JUSTICE AND SECURITY GREEN PAPER

Response to consultation from the Police Actions Lawyers Group

The Police Actions Lawyers Group

1. The Police Action Lawyers Group (PALG) is an organisation comprised of lawyers who represent claimants in civil litigation against the police throughout England and Wales. Such actions can include private law claims for torts such as assault, false imprisonment, malicious prosecution and misfeasance in public office, as well as judicial review claims involving the police exercise of statutory functions, and cases brought pursuant to the Human Rights Act. PALG members often represent family members in death in custody inquests involving the police.

2. PALG members are concerned first and foremost with the principle objective of the claimants they represent: to ensure that the police are held accountable for their conduct through all available avenues, including those referred to above.

3. PALG has a long history of responding to government proposals for changes in the civil justice system, police complaints and misconduct procedures and the operation and scope of legal aid available for claimants in cases involving the police.

The Green Paper

4. This response concentrates on the areas most pertinent to the area of litigation on behalf of claimants against the police.

5. In general terms, PALG does not accept the main premises that lie beneath the questions posed by the Green Paper. First and foremost, PALG does not accept

the premise that closed material procedures (CMPs) should be more widely available in civil proceedings. And PALG does not accept that the increased use and training of Special Advocates can address the inherent disadvantages to claimants that the increased use of CMPs would inevitably involve.

6. Subject to those important caveats, the questions posed by the Green Paper which would be relevant to PALG members and the litigation in which they are involved are as follows:-

> *Q.1 How can we best ensure that closed material procedures support and enhance fairness for all parties?*
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> *Q.4 What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?*
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> *Q.5 If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the "AF (No 3) "gisting" requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No 3) does not apply?*
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> *Q.8 In civil cases where sensitive material is relevant and where closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?*

Inquests

7. Although our members are also frequently involved with inquests into deaths in police custody, we have had the advantage of reading the draft submissions from INQUEST in relation to the aspects of the Green Paper which involve inquests in sensitive cases, and we endorse everything that is said in that submission in opposition to the proposed changes set out in the Green Paper in relation to the procedures in inquests.

PALG cases

8. Appendix A to the Green Paper sets out some of the situations where it is thought that a CMP might be necessary. Some of these involve protection of sources and the protection of investigations and methods of investigation for various reasons.

9. The kinds of cases in which PALG members are engaged which might include the consideration of sensitive material are often those that involve the source of police information or may involve information about ongoing police investigations and methods.

10. Thus, cases often involve claimants who argue that an arrest (possibly involving force and significant injury) was unlawful because there were no reasonable grounds to suspect the claimant of a crime. The police response might be that they are relying on information from an informant whose identity must be kept secret for the informant's own safety or other reasons.

11. The police might also argue that there are reasons of national security (where, for example, there is a terrorist investigation that has led to an arrest) which mean that the background to an arrest cannot be revealed. Otherwise, it might be said there is an ongoing police investigation the details of which need to be withheld to ensure that other potential arrestees are not forewarned about the existence of the police interest.

12. Similar issues might arise in cases involving malicious prosecution, misfeasance in public office, or the obtaining and execution of search warrants where it is sometimes argued that the material justifying police action cannot be disclosed.

13. There have also been cases where the actions have been brought against the police for failing to provide protection to witnesses or potential victims of violence where it could be argued that some information cannot be disclosed.

14. PALG members have also brought challenges to CPS refusals to prosecute and police refusals to investigate where it has been claimed that there is sensitive third party information (for example in cases of alleged child abuse) which cannot be disclosed.

15. Challenges are sometimes brought (often by way of judicial review) to the strategy and policy whereby demonstrations have been policed, where the police have argued that intelligence which has informed the strategy and policy of policing cannot be disclosed.

16. PALG members have unrivalled experience in the kinds of cases described above, and will, collectively, have acted in hundreds, if not thousands, of such cases. We would note here immediately that, although these appear to be the kind of cases which could easily fall within the enlarged system of CMPs envisaged by the Green Paper (and no doubt the police would apply for such a procedure in many cases if it were available), there is no evidence that we are aware of that cases have been unfairly tried, or where a trial has been impossible, by reason that only the current common law procedure of PII is available.

17. For this reason alone, in relation to police cases at least, it is our view that the need for the extended availability of CMPs set out in the Green Paper is exaggerated, and not evidence-based.

