JUSTICE AND SECURITY BILL

MEMORANDUM ON THE ECHR ISSUES RAISED BY THE BILL

1. This Bill follows the Government’s consultation on its Justice and Security Green Paper. Part 1 of the Bill deals with oversight of the security and intelligence services. It replaces the existing Intelligence and Security Committee under the Intelligence Services Act 1994 with a new Intelligence and Security Committee. Like the old committee, the new one will be made up of Parliamentarians from both Houses, and will have the function of examining the expenditure, administration and policy of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters (the “Agencies”). However, unlike the old statutory regime, the Bill allows committee members to be appointed by Parliament, from persons nominated by the Prime Minister. The new regime also provides in statute that the Prime Minister and the committee may agree for the committee to oversee intelligence and security activities of other parts of the UK government and to oversee (on a retrospective basis) certain operational matters of significant national interest.

2. Part 1 also increases the statutory oversight remit of the Intelligence Services Commissioner. It extends the Commissioner’s statutory role to include oversight of the exercise by the intelligence services and their heads of almost any aspect of their functions that is specified by the Prime Minister. It will also extend oversight in relation to the intelligence activities of the Ministry of Defence and Her Majesty’s forces.

3. Part 2 establishes a general “closed material procedure” (“CMP”) regime for civil proceedings in the High Court, Court of Appeal and Court of Session. Under that new regime, the Secretary of State may, after first considering whether a PII application should be made, apply to the court for a declaration that a “closed material application” may be made in the proceedings. The court must make such a declaration if it considers that a party would be required to disclose material during the proceedings which should not be disclosed in the interests of national security. The effect of the declaration is that the party holding the sensitive material may apply for permission not to disclose it except to the court, the Secretary of State (if a separate party to the proceedings), and any appointed special advocates. Special advocates may be appointed to represent the interests of the other parties, and the court or tribunal may require the applicant to provide the other parties with a summary of the material. If the permission is not given but the applicant nonetheless chooses not to disclose the material, the court or tribunal may order the applicant to make various concessions in the proceedings.

4. Part 2 also contains provision extending the existing closed material procedure under the Special Immigration Appeals Commission Act 1997 to cover reviews of certain cases where the Secretary of State has decided to exclude a non-EEA national from the UK or to refuse a certificate of naturalisation under section 6 of the British Nationality Act or an application of a kind mentioned in section 41A of that Act, in reliance on information which the Secretary of State considers should not be made public in the interests of national security, international relations or otherwise in the
public interest. The Bill gives the person concerned a right to apply to the Special Immigration Appeals Commission for the decision to be set aside. The Commission will review the decision on judicial review principles, and the existing closed material procedure set out in Special Immigration Appeals Commission Act 1997 will apply to any such review.

5. Finally, Part 2 of the Bill also restricts the availability of relief in cases where a person has, or may have suffered “wrongdoing”, but needs information from a third party in order to obtain redress or rely on a defence in connection with that wrongdoing. This is known as *Norwich Pharmacal* relief. The Bill restricts the grant of such relief, made under the residual disclosure jurisdiction of the court, in cases where the information sought is sensitive. Sensitive information means, broadly, information which relates to, has come from or is held by the intelligence services or whose disclosure the Secretary of State has certified would damage the interests of national security or international relations.
Clause 5: Additional functions of the Intelligence Services Commissioner

6. Clause 5 increases the functions of the Intelligence Services Commissioner. It inserts a new section 59A into the Regulation of Investigatory Powers Act 2000 (“RIPA”). Under section 59A the Prime Minister may direct the Intelligence Services Commissioner to keep the carrying out of functions of an intelligence service or the head of an intelligence service under review. A direction may also cover review of the intelligence activities of any part of Her Majesty’s forces, or of the Ministry of Defence.

7. In RIPA, “intelligence service” means the Agencies (the Security Service, the Secret Intelligence Service or the Government Communications Headquarters).

