JOINT COMMITTEE ON HUMAN RIGHTS
JUSTICE AND SECURITY GREEN PAPER Cm 8194

MEMORANDUM FOR THE JOINT COMMITTEE

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Introduction

1. This memorandum summarises my views on the proposals in the Green Paper **[GP]** relating to closed material procedure **[CMP]** and *Norwich Pharmacal*. It is submitted in advance of the oral evidence that the Committee has invited me to give on 31 January 2012. I express no view on the issue of intelligence oversight, or on the international parallels which have been touched upon in the response of my Special Adviser, Professor Clive Walker.

2. My functions as Independent Reviewer of Terrorism Legislation include reporting to Ministers and through them to Parliament on the operation of various executive measures (proscription, asset-freezing, control orders, TPIMs) in which court challenges are heard via CMP.[1] As a practising Q.C. and Criminal Recorder, I have some experience of dealing with secret material in court, via public interest immunity and confidentiality rings.

3. For the purposes of this exercise, I have had the additional benefit of reading a number of consultation responses supplied with the authors' consent (though regrettably in my view, there is no practice of publishing responses to consultations of this kind).[2] I have also discussed the issues with a range of people within Government and the legal profession, including advocates on all sides of the type of case to which CMPs are currently applied. I express my views in five propositions, below.

CLOSED MATERIAL PROCEDURE

(1) There are likely to be some cases in which secret evidence renders cases untriable under existing procedures.

4. The case for making a CMP available in civil litigation rests principally on fairness rather than national security. It relies upon the identification of a significant category of cases whose resolution under current procedures (including notably PII) is unfair to one side or the other.

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[1] Those reports are on my website http://terrorism-legislation-reviewer.independent.gov.uk.

[2] The initiative taken by the blog http://ukhumanrightsblog.com/ to collect consultation responses is commendable, but its harvest will inevitably be incomplete.

Fairness

5. The PII system (as acknowledged at GP §2.75) is in most cases effective in balancing two vital interests: open justice and the protection of material whose disclosure could compromise national security. Thus:

    a. The court, not the Government, is the ultimate arbiter of whether the disclosure of sensitive material is required in the interests of justice.

    b. National security is not thereby jeopardised, because in a case where it feels strongly that disclosure was wrongly ordered, it is always open to the Government to concede the issue to which such material relates (though sometimes at the cost of dropping a prosecution or abandoning a important contention).

    c. Where sensitive material is supportive of the Government's position, it is incentivised to overcome any natural inclination towards secrecy and produce it in open court: what has been aptly described as a "*healthy dilemma*".[3]

6. There are however said to be cases in which PII does not produce a fair result. These are cases in which highly sensitive material is central to the whole case, to the point where if such material is excluded by PII, the case will be rendered "*quite simply untriable by any remotely conventional open court process*".[4] The result is:

    a. *either* a strike-out of a potentially meritorious claim, as in *Carnduff v Rock*, which cannot be said to represent justice for the claimant;[5]

    b. *or* the forced settlement of a claim to which there is a potentially meritorious defence, which cannot be said to represent justice for the defendant.

    As was remarked recently in the Supreme Court, "*Neither of these possibilities is one which the law should readily contemplate.*"[6] If public authorities or agencies have acted unlawfully, this should be exposed, and compensation awarded. If they were not, they should have an opportunity to clear their name without being forced into settlements and the serious reputational damage that is associated with perceptions of guilt.

7. I am prepared to accept that such cases are likely to exist. If there are cases sufficiently saturated in secret material to require the use of a CMP in other contexts (SIAC, control order/TPIMs), it is logical to suppose that there may be civil cases of

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3 *Al-Rawi v Security Service* [2011] UKSC 34, 13 July 2011, per Lord Kerr at §96.

4 *Al-Rawi*, per Lord Brown at §86.

5 Some consultees have sought to characterise this case as eccentric or wrongly decided (e.g. SA Response §37). The courts have been slow to apply it. It should be noted however (1) that the European Court of Human Rights rejected an application by the disappointed claimant and (2) that *Carnduff* received the implicit support of at least five members of the Supreme Court in *al-Rawi*, and was criticised by none of them: see Lord Mance at §108; see also *Tariq* §110. It may yet acquire a new lease of life in the national security context.

