to the *Binyam* case). The Green Paper proposes in paragraph 2.91 that the jurisdiction of the courts to hear Norwich Pharmacal applications in cases where the disclosure concerns material that would cause damage to the public interests should be removed. From a human rights perspective in particular this is a very problematic proposal, because it would create a blanket exemption for the Agencies. It suggests that the Control Principle is absolute, whereas human rights defenders argue that if

the material sought for disclosure contains evidence of human rights violations this creates even stronger and more pressing reasons for it to be disclosed. It was contended that it would be incompatible with international law if the Control Principle would overrule human rights principles such as those of the prohibition on torture.

A more practical argument was also advanced, namely that, despite US disappointment with UK court decisions, intelligence sharing is still ongoing. The Green Paper also accepts that intelligence that "threat-to-life" information will never be withheld by partners". This led some participants to conclude that the only potential risk is that certain information might be withheld, for example the precise techniques that were used to obtain a certain piece of intelligence. This would have minimal operational consequences, but this was opposed with the argument that even if only minor elements are withheld there might be larger consequences as seemingly less relevant information might be the missing part in a larger puzzle.

The *Binyam Mohamed* case

The *Binyam Mohamed* case was discussed in some detail, because there were differing views as to whether the case was relevant with regard to the Control Principle. In his case, Binyam asked the UK to disclose certain sensitive material to his US lawyers, who had the highest US security clearance. He was not asking for material to be given to him or to his UK lawyers but only his US lawyers. Part of the disclosure issue was resolved because the US authorities decided to provide Binyam's legal team with some of the material, but in the UK there remained the question of whether some paragraphs of a judgment (containing a summary of the intelligence passed to the UK) should be made open. The Government sought PII protection on the grounds that disclosure would breach the Control Principle, but the Court of Appeal decided not to uphold the claim for PII. Instead the court ordered that seven paragraphs of the judgement should be made open.

Some participants were of the view that in doing so the Court had violated the Control Principle, whereas others argued that this cannot be the case because the US court made positive findings that Binyam was tortured, and thus disclosing this information cannot be contrary to national security. It may have been an embarrassment and damaging for national security for the UK

government to disclose this information, but it cannot be said that there was any value to this information in terms of intelligence.

An important point was made about balancing, relating strongly to the first section of this report. The balancing in the *Binyam* case required an appreciation on both a national and individual level. Whereas the Government was concerned about the Control Principle and potential consequences for the sharing of intelligence, there was also the individual concern from a man who faced a possible death sentence and who had already been tortured. Striking the balance in such cases will never be easy.

A Limited Non-Application of Norwich Pharmacal?

It was briefly discussed whether there could be a more limited form of non-application of the Norwich Pharmacal principle in cases where the disclosure concerns material that would cause damage to the public interests. It was proposed that certain procedures could be adapted, in particular sections 23 and 27 of the Freedom of Information Act[7] were mentioned. Section 23 provides an exemption to disclosure for the information supplied by the Agencies and provides that information should be exempt if disclosure would prejudice international relations[8]. Using these kinds of procedures potentially widens their application to both domestic and foreign material. It could prevent material that would not be disclosed in domestic procedures being disclosed as a result of proceedings which seek the information in proceedings abroad. One participant suggested that rule 6.1 of the Investigatory Powers Tribunal serves as a model, which determines that the IPT shall not disclose information that is (amongst others) contrary to the public interest or prejudicial to national security or the continued discharge of the functions of any of the intelligence services.

Even for such limited non-application of the Norwich Pharmacal principle certain participants expressed their concerns in terms of creating exemptions. It was warned that a broad term such as ‘damage to the public interests’

[7] Freedom of Information Act 2000 [30th November 2000]
[8] (1) Information is exempt information if its disclosure under this International Act would, or would be likely to, prejudice— relations.
(a) relations between the United Kingdom and any other State,
(b) relations between the United Kingdom and any international organisation or international court,
(c) the interests of the United Kingdom abroad, or
(d) the promotion or protection by the United Kingdom of its
interests abroad.

would still create a big loophole leaving room for abuse. It was argued that the reasons for disclosure (such as in the *Binyam* case, potential information about human rights violations) should always be weighed and no general exemptions should be created.