8. A direction under section 59A RIPA must be published except insofar as publication would be contrary to the public interest or prejudicial to:
   a. national security,
   b. the prevention or detection of serious crime,
   c. the economic well-being of the United Kingdom, or
   d. the continued discharge of the functions of any public authority whose activities are currently under review by the Intelligence Services Commissioner.

ECHR analysis

9. Insofar as this clause raises any ECHR issues, it enhances rather than interferes with ECHR rights. RIPA provides the safeguards considered necessary by Parliament to ensure that public authorities exercise investigatory powers compatibly with the ECHR. In particular, the substantive protections of Article 8 are guaranteed by the express terms of RIPA which only permit the exercise of the relevant powers if the tests of necessity, proportionality and legitimate aim are satisfied. The Intelligence Services Commissioner provides independent oversight of the RIPA regime to ensure that the exercise of investigatory powers by those in the intelligence community are subject to adequate and effective safeguards against abuse for the purposes of Article 8 (2) ECHR.

10. In addition to statutory functions under RIPA, the Intelligence Services Commissioner has occasionally agreed, at the request of the Prime Minister, to take on additional duties outside that remit. The new section 59A enables the extra-statutory functions the Intelligence Services Commissioner already has to be put onto a statutory footing and to increase the Commissioner’s functions going forward. This will enhance the scrutiny of the intelligence services and ensure that the oversight regime as a whole continues to be robust.
11. Clauses 6 to 11 will introduce a statutory mechanism for proceedings in the High Court, Court of Appeal and Court of Session to be heard using a closed material procedure (“CMP”). This will not affect existing statutory schemes for CMPs. A CMP is a procedure which incorporates all of the following elements:

- A party to the court proceedings is in possession of relevant material which, if disclosed openly, even if only to another party in the litigation or to that party’s legal representatives, would damage the interests of national security. Such a party will nearly always be a Government body but it is possible that a party in private litigation might fall within this category if it holds material originating from the Government;

- That party wishes to rely upon such material in support or defence of its case or alternatively, is required under the particular rules of disclosure applying to the proceedings to disclose such material to another party to the litigation;

- The party in possession of the sensitive material can adduce and make submissions on that material to the court in the absence of any person, including the other parties in litigation and their legal representatives. This also includes the press and general public;

- The proceedings can take place without the excluded party in litigation being given particulars of the sensitive material disclosed to the court;

- The court can nevertheless order that the excluded party in litigation is provided with a summary of any evidence taken in his absence provided that the court is satisfied that this does not damage the interests of national security;

- A special advocate may be appointed to represent the interests of the party who is (together with his legal representatives) excluded from the closed part of the proceedings;

- During any part of the proceedings where sensitive evidence is not at issue, the proceedings will be heard in the normal way with the other party in litigation and his legal representatives present;

- The court or tribunal using a CMP, when exercising its functions, is under a duty to secure that information is not disclosed contrary to the interests of national security. However, this is subject to the court’s duty to ensure that the hearing is fair in accordance with article 6 of the ECHR.

12. These clauses follow previous statutory models for CMPs, the most recent example being in the Terrorism Prevention and Investigation Measures Act 2011 and associated rules found in Part 80 of the Civil Procedure Rules.

13. Clauses 6 to 11 provide for the basic foundation of the proposed legislative system. Clause 6 sets out the circumstance when an application to the court to hear a case using a CMP will be granted. This is when the court finds that a party to the proceedings (whether or not the Secretary of State) would be required to disclose material to another person during the course of the proceedings and that this disclosure would be damaging to national security.
14. Clause 7 provides for rules of court to be made which allow a CMP to be used to hear particular proceedings. The clause largely follows the model in the Terrorism Prevention and Investigation Measures Act 2011, with certain amendments to allow for CMPs to be used in this wider range of civil proceedings.

15. The clauses apply to proceedings in the High Court, Court of Appeal and Court of Session only, although there exists the power to add by means of affirmative order to the list of court (and tribunals) which are within the scope of the provisions (clause 11(2) and (3)).