6 *Tariq v Home Office* [2011] UKSC 35, per Lord Mance at §40; cf. Lord Brown at §84.

which the same can be said. One example given in the Green Paper is the Government's decision to settle the damages claims brought by former Guantanamo inmates (after a CMP was held in one such case, *al-Rawi*, not to be available). Faced with a PII exercise that might have taken three years,[7] the Government threw in its hand, presumably because it took the view that success in its PII claims would have left it without the evidence it needed to defend the claims.

8. Lack of information prevents me from expressing any firmer view in relation to the size of the problem. At my request, I was helpfully provided with further information on the pending cases referred to in GP Annex J para 11. Their subject-matter is various, ranging from damages claims for complicity in detention, rendition and torture to judicial reviews of naturalisation decisions. The Green Paper claims that "*sensitive information is central*" to them (which I do not doubt), and asserts that "*in many of these cases judges do not have the tools at their disposal to discharge their responsibility to deliver justice based on a full consideration of the facts"*. It stops short however of stating whether each of these cases could be fairly resolved only by means of a CMP. When I sought discreetly to pursue this question with the Treasury Solicitors' Department or with counsel instructed by them, I was told on instructions that it could not be discussed.[8] Accordingly, while I think it likely that a problem does exist, I am unable to assist the Committee with any informed estimate of its size or gravity.

9. One may ask why, if there is a significant problem, it is emerging only now. It is true that civil claims directed specifically to the alleged activities of the intelligence services have only recently become widespread. One should be cautious however in concluding that novel subject-matter requires the introduction of novel (and secret) procedures. There is after all a long history of civil litigation and judicial review against the police and prison service. The response to an allegation of wrongful arrest, or wrongful re-categorisation of a prisoner, may well depend on human intelligence sources whose safety would be jeopardised by disclosure. Yet such cases have generally been resolved in the past without recourse to a CMP.[9] It may be that not all such resolutions were satisfactory: *Carnduff v Rock* after all was a police case, and some claimants with weak cases have no doubt been paid to go away. But CMP has not previously been advanced as a necessary response to such litigation, and is now advanced only tentatively (and only in relation to prisons, not police) in the Green Paper.

10. It would materially assist the debate if the views of the police and prison service on the necessity or otherwise for CMPs could be expressed or, if already expressed in response to the consultation, be made publicly known.

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7 *Al-Rawi* per Lord Clarke at §135.

8 This reaction is not at all typical of my experience as Independent Reviewer. On all other issues, including those of the highest sensitivity, I have been allowed to form my opinions on the basis of full inspection of Government documents and uninhibited (though confidential) conversations with those involved.

9 As to the police, see the consultation response of the Bingham Centre at §44.2. See GP Appx C §§9-12 for the position in some Northern Irish prison cases. A special advocate procedure may also be used in parole board proceedings "*in rare and exceptional cases*" and "*as a course of last and never first resort*": *R (Roberts) v Parole Board* [2005] UKHL 45 §144.

Security

11. The case for change is not principally advanced in the Green Paper on the basis of any risk that secret material could, under the current procedures, be damagingly and wrongly disclosed. That is a correct judgement: as noted at 5(b) above, the Government can always press the eject button (albeit at some cost) if it believes that national security (or, where foreign intelligence material is concerned, the control principle) is unacceptably threatened by the refusal of a PII application.

12. There are respects in which it might be suggested that national security could be indirectly threatened by the current system. Take the example of a judicial review challenge to a refusal of naturalisation on national security grounds. If the Government is unable to defend itself because material evidence cannot safely be placed in open court, the consequence could be the quashing of a decision to refuse citizenship (and hence the right of abode) to someone whom it correctly judged to be a threat to national security. It is however unlikely that a court of judicial review would in such circumstances order naturalisation to be granted: rather, it would remit the decision to the Secretary of State, who would once again take it in the light of all the relevant information including that which is secret.[10] Such a consequence would be messy, and potentially circular, but it would not threaten national security.