VI. MAKING PUBLIC INTEREST IMMUNITY MORE EFFECTIVE

Public Interest Immunity (PII) is a principle of common law that has been primarily developed in the courts. The 'immunity' entails that one of the parties (usually the Government) is allowed to withhold material from the other party in order to prevent disclosure that would be harmful to the public interest. The material is thus 'immune' from the normal requirement of disclosure to all parties in the proceedings. Normally a PII certificate is claimed by Ministers, who have a duty to do so where they believe disclosure will cause harm to the public interest. PII developed through litigation; the most important recent cases were *Matrix Churchill* (followed by the Scott-Inquiry) and *R v Chief Constable of West Midlands, ex parte Wiley*[9]. After these developments the UK moved away from identifying certain classes of material as attracting PII, leaving the focus on the content of the material.

Anticipating the option that CMPs are not extended to all civil cases, participants discussed in this session what the best mechanism would be for ensuring that cases involving sensitive material can be tried fairly without jeopardising the protection of the public interest. The Green Paper proposed not to legislate on PII, and participants debated whether the further development of PII should come from Parliament or from the courts. It was accepted that PII could prevent certain cases from proceeding, and it was contrasted with CMPs. Participants questioned what the Government's interests were in favouring one option over another, and whether they could be combined.

Who has the final say?

The debate on whether legislation could potentially clarify which actor has the final say in determining the application of PII is not a new one. In *Duncan v. Cammell Laird and Co. Ltd*[10], the House of Lords held that the courts should take PII certificates at face value, but in *Conway v Rimmer*[11] it was held that the courts make the final decision on whether PII applies. Some participants held that if the Government would want to be the final decision-maker it could use legislation to determine so, but it was hard to come up with outlines of what such legislation would look like. It was suggested that the UK could go

[9] R v Chief Constable of the West Midlands, ex p. Wiley [1994] UKHL 8
[10] Duncan v Cammell Laird & Co Ltd (Discovery) [1942] UKHL 3
[11] Conway v Rimmer [1968] UKHL 2

back to the system of identifying 'classes' of material that attract PII, but this would only be advantageous for very limited classes of material, for example material obtained from foreign partners. One participant stated that it will never be evident to outsiders why certain pieces of material are sensitive, and it is therefore very hard to legislate on this matter. It was suggested that the Government could take another look at the evidence and material used in the Scott-enquiry, but it will be hard to go back to the classes-system because it could have negative consequences in terms of public confidence. If there would be an exemption for the intelligence services this might seem as if they want to hide their material from the public. Especially in light of the recent SIAC-case over an alleged Russian spy, it might be that the public will be in favour of more judicial scrutiny. If Government decides it would want to go back to the class-system (which it does not propose in the Green Paper but which was discussed as a hypothetical situation), then there should be more than a simple class-test but for example some sort of double test.

Concerning the role of the courts it was suggested that a small group of judges could be given more training to deal with national security issues, and such judges would be able to make more informed decisions on PII certificates. One participant suggested a combination of PII and confidentiality rings and/or other mechanisms already used in criminal and civil cases, and it was suggested the Government should give this more thought. Several participants were of the opinion that PII should develop further through more litigation as opposed to through legislation.

PII v. CMPs or a combination?

The Government's intentions in terms of PII and CMPs in civil cases were also debated. They were contrasted with criminal cases, because in these two types of cases the Government will tend to have a different role. In criminal cases the Government tends to be the claimant, whereas in civil cases it will more likely be the defendant. Considering the disclosure of information the Government thus has different interests in these situations. In criminal cases the Government can decide not to proceed or not to use certain evidence because it deems it too sensitive for national security. In civil cases the Government may have more interest in having the courts take into account their evidence because the material is used to defend itself. Therefore, it was questioned whether PII was not further discussed in the

Green Paper because the paper focuses on civil cases, and in these cases the Government is more interested in having CMPs.

An area where there could be a combination would be in the Norwich Pharmacal procedures. In such cases the court could decide in a closed hearing whether or not the claimant's case is strong enough, and then the case could move to a PII-stage. At that point, the court would decide whether to uphold the certificate or not. Norwich Pharmacal cases are very different from cases involving CMPs, because they involve a third party being mixed-up in the wrongdoing. It was commented on that in such cases Government would mainly want to protect the Control Principle, whereas in the CMPs envisaged in the Green Paper the Government actually wants to bring forward material into the proceedings so as to defend itself.