16. Clause 11(5)(c) provides that nothing in clauses 6 to 11 is to be read as requiring a court or tribunal to act in a manner incompatible with Article 6 of the ECHR.

**ECHR analysis**

**Article 6**

*General*

17. The extension of the power to apply for particular civil proceedings to be heard using a CMP engages the right to a fair trial enshrined in Article 6 of the ECHR.

18. Article 6(1) of the ECHR provides that “everyone is entitled to a fair and public hearing… Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the…protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” In Brown v Scott [2003] 1 AC 681, 719 the Law Lords affirmed that whilst the right to a fair trial under Article 6 is absolute, the rights to be implied from that Article are not. Recent domestic and European case law confirm this approach, as referred to below.

19. CMPs were first introduced into the United Kingdom following the judgment of the European Court of Human Rights in the case of Chahal v. UK 23 EHRR 413. In that case, Mr Chahal, an Indian national, claimed asylum on the basis that if he was deported from the UK to India he would face treatment contrary to Article 3 by the Indian authorities. The Court held that the existing arrangements for consideration of Mr Chahal’s asylum case were not Convention compliant because there was no mechanism for his claim to be considered by a Court in cases where national security was at stake. Furthermore, there was no mechanism for anyone acting in his interests to challenge the evidence against him. At that time, the applicable mechanism for consideration of national security deportation decisions was for the Home Secretary to consider the relevant material personally and make a decision, following which that decision would be reviewed by a panel that would make recommendations about whether the decision should stand. The relevant material was not seen by the applicant, his lawyers or anyone else acting on his behalf. In passing judgment, the Court accepted that it might be necessary in some cases for the Government to rely upon material which should not be disclosed to an applicant in the interests of national security. In so commenting, it cited with approval a Canadian model
whereby lawyers appointed on an applicant’s behalf could view and make representations on such material even though the applicant himself had not seen it.

20. In response to the *Chahal* judgment, Parliament passed the Special Immigration Appeals Commission Act 1997 which established the Special Immigration Appeals Commission (“SIAC”). This Act legislated for a CMP in SIAC to be used in relation to the hearing of appeals against immigration decisions which were made on the basis of material which should not be disclosed in the public interest. Since then, Parliament has legislated for a number of other contexts where a CMP can or must be used for the determination of a case involving material which should not be disclosed in the public interest, most recently in the Terrorism Prevention and Investigation Measures Act 2011 in respect of measures imposed under that Act.

21. The clauses in the Bill which provide for the extension of the availability of CMPs in civil proceedings draws from existing models of CMPs, including SIAC. At present the range of civil proceedings covered are those that could be heard in the High Court, Court of Appeal and the Court of Session. This is to cover two main categories of cases. The first are civil claims for damages against the Government where the fair resolution of the claim would involve the consideration of material which should not be disclosed to another party to proceedings in the interests of national security. This includes claims that the Government was complicit in the unlawful arrest and ill treatment of a claimant in a third country in the context of a counter terrorism operation. The Supreme Court case of *Al Rawi* [2011] UKSC 34 held that in the absence of statutory provision a CMP could not be used to hear a civil damage claim. The CMP clauses seek to introduce this statutory provision because without it, the Government is unable to adduce relevant sensitive evidence (whether it supports its case or not) and has no option other than to seek to settle the case without any judicial consideration of the merits of the case if it is to protect national security. The other category of case is executive actions based on material which should not be disclosed in the interests of national security which are challenged by means of a judicial review. In the recent case of *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), the High Court held that CMPs are not available in naturalisation proceedings even with the consent of the parties. According to the High Court, the result is that in cases involving sensitive evidence, the Government is in possession of sensitive evidence which must be excluded from consideration under the PII process but upon which it relies for its decision, the court will have no option other than to uphold the decision without consideration of the material. The High Court opined that “this rather unsatisfactory outcome should be remedied in Parliament, by provision for a CMP, at least in this sort of case”. It is possible that other categories of case will arise in the future, which explains the need to provide for a power to amend the scope of the civil proceedings (that is, proceedings in courts and tribunals other than those mentioned above) to which the CMP clauses can apply.