(2) If CMP is to be made available in such cases, it must be on strict conditions

13. It is hard to resist the argument for applying a CMP to cases which would otherwise be "*untriable*". Whatever the drawbacks of a civil CMP in terms of participation in the hearing, invisibility of precedent, procedural inflexibility and cost,[11] it would have the important benefit of allowing a civil court to determine a case on the basis of all the evidence. Indeed, as suggested below, it should enable domestic intercept evidence, currently excluded from civil proceedings by RIPA, to be considered as well. For those reasons, and assuming that a significant problem can be demonstrated to exist (see (1) above), I would favour adding a CMP to the procedural armoury of the civil courts.

14. The claim that CMPs "*have been shown to deliver procedural fairness and work effectively*" (GP §13) is however overstated. It is true that the concept of a CMP is not in itself contrary to Article 6 ECHR, as recent authority has made clear.[12] That fact is however not conclusive either of the lawfulness of a specific CMP under the common law,[13] or of its fairness. The Green Paper gives no voice to the misgivings concerning any system of secret justice that are regularly expressed by some of those who work in the system.

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10 In accordance with *A (No. 2)* [2006] 2 AC 221.

11 Some of the practical difficulties of a civil CMP are referred to in the SA response §38.

12 *Kennedy v UK* 18 May 2010 (IPT), *Tariq v Home Office* [2011] UKSC 35 (employment tribunal). Immigration proceedings fall outside Article 6, as (it seems) may asset-freezing proceedings: *Bhuta v HM Treasury* [2011] EWHC 1789 (Admin), under appeal.

13 *Al-Rawi*, Lord Dyson at §68.

Views of the Supreme Court

15. The judgment of a 9-member Supreme Court in *al-Rawi*, handed down three months before the Green Paper was issued, displays a far more cautious and qualified approach to the question of fairness. Lord Kerr described the Special Advocate system (*al-Rawi* §94) as:

> "a distinctly second best attempt to secure a just outcome to proceedings",

adding:

> "It should always be a measure of last resort, one to which resort is had only when no possible alternative is available."

Reservations about the fairness of CMPs in the context of civil litigation, and caution as to the circumstances in which Parliament might authorise them to be used, were also expressed, in varying degrees, by the Court of Appeal in that case and by Lord Dyson §§35-37, Lord Hope §73, Lord Brown §83, Lord Mance and Baroness Hale §115 and Lord Clarke §167.

16. It is fair to point out that the appellate courts, by their own wish, do not examine the closed material;[14] and that I am not aware of similar views having been expressed, judicially or extra-judicially, by the High Court judges who have hands-on experience of the operation of existing CMPs.

Views of the Special Advocates

17. The Special Advocates have submitted, in a carefully-argued response to the Green Paper consultation (§§13, 15):

> "The reasons why ... criticisms have been made is that CMPs represent a departure both from the principle of natural justice and from the principle of open justice. They may leave a litigant having little clear idea of the case deployed against him, and ultimately they may prevent some litigants from knowing why they have won or lost. Furthermore, and crucially, because the SA appointed on his behalf is unable to take instructions in relation to that case, they may leave the SA with little realistic opportunity of responding effectively to that case. They also systematically exclude public, press and Parliamentary scrutiny of parts of our justice system.
> ...
> Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do <u>not</u> 'work effectively', nor do they deliver real procedural fairness."

[14] *SSHD v AF (No. 3)* [2010] 2 AC 269, §121 (Lord Brown).

That response was signed by 57 of the 69 Special Advocates, including almost all those with substantial experience of CMPs. Of the remaining 12, not one has expressed active disagreement with its contents (§1). The Special Advocates rely for their instructions on solicitors acting for the individuals confronted with CMPs; but they are security-cleared and appointed by the Law Officers. They know the ins and outs of the system. The detailed reasons for their position have been rehearsed before this Committee on previous occasions[15] and I do not repeat them here.