The case against extending CMPs

18. PALG is fundamentally against the introduction of extended availability of CMPs with particular reference to our core area of work, namely civil actions against the police.

19. It is our view that the introduction of such a procedure will undermine the delivery of justice to our client claimants. Our experience is that these claimants often face inequality of arms due to the fact that courts often tend to believe

State agents (who are trained to give evidence) as opposed to individual claimants and due to the increasing funding difficulties for such individuals. Introducing the CMP process for such people will add a further hurdle to them achieving justice.

20. As the Supreme Court recently noted (see below), CMPs represent a departure from the fundamental principle of natural justice and open justice that all parties are entitled to see and challenge all evidence relied upon before the court and to challenge that evidence by calling evidence of their own.

21. It is our view that this principle takes on even greater importance in cases, such as those brought by our client claimants, where there are, at the heart of the claims brought, allegations of abuse of power by state agencies. In such cases, where the integrity of the state is in question, a procedure which excludes the claimant from all, or part, of the evidence which will otherwise be considered by the court, would be the antithesis of natural justice.

22. The Green Paper has been issued following the Supreme Court's in depth consideration of the arguments for introducing CMPs in civil proceedings by way of the common law by in the case of *Al-Rawi v Security Service* [2011] 3 WLR 388. In that case there was a preliminary issue hearing into the question of whether the court was entitled in an ordinary civil claim for damages to order the adoption of a closed material procedure.

23. It is noteworthy that, despite the apparent certainty with which the Green Paper advocates for the extension of CMPs, the majority of the eight members of the Supreme Court took a rather different view (while of course finding that Parliament could introduce provisions that would change the common law position) of the need for change and the justifications for it, which reflect the concerns held by PALG.

24. Indeed, in the holdings of the law report it is noted that:-

(a) a majority of the court was of the view that there was "no compelling reason justifying the fundamental change envisaged by the preliminary issue, which involved an inroad into a fundamental common law";

(b) Four members of the court highlighted the fundamental features of a common law trial which included a situation where "parties know and can respond to the cases against them".

(c) The Court highlighted the benefits of the current system of public interest immunity (PII) where "the principles of fairness and equality of arms apply so that documents are either disclosed to or withheld from all the parties and no party is excluded from participation in the litigation".

(d) This was contrasted with a CPM procedure "which excludes a party from part or the whole of a closed hearing and prevents him from seeing and challenging the evidence, save to the limited extent available to him through the assistance of a special advocate".

(e) Baroness Hale and Lord Mance thought that a CPM should only be available where, after a PII hearing, the case was "untriable" but, significantly, only where the claimant consented to such a procedure.

(f) Otherwise, only Lord Clarke adopted an approach akin to that proposed by the Green Paper.

25. The Green Paper description of the case (at paragraph 1.32 – 1.33) emphasises the Supreme Court's view that any change was a matter for Parliament. However, the Green Paper does not reflect at all the very clear scepticism of the majority of the Court towards arguments that change would be an improvement on the current procedures in place, or would lead to more just outcomes of civil trials.

26. It is our view that the searching analysis and the conclusions reached by the Supreme Court in Al Rawi should be given very great weight when proposals for change are considered. Potential consultees have not been properly informed about the views of the Supreme Court judges, in particular the view of the majority that there is no compelling case for change.

27. We would go further and say that the proposals are wholly unnecessary. They are not supported by the evidence from practice. It is our view that that the current legal framework is able to deal effectively with the issue of sensitive material when it arises. The Green Paper seeks to dismantle the current procedures in favour of a system that would be deeply detrimental to natural justice and the principle of open justice. It is a fallacy to suggest – as the Green Paper does – that more evidence being put before the judge necessarily results in better justice, or is more likely to lead to the "right" outcome. If the evidence is untested there is an increased risk of the case being decided on unreliable evidence which may positively mislead the court.

28. Judges, the Joint Committee on Human Rights and SAs have all highlighted the fundamental unfairness inherent in the use of CMPs. We join the Joint Committee in our strong view that the use of CMPs are "offensive to the basis principles of adversarial justice" and "very much against basic notions of fair play as the lay public would understand them".