22. Different versions of the closed material procedure have been considered by domestic courts and the European Court of Human Rights, and have been found in their particular contexts to be ECHR-compliant. The principal domestic case on the use of CMPs is *Tariq v Home Office* [2011] UKSC 35. In *Tariq*, the claimant, an immigration officer, had brought a claim before the Employment Tribunal arguing that the Home Office’s decision to withdraw his security clearance constituted direct
or indirect discrimination on grounds of race and/or religion. In this case, there was statutory provision for a CMP: Employment Tribunals Act 1996, s 10 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch. 1. The Employment Tribunal made an order for a CMP in this case on the application of the Crown and considered closed material adduced by the Home Office which was not disclosed to the Claimant. One of the issues which the Supreme Court had to consider was whether the legislative provisions providing for a CMP were contrary to EU law and/or the ECHR.

23. The Court unanimously held that the CMP provided for in the Employment Tribunal legislative scheme, including its provision for the appointment of special advocates was compatible with Article 6 of the ECHR and EU law. Relying upon the case law of the European Court of Human Rights (in particular, *Leander v Sweden* (A/116) (1987) 9 EHRR 433 ECHR, *Esbester v United Kingdom* (18601/91) (1994) 18 EHRR CD72 Eur Comm HR and *Kennedy v United Kingdom* (26839/05) (2011) 52 EHRR 4 ECHR), the Court held that it was established that the demands of national security may necessitate, and under the ECHR justify, a system for handling and determining complaints under which an applicant is, for reasons of national security, unable to be shown the entirety of the Secretary of State’s case. The Court held that the critical questions were whether the system was necessary and contained sufficient safeguards. The Court observed that the context would always be crucial to where and how the balance was to be struck. In relation to the present case, security vetting was a highly sensitive area where the need to preserve the integrity of sources of information and the methods of obtaining it was paramount. Given the appointment of a special advocate to represent the Claimant’s interests in the closed part of the hearing as a potentially useful safeguard, in the circumstances the use of a CMP was lawful in the instant case.

24. The principal line of ECHR jurisprudence is summarised in *Tariq*. This line of authority culminates in *Kennedy v UK* (2011) 52 EHRR 4, in which the European Court of Human Rights considered the Article 6 compatibility of the Investigatory Powers Tribunal’s (“IPT”) procedures for reviewing the exercise of powers used to intercept communications. The Court concluded that the procedure before the IPT did not violate the applicant’s right to a fair trial, holding firstly, that the disclosure of relevant evidence is not an absolute right and secondly, that national security may justify the exclusion of the complainant and the general public from the proceedings. This case provides authority that using a closed process (indeed, one which did not even involve the use of special advocates) to determine civil rights and obligations, was not inherently unfair when its use was necessary in order to protect relevant but sensitive material.

25. The above jurisprudence provides authority for the proposition that a CMP can be used in compliance with Article 6 where to do so is necessary and proportionate in the interests of national security and where there are adequate procedural safeguards.

26. In relation to what adequate procedural safeguards are in place, the case of *Tariq* demonstrates that the interests of a person not permitted to remain during the closed part of a hearing being represented by a special advocate are one of a number of safeguards which ensures that the essence of the right to a fair trial is not impaired. In that case the claimant argued that CMPs were not permissible, because the “adequate procedural safeguard” element could not be met due to the inadequacy of the special
advocate system. All such arguments were rejected by Lord Mance, who gave the leading judgment. The claimant’s first argument was that it was inappropriate that special advocates were appointed by the Attorney General who is also the Government’s principal adviser. The Court rejected this argument on the basis of previous authority and because special advocates are appointed from the independent bar and selected on the basis of an open competition taking account of their abilities. It was also noted that the claimant had freedom to choose who he would appoint to act as a special advocate. Secondly, Mr Tariq argued that special advocates are subject to a conflict of interest because they are supported by the Special Advocates Support Office which is located within Tsol. This argument was rejected on the basis that Tsol does not have two clients since the special advocates are not formally acting for a person, they are charged to “represent their interests”. Lord Mance accepted there was a proper Chinese wall arrangement within Tsol. He also dismissed arguments that special advocates lack supervision, are insufficiently guided as to their role and lack any or sufficiently defined powers in respect of matters such as disclosure, the calling and cross-examination of witnesses and appeal, as “not well founded or as rendering the whole closed material procedure unfair.” (para 55).

