



Consultation response to New Zealand Law  
Commission: National Security Information in  
Proceedings (Issues Paper 38)

Response by the Bingham Centre for the Rule of Law

Response by the Bingham Centre for the Rule of Law, 30 June 2015

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## A. Introduction

1. This submission addresses a selection of issues that arise from Issues Paper 38. It covers four main areas:
  - overarching issues about decisions to legislate in the area
  - key protections: sunset clause and periodic review
  - matters relating to open justice, transparency and accountability
  - the expansion of secrecy provisions into criminal proceedings
2. It should be noted that although we pay limited attention to the equality of arms issues, that should not be interpreted as meaning that we see few or no problems with the effects on natural justice or the operation of procedures as they stand in the UK.
3. We begin in section B by addressing the possibility raised by the Commission that New Zealand should not move to legislate to expand secrecy. In the remaining sections we proceed on the basis that New Zealand is likely to enact legislation that will in some form expand secrecy in proceedings.
4. Our recommendations are aimed at putting in place safeguards that aim to combat the most troubling aspects of the laws, trying to provide practical mechanisms that would aid fairness, openness, transparency and accountability. However, in almost all instances, those measures are a second-best alternative. The better alternative is not to depart from core rule of law commitments in the first place.
5. In several instances IP38 raises issues, identifying matters as being very important, but no specific questions are directly stated in relation to those issues. Of note, these occur in relation to:
  - Periodic review (6.96, but no question posed)
  - Open justice (throughout, but especially Ch 2, but only Q 6 posed, which is limited in focus)

In other instances we raise matters that arise from IP38 and legislation of the type envisioned, but which are not addressed in the paper. In particular:

  - Can closed judgments later be opened when the danger to national security has passed?

### The Bingham Centre for the Rule of Law

6. The Bingham Centre for the Rule of Law was launched in December 2010. It is a London-based independent research institute, operating internationally, devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity in the UK.

### The authors and the background to the submission

7. This submission was prepared by Dr Lawrence McNamara, Senior Research Fellow and Deputy Director of the Bingham Centre for the Rule of Law, and Justine Stefanelli, Maurice Wohl Associate Senior Research Fellow in European Law at the Bingham Centre for the Rule of Law.
8. The submission aims to inform the New Zealand Law Commission's consultation by providing background and analysis of the experience in the UK, where the Justice and Security Green Paper (2011) and the subsequent Justice and Security Bill raised many of the issues that are found in the New Zealand Issues Paper 38 (IP38). The Bingham Centre was involved in

consultations and made submissions in the period leading up to the enactment of the Justice and Security Act 2013, some of which made their way into the legislation.

9. One of the authors of this submission (McNamara) prior to joining the Bingham Centre was separately engaged in consultations and submissions on the Justice and Security Bill while running a major research project at the time, *Law, Terrorism and the Right to Know*, funded by the UK Economic and Social Research Council and based at the University of Reading. He gave evidence to the UK Joint Committee on Human Rights with regard to the effects of laws on media freedom and open justice. Some of the recommendations made their way into the legislation. While at the Bingham Centre, McNamara has continued to research and analyse the operation of the Justice and Security Act 2013 and related matters.
10. The authors hope that this submission largely based on the UK experience will be of assistance to the New Zealand Law Commission in its work, not least with respect to paragraph (f) in the terms of reference about what New Zealand may learn from the experience in foreign jurisdictions. Should it assist the Commission we would be happy to discuss any aspects of the