29. There are a number of factors that should be raised which relate specifically to our area of specialism.

30. First, we note that some actions against the police (notably for the torts false imprisonment and malicious prosecution) attract the right to trial by jury: see s69 Senior Courts Act 1981. This ensures a higher degree of public scrutiny than in much other litigation in recognition of the constitutional issues at stake. Although the nature of the documentation involved can mean that that right is not exercisable in some circumstances, it is our view that, wherever possible, the

statutory right to jury trial should be preserved. Where all the evidence is before the court then this is more easily achieved. If a CMP was adopted in any case that could otherwise be heard with a jury, that right would be lost as, in many cases, the closed material would need to be withheld from the jury as well. The Green Paper does not address this issue at all.

31. Second, there will be some cases where the civil proceedings in question will be the way in which the State will discharge its duty of investigation under Article 3 ECHR. These will often be cases where there are allegations of excessive force used upon arrest or after arrest while in custody. They might also be challenges to failures to investigate or prosecute rape or other abuse. (In cases where Article 2 ECHR is engaged the investigative requirements are usually fulfilled by the inquest: see the INQUEST submission).

32. The case law establishes that to satisfy the investigative duty into allegations of a breach of Article 3, there must be an effective and official investigation: see *Assenov v Bulgaria* (1998) 28 EHRR 652 and *Morrison v IPCC* [2009] EWHC 2589 (Admin). This must include the appropriate involvement of the person making the allegation, and an appropriate degree of public scrutiny. Article 3 also requires an explanation by the State as to how a person came by their injuries, see Lord Bingham at paragraph 20(3) in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, where he said that:-

> "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused…

33. In our view, any court procedures which have the effect of overly restricting the involvement of the claimant or of an appropriate level of public scrutiny, or of hiding any explanation as to how a person came by their injuries, run a significant risk of being in breach of the investigative duty under Article 3 ECHR. Again this aspect has not been addressed in the Green Paper.

34. Thirdly, It is also our view that the Civil Procedure Rules contain sufficient safeguards to mean that the introduction of a CMP is unnecessary. Thus there are the general management provisions in CPR Pt 3.1 which give judges wide discretion as to how to run a trial. CPR Pt 5.4C contains provisions about restricting access to third parties to court documents, orders and judgments. CPR 31.19 contains the provisions for a party to apply for PII. CPR Pt 32.1 enables the Court to control the way in which evidence is placed before the Court, and CPR Pt 32.13 contains powers over inspection of witness statements. Restrictions can be made at trial which can include hearings *in camera*, but with the parties present to hear all the evidence.

35. In addition we note and endorse the impressive list of case studies annexed to the INQUEST response to the Green Paper. These case studies provide practical examples of how creative and sensitive case management by a coroner or judge can ensure that the current range of tools available to a court can ensure that appropriate safeguards can be put in place to protect sensitive material, while also ensuring that the requirements of natural justice are met. The practical measures described apply, in many cases, as equally to civil litigation as they do to inquests.

36. Lastly, it is our view that extending CMPs to ordinary civil cases (as opposed to cases challenging the exercise of executive power) such as actions against the police would have a deleterious effect on the administration of justice. The whole set-up of the civil justice system, including costs rules, insurance and public funding, depends on the parties being able to assess their prospects of success. In cases involving a CMP it will be impossible for a claimant to do so.

Special Advocates

37. The Green Paper also seems to be based on the premise that the current system of Special Advocates can be extended to provide sufficient safeguards for claimants in CMPs, with additional training provided to SAs and maybe an alteration to the rules regarding contact by SAs with the "open" advocates once the SA has gone into closed.

38. However, the system of SAs cannot, in our view, be a panacea for all the injustices and shortcomings that a CMP would entail for a claimant in a police action case. Lord Dyson certainly was of this view in *Al-Rawi* when he discussed the issue as follows:-

> 36 Can all of these flaws be cured by a special advocate system? No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. ...But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material....
> 37 The limitations of the special advocate system, even in the context of the statutory contexts for which they were devised, were highlighted by the Joint Committee on Human Rights in their report on *Counter-Terrorism Policy and Human Rights* (16th report)....in the context of the Prevention of Terrorism Act 2005 and cases heard by the Special Immigration Appeals Commission. This report was based on the first-hand experience of those who have acted as special advocates. ...At para 210 of its earlier report, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, 19th report of Session 2006–2007, HL Paper 157/HC 394, (30 July 2007), the committee had concluded:
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> > "After listening to the evidence of the special advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The special advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening … has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them."