27. Relying upon the case law mentioned above, the Government considers that excluding a party, as well as the press and public, from the “closed” part of CMP proceedings, but having that party’s interests represented by a special advocate, if done to the extent strictly necessary in the interests of national security, can operate compatibly with Article 6 of the ECHR.

28. Finally, the Government also notes that the Supreme Court applied its reasoning in Tariq to ECHR compatibility generally and not solely in relation to Article 6. In particular, the Court found that if the requirements of necessity and appropriate safeguards mentioned above were in place, a CMP would be compatible with the ECHR generally, including in particular, the substantive and procedural rights incorporated by Articles 8 (right to respect for private and family life), 10 (freedom of expression) and 13 (right to an effective remedy) (see, for example, paragraph 36 which follows an analysis of the case law of the European Court of Human Rights).

“AF (No 3)” disclosure

29. The legislative scheme set out in the clauses enables rules to be made preventing the open disclosure of material which should not be disclosed in the interests of national security. This is without prejudice, however, to any obligation which might arise in a case to disclose material pursuant to the ruling in the House of Lords case of Secretary of State for the Home Department v AF and another [2009] UKHL 28 (“AF (No.3)”). In that case, which concerned control order proceedings, the court held that in order for such proceedings to be fair and compliant with Article 6, “the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. 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.” Whilst there is ongoing litigation on the reach of the judgment in AF (No. 3), described below, it is accepted that the AF (No. 3) disclosure requirement might apply in a case where a CMP is being used by virtue of the Bill
provisions. In such a case, clause 11(5)(c) explicitly provides that the court must act in accordance with its obligations under Article 6. Therefore, if in the view of the court disclosure under Article 6 is required, notwithstanding that such disclosure should not happen in the interests of national security, it must nonetheless order it to take place or for the Secretary of State to concede the relevant point. In such a case, the Secretary of State must respect that judgment and either make the disclosure or not take a particular point or concede part of the case (even if this results in conceding the entire case).

30. There is ongoing litigation about the reach of AF (No.3). In the most recent case of Tariq mentioned above, the Supreme Court held that there did not exist an absolute requirement that a claimant be provided with sufficient detail of the allegations against him to enable him to give effective instructions on them (the AF (No. 3) disclosure requirement), where it would involve disclosure to the claimant of details of allegations which, in the interests of national security, should be kept secret. On the facts of that case the Supreme Court found that there was no requirement to provide the claimant with such disclosure. However, it is clear that whether or not Article 6 requires AF (No. 3) disclosure to be produced will depend upon the context of the case.

31. The Bill does not include any provision explaining when or to what extent AF (No. 3) disclosure may be required in any particular case as this is still to be worked out in the case law. The courts will be left to determine the level of disclosure required to comply with the excluded party’s right to a fair hearing in accordance with Article 6. It is, as mentioned above, explicitly stated at clause 11(5)(c) that nothing in clauses 6 to 11, or in rules of court made by virtue of them, is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the ECHR. The Government therefore assesses that because any requirement to provide a person excluded from the closed part of a hearing with AF (No. 3) disclosure of sensitive evidence if necessary to ensure the right to a fair trial is preserved, the Bill is compliant with Article 6.

Article 10

32. It is acknowledged that when closed material proceedings are used, the ability of the press to report on those proceedings is correspondingly limited. As such, Article 10(1) of the ECHR, which enshrines the right to freedom of expression, is engaged. The question is whether this limitation on Article 10(1) is permitted by Article 10(2) of the ECHR.

33. Like Article 6, Article 10(1) protects the public’s right to know what happens in court proceedings, as the Court of Appeal recognised in R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 at [180] and more recently, albeit in the context of extradition proceedings, the case of R (Guardian News and Media Limited) v City of Westminster Magistrates’ Court [2012] EWCA 420. However, the courts have long recognised that it may be legitimate to restrict the right to freedom of expression in Article 10 to protect national security: see e.g. Vereniging Weekblad Bluf! v Netherlands, App. No. 16616/90, (1995) 20 EHRR 189, at [35] and [40], R v Shayler [2002] UKHL 11 at
34. As always with the qualified rights in the Convention, whether a restriction on the right is necessary and proportionate will depend on all the circumstances of each case. It is important that under the scheme set out by the Bill, when a closed material procedure is used, the judge is required to assess whether the material is discloseable and damaging to national security. The role of the judge throughout the proceedings is therefore to ensure that closed proceedings are only used where disclosure of the material into open proceedings would be damaging and there is no Article 6 requirement for disclosure. Therefore, the Government considers that in all cases where the test for closed proceedings is met it will be possible to justify the interferences with Article 10 rights as necessary and proportionate in the interests of national security.

35. On that basis, the Government assesses that the Bill is compatible with the freedom of the press, and with Article 10 of the ECHR. This is consistent with the reasoning in *Tariq* (see above).
Clauses 13 and 14: Residual disclosure jurisdiction

36. Clauses 13 and 14 of the Bill make provision limiting the residual jurisdiction of the courts to order disclosure in cases where a person has, or may have suffered a legal wrong, but needs information from a third party in order to obtain redress or rely on a defence in connection with that wrong. Currently in England and Wales and Northern Ireland, a person in that situation may apply for an order under the court’s residual disclosure jurisdiction so as to require the third party to release the information if the third party was (however innocently) mixed up in the wrongdoing. This is called a “Norwich Pharmacal” order.

37. In the last four years, individuals have used Norwich Pharmacal relief to seek sensitive national security information. And it is this recently developed application of the jurisdiction which the clauses operate on. In practice, Norwich Pharmacal applications involving sensitive material have been made by individuals who are outside the UK, seeking information from the UK government (which has been alleged to have been in some way mixed up in an alleged wrongdoing against the claimant by a third party). This information has been sought in order to assist the individual in either bringing or defending proceedings overseas that the individual is involved in, or intends to commence, either against or otherwise concerning the third party in connection with the alleged wrongdoing.

38. Clause 13 prevents the court from ordering disclosure in Norwich Pharmacal cases where the information sought relates to, comes from or is held by an intelligence service (that is, the security service, the secret intelligence service, the Government Communications Headquarters and any party of Her Majesty’s forces or of the Ministry of Defence which engages in intelligence activities). There is no current equivalent form of relief available in Scotland, so there the clause simply prevents one from arising. Clause 13 also prevents the court from ordering disclosure in Norwich Pharmacal cases where the Secretary of State considers that the disclosure of information (including whether or not the information sought exists or is held) would cause damage to the interests of national security or the international relations of the United Kingdom and has issued a certificate to that effect. A party to the proceedings may challenge such a certificate on the ground that the Secretary of State ought not to have determined that disclosure of the information would cause damage to national security or international relations and the court will review that determination applying judicial review principles (clause 14).

39. The prohibitions on ordering disclosure in clause 13 apply only to the court’s residual inherent jurisdiction to order disclosure. The court’s ability to order disclosure by other means (for example, as provided for by the Civil Procedure Rules) will remain intact (as will the court’s inherent jurisdiction to order disclosure in Norwich Pharmacal cases not involving sensitive material as defined).

ECHR analysis

Summary

40. The Government considers these clauses are compatible with the Convention rights. This is on the basis that it is very difficult to see how the domestic courts or the ECHR could assert that the ECHR requires the UK Government to maintain Norwich Pharmacal relief for sensitive material, given the lack of any similar relief
in other Convention countries. But in any event, the proposed legislation does not detract from the duty of public authorities to act compatibly with Convention rights in accordance with section 6 of the Human Rights Act 1998. Therefore, it will still be open for an applicant to assert that they have a right to information under the ECHR and the courts will still be able to determine that claim, albeit not within Norwich Pharmacal proceedings. However, for the reasons discussed below, it is very difficult to conceive of situations in practice where the ECHR would give rise to a freestanding right to information under Norwich Pharmacal proceedings in any event – bearing in mind that any substantive proceedings relate to a third party and not the UK Government.

**Analysis**

41. The clauses do not preclude claims for disclosure of sensitive information (as defined) in all circumstances. Neither do they prevent a claim that disclosure of such information is required by the ECHR. The purpose and effect of the clauses is rather, and more narrowly, to close down the recent expansion of the equitable relief known as Norwich Pharmacal relief so that it will no longer be available in relation to sensitive material.

42. The Government considers that the proposed restrictions on Norwich Pharmacal relief do not interfere with any Convention rights because it does not consider that any ECHR right gives rise to the right to disclosure available through such relief. Such relief did not develop, and does not currently exist, in order to meet any ECHR need. This is further evidenced by the fact that no other country which is signatory to the Convention has the equivalent of Norwich Pharmacal relief.

43. One reason why it is difficult to see how claimants could be seen as having a Convention right to Norwich Pharmacal disclosure is that the vast majority of the claimants in Norwich Pharmacal cases are outside the UK for the purposes of article 1 of the ECHR. Article 1 of the ECHR provides that:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention”.

44. It has been confirmed in Al-Skeini v UK (2011) 53 EHRR 18, that a State is normally only required to apply the Convention within its own territory. The precise ambit of a State’s jurisdiction for this purpose is still the subject of developing jurisprudence. However, the Government assesses that, to date, all the claimants who have sought sensitive information by bringing a claim for Norwich Pharmacal relief have been outside the UK’s ECHR jurisdiction.

45. But in any event, to the extent that claimants may come within the UK’s ECHR jurisdiction, the restriction of the Norwich Pharmacal jurisdiction does not interfere with their Convention rights because, as mentioned above, the Government considers that the Convention rights do not confer a right to Norwich Pharmacal disclosure.

46. Furthermore, even if on the facts of a particular Norwich Pharmacal case, the individual claims there is an ECHR right to disclosure, the clauses do not preclude disclosure of sensitive information per se – they merely preclude disclosure of such information under one particular route, namely the court’s residual disclosure jurisdiction known as Norwich Pharmacal relief. So, notwithstanding the clauses,
the applicant is not prevented from asserting that Convention right, whether or not in free-standing proceedings or as part of a wider ECHR claim. Where an individual has a substantive claim within the UK (including in relation to failure to provide information in breach of Convention rights or any other breach of Convention rights), they have a fully adequate means of asserting that claim within the UK courts – and their claim will be dealt with compatibly with Convention rights in accordance with section 6 of the Human Rights Act 1998. The rules on litigation disclosure (including pre-action disclosure, third party disclosure and standard disclosure) provide all the disclosure that is required under the ECHR.

47. In short, if an applicant considers that they have an ECHR right to sensitive information as defined in clause 13, the Bill does not prevent that applicant from claiming, or being entitled to, such disclosure that is required under ECHR rights. The applicant may still claim such disclosure via other routes - such as via a claim under section 7 of the Human Rights Act 1998 for the information, via disclosure obligations in substantive legal proceedings against the Government or under the Data Protection Act 1998. By virtue of section 6 of the Human Rights Act 1998, requests for disclosure, or litigation obligations to disclose, must be dealt with compatibly with Convention rights.