Significance of gisting

18. The Special Advocates' criticisms have particular force, as it seems to me, in those categories of case where there is currently said to be no requirement to give the individual even the "*gist*" of the allegations against him. The provision of a gist means that the person in question is given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. As the Supreme Court has held in the control order context, giving effect to a prior ruling of the Strasbourg Court:

> "Provided that this requirement is satisfied ***there can be a fair trial*** notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations.
>
> Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials ***the requirements of a fair trial will not be satisfied***, however cogent the case based on the closed material will be."[16]

19. Gisting is required in certain categories of case in order to comply with Article 6 ECHR or with EU law. In other cases it has been held not to be mandatory, even if Article 6 applies.[17] The Government has recently done everything it can to resist the spread of the gisting obligation, both in the legislative process[18] and in the courts.[19] It believes, no doubt rightly, that the obligation to gist can compromise sources, particularly where evidence comes from a single source. To fight a case without even the gist of the allegations against you is, however, self-evidently to fight with one hand behind your back. There are cases in which "*very little indeed*" is disclosed

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15 See e.g. *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Ninth Report of Session 2009-10, HL Paper 64 HC 395, cited by Lord Dyson in *al-Rawi* §37. Lord Brown §83 described the Committee's views as "extreme" but endorsed a version of them. See also the articles by Martin Chamberlain, a Special Advocate, in (2009) 28 CJQ 314-326 and 448-453.

16 *SSHD v AF (No. 3)* §59 (Lord Phillips), giving effect to *A v United Kingdom* (2009) 49 EHRR 625.

17 *Tariq v Home Office* [2011] UKSC 35. Lord Kerr (following the Court of Appeal) was alone in considering that gisting is always required where Article 6 applies.

18 It refused amendments which would have acknowledged an obligation to gist the allegations giving rise to onerous executive measures in both the Terrorist Asset-Freezing &c. Act 2010 and the Terrorist Prevention and Investigation Measures Act 2011.

19 For example in *Bhuta v HM Treasury* [2011] EWHC 1789 (Admin), under appeal, in which the Government successfully resisted the obligation to gist allegations that had given rise to an asset freeze with highly restrictive effects.

to the individual.[20] A Special Advocate may still be of value in such cases; but it is likely that his effectiveness will be compromised by the inability to take instructions.

20. The suggestion that legislation might define the categories of case in which gisting is not required (GP §2.43) is unwelcome, both because the Government is likely to err on the side of caution and produce an over-long list, and because the courts rather than Parliament are best equipped to determine what the justice of a particular case requires.[21]

21. It would in any event be surprising, in the light of its past approach, if the Government were to accept a gisting obligation in a civil litigation CMP. Until the courts in the UK or Strasbourg have decided otherwise, therefore, it seems prudent to assume that the CMP proposed for civil proceedings would operate on the basis of disclosure that will not always be adequate to allow a special advocate to receive effective instructions.

Conditions

22. The CMP has the capacity to operate unfairly, particularly in cases where a gist is not provided. This dictates considerable caution. Every effort should be made to prevent its adoption in cases where it is not strictly necessary. Thus:

    a. The availability of a CMP should be strictly tailored to the problem as it can be demonstrated to exist. Its proposed application to any case involving "*sensitive material*", as broadly defined (GP Glossary), is overbroad and unsupported by evidence.

    b. A starting point could be that the court's power to order a CMP should be exercisable only if, for reasons of national security connected with disclosure, the just resolution of a case cannot be obtained by other procedural means (including not only PII but other established means such as confidentiality rings and hearings *in camera*).[22]

    c. Detailed rules similar to CPR Part 76 would have to be drafted. They should not be too prescriptive in relation to such matters as whether PII need be exhausted before a CMP can be triggered: the complexity of such issues is evident from the speeches in *al-Rawi.* They should be left to the good sense of the courts themselves.

23. The major benefit of existing CMPs are that they allow the court or tribunal to decide the issues before them on the basis of all the evidence – including the intercept

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20 *AF* [2008] EWCA Civ 1148, §64(iv).

21 As Lord Hope put it in *Tariq* §83, "*There are no hard-edged rules in this area of the law.*"

22 Confidentiality rings have a function but are no panacea. Where the material covered by a confidentiality ring is substantial and highly sensitive, counsel for the individual may be placed in a very difficult position, and "*a certain paralysis in the procedure*" may result. See the characterisation of the practice as "*wrong in principle*" by the House of Lords in the prison case *Somerville v Scottish Ministers* [2007] 1 WLR 2734, §§ 152-153.

evidence that is otherwise not admissible in legal proceedings. If a CMP is to be introduced into civil proceedings, it should be on condition that section 18(1) of RIPA be amended so as to add civil litigation CMPs to the list of proceedings in which intercept evidence can be admitted.[23]

(3) The decision to trigger a CMP must be for the court, not the Government

24. The Green Paper §2.7 proposes that a CMP would be triggered in civil proceedings on the basis of a decision taken by the Secretary of State, subject only to the possibility of judicial review by the other party or parties.[24]

25. That proposal seems to me profoundly wrong in principle. The decision whether to order a CMP is properly for the court in the exercise of its case management functions. In the words of Lord Hope in *Tariq* §78, describing the regime applicable in security vetting cases before the Employment Tribunal:

> "The fact that the decision [as to whether closed procedure is resorted to] rests with the tribunal or the employment judge. The fact that the decision is taken by a judicial officer is important. It ensures that it is taken by someone who is both impartial and independent of the executive."

His concerns about impartiality may readily be illustrated: given the choice, the Government might for example elect *not* to initiate a CMP in a case which, without a CMP, might be struck out under *Carnduff v Rock.* The issue is one of fairness: and the court (rather than the parties before it,[25] let alone just one of those parties) is the best judge of that. Public mistrust of "*secret justice*", and a perception that the Government holds all the cards, will only be enhanced if this Green Paper proposal is adopted.

26. It is difficult to see how this proposal could be considered, even by the Government, to be a necessary part of a civil CMP regime. In *al-Rawi*, counsel for MI5 argued only that "***the court** has the power to order a closed material procedure in exceptional cases where this is necessary in the interests of justice*" (§39, emphasis added). If a judicial power to order CMP would have been satisfactory as a statement of the common law, it is not clear why an executive power should be required in the proposed legislation.

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[23] It does not seem adequate, in this context, to omit the issue of intercept evidence from the Green Paper on the basis that it is being considered elsewhere (GP §6 and p. 11). The onus in this context should be on anybody seeking to resist the admissibility of intercept evidence, which is already the norm in other CMP proceedings.

[24] The only parallel for this of which I am aware is in Rule 54 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, which allows a CMP (normally in vetting cases) to be triggered by the Tribunal or by ministerial direction. As I understand it, however, the latter course has never been taken.

[25] In *Al-Rawi*, Lord Brown at §84 described the principle of open justice as one that "*cannot be sacrificed merely on the say so of the parties*".

(4) Continuing efforts should be made to improve the CMP procedure

27. The Special Advocates rehearse in their response to the Green Paper a number of serious difficulties which they claim to experience when operating within closed procedures. These include:

    a. the prohibition on direct communication with open representatives;

    b. the inability effectively to challenge non-disclosure; and

    c. the lack of any practical ability to call evidence.

    They refer also to the difficulties caused by the lack of a searchable database of closed judgments, and to specific difficulties experienced in the employment context.

28. I have discussed these difficulties with Special Advocates and also with counsel regularly instructed by the Government in CMP cases (there being no overlap of personnel between the two bodies, which is unfortunate but probably unavoidable). The grounds are well-travelled: for example, many of the points made by the Special Advocates were the subject of a written response from counsel for the Crown before the House of Lords in *AF No. 3*.[26]

29. The underlying principle is not in doubt: to give individuals in CMPs as many of the normal fair trial rights as can be reconciled with the requirements of national security. Some of the Special Advocates' proposals seem difficult to resist: for example, the need for some sort of searchable database (which could benefit both sides to a case)[27] and their wish to be able to communicate with open advocates for the purposes of agreeing procedural directions over the telephone in advance of a case management conference.[28] Others are more complex, as may be seen for example from GP §§2.29-2.34.

30. The Committee has previously suggested a forum for special advocates to discuss with ministers and representatives of the security and intelligence services the "*difficult issues of principle which the day-to-day operation of the special advocates system has thrown up*".[29] Such discussions, even if held, seem unlikely to be conclusive. If the judiciary approve, it may be that the time has now come for a working party, chaired by a High Court judge with extensive experience in CMPs and with representation from all sides of the debate, to be tasked with finding solutions to some of these difficult and delicate problems. Such a group should take full account of the international experience to which summary reference is made in GP Appendix J and in the submission of the Special Advocates.

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26 [2009] UKHL 28.

27 See GP Appx F §3.

28 "*Further analysis*" of this issue is said to be underway: GP §2.35.

29 *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, Ninth Report of Session 2009-10, HL Paper 64 HC 395, §§95-98.

NORWICH PHARMACAL

(5) I support the placing of proportionate limitations on the *Norwich Pharmacal* principle in the national security context

31. The CMP issue is about fairness; but the *Norwich Pharmacal* issue is about national security. The case made in the Green Paper is that the novel application of the *Norwich Pharmacal* principle (as to which, see GP p. 15) to national security cases – initially in the case of *Binyam Mohammed* [30]– has adversely affected the flow of intelligence from our most valuable international source, the USA, and may do so to a greater extent in the future. Having questioned people in a number of departments and agencies in several capacities, some of them in direct contact with counterparts in the US, I am in no doubt that this suggestion is correct. It is fairly set out at GP §1.22, which also records that there is no suggestion that key '*threat to life'* information would not be shared.

32. Nobody suggests that the courts in *Binyam Mohammed* were blind to national security concerns, or indeed that they disclosed any information subject to the control principle that was not already in the public domain. The case does however demonstrate that UK law allows information obtained from an international partner and subject to the control principle to be disclosed for the purposes of other proceedings, potentially including open proceedings, notwithstanding the absence of that international partner's consent. Unlike in the case of PII, where the Government can by abandoning all or part of its case retain ultimate control over whether the information is used in open court, neither the Government nor the international partner has an eject button. Take an action brought against the Government for disclosure of information said to be relevant to a case brought in the US. If disclosure is ordered for the purposes of those US proceedings, then subject to appeal there is nothing that can be done. The *Norwich Pharmacal* procedure would have been used by Americans to circumvent an executive order which prevented them from accessing the intelligence in the US.

33. It is unlikely that matters truly damaging to the security of the USA or other international partners would in practice be disclosed under *Norwich Pharmacal* – even for the purpose of a capital trial in the US such as that of Binyam Mohammed. Nervousness on the part of international partners may nevertheless be understood. If UK agencies are unable to give an unqualified assurance that US intelligence supplied under the control principle will not find its way into the public domain, a reduction in the quality and quantity of intelligence-sharing is an entirely foreseeable consequence. In circumstances where, as stated in GP 1.22, "*the fullest possible exchange of sensitive intelligence material between the UK and its foreign partners is critical to the UK's national security*", this is a matter of the highest importance.

34. It follows that I am sympathetic to the wish expressed in GP §§2.83-2.97 to restrict the novel application of the *Norwich Pharmacal* doctrine to matters of national

[30] See also *Shaker Aamer v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 3316 (Admin).

security. Any such restriction should however be no more extensive than is necessary for its legitimate purpose. As to the specific suggestions made, and in broad terms only:

a. Legislation to remove the jurisdiction of the courts to hear *Norwich Pharmacal* applications against all public bodies, whether or not any question of national security arose (GP §2.90), would appear manifestly disproportionate, as would a blanket exclusion for all material held by or originating from one of the Agencies, regardless of its sensitivity.

b. A system of exemption for non-disclosure based on judicially reviewable ministerial certificates (GP §§2.91-2.93) might work, if it could be rendered compliant with Article 6 ECHR. Failing that, a rebuttable legislative presumption might be considered.

c. A statutory definition of the *Norwich Pharmacal* test (GP §2.94) would be unobjectionable, though it is difficult to see how it would meet the intelligence-sharing objective.

Conclusion

35. To summarise my views as expressed in this Memorandum, by reference to its headings:

a. **There are likely to be some cases in which secret evidence renders cases untriable under existing procedures.** I can shed little useful light however on whether the problem is a serious as the Green Paper implies.

b. If CMP is be made available in such cases, it must be on strict conditions. The potential absence of gisting dictates great caution. The proposed scope (any case involving "*sensitive material*") is overbroad, and intercept evidence should be admissible as it is in other CMPs.

c. The decision to trigger a civil CMP must be for the court, not the Government. An impartial decision-maker is essential for the appearance and the reality of justice.

d. **Continuing efforts should be made to improve the operation of CMPs.** A working group chaired by a High Court Judge could be a way forward.

e. **I support the placing of proportionate limitations on the *Norwich Pharmacal* principle in the national security context.** Respect for the control principle is vital to our national security and should not be jeopardised.

26 January 2012 DAVID ANDERSON Q.C.