The views of the Special Advocates themselves are clearly of great importance in this context, as it is they who have the experience of trying to uphold natural justice for claimants in the current situations where CMPs are held. If the SA system were a success in this regard, SAs might be expected to say so and endorse the Green Paper proposals.

39. However, we have seen the SA response to the Green Paper and it contains an emphatic rebuttal of the government's proposals for extending the availability of CMPs and of the suggestion that the system of SAs should ensure that the justice is delivered for claimants. In particular we note the following:-

    (a) the SAs are of the view that there are considerable shortcomings to the SA system in ensuring justice;

    (b) the views expressed to the Select Committee (cited in *al-Rawi)* are repeated in the SAs submission;

    (c) SAs often have little realistic opportunity of responding effectively to the "closed" case against a person;

    (d) the view of the SAs are that CMPs are inherently unfair, and they refute the Green Paper assertion that they work effectively and deliver real procedural fairness.

    In our view, and in our experience, the points made by the SAs are good ones, and have been known by the government for some time (see the 2007 report of the JCHR cited by Lord Dyson in *Al-Rawi* (above)).

40. However, the criticisms by the SAs are not properly reflected in the Green Paper which suggests that the current system works effectively in protecting justice. SAs fundamentally disagree with the premise that the current system works well. The SAs say that, "Contrary to the premise underlying the Green Paper, the contexts in which CMPs are already used have **not** proved that they are "capable of delivering procedural fairness"" and that even with SAs "CMPs remain fundamentally unfair". "The introduction of such a sweeping power could be justified only by the most compelling of reasons. No such reason has been identified in the Green Paper and, in our view, none exists".

41. SAs are not the answer to the inherent unfairness of CMPs and this should be clearly recognised by the government.

The questions

42. PALG responds to the specific questions relevant to its members' work as follows.

Q.1 How can we best ensure that closed material procedures support and enhance fairness for all parties?

43. As set out above, our view is that CMPs do not support and enhance fairness for claimants, and there is no evidence that CMPs would enhance fairness more than existing powers relating to PII and case management. The compelling reasons that would be necessary to justify CMPs being extended to all civil cases do not, in our view, exist.

44. If, contrary to our view, CMP procedures are introduced, we would submit that they should only be used in instances where the PII process would result in material being suppressed altogether. A process would therefore need to be introduced to assess whether in any case a closed procedure would be more likely than PII to achieve justice through a fair trial. This process should take into account the views of the claimant and would therefore require that the claimant be permitted to make representations in advance of a decision being made.

Q 4 What is the best mechanism for facilitating Special Advocate communication with the individual concerned following service of closed material without jeopardising national security?

45. If, contrary to our view, CMP procedures are introduced, then we would adopt the proposals by the SAs in their response to allow greater communication

between the claimant and the SA, with the possibility of a judge considering communication without automatic referral to the defendant.

Q. 5 If feasible, the Government sees a benefit in introducing legislation to clarify the contexts in which the "AF (No 3) "gisting" requirement does not apply. In what types of legal cases should there be a presumption that the disclosure requirement set out in AF (No 3) does not apply?

46. If, contrary to our views, CMPs are introduced, it is our view that actions where there are allegations of abuse of police power are exactly the kind of case where at least a gist of the case relied upon by the police will be essential, for the individual claimant and for the principle of public scrutiny. The need for this is enhanced in cases where Article 3 is engaged. Legislation should refer to the common torts in police actions, judicial review applications involving the police and actions pursuant to the Human Rights Act 1998, as those cases where the "gisting" requirement must always apply even where there is a CMP.

Q. 8 In civil cases where sensitive material is relevant and were closed material procedures not available, what is the best mechanism for ensuring that such cases can be tried fairly without undermining the crucial responsibility of the state to protect the public?

47. It is our view that the current systems in place have demonstrated sufficient flexibility to enable both these objectives.

Conclusion

48. PALG's view is that the proposals for change set out in the Green Paper are not necessary and would significantly undermine the justice system by increasing unfairness and limiting scrutiny. PALG is concerned that the Green Paper does not properly represent the views of the Supreme Court, the Joint Committee on Human Rights or the Special Advocates. As such that consultees have not been provided with a full picture of the current arguments for and against change. PALG members have no evidence of trials involving the police which would have required a CMP to allow justice to be done. PALG refers to the special

characteristics of civil actions involving the police which mean that the use of CMPs would be especially inappropriate, for example in cases engaging Article 3 ECHR and cases where there is a right to trial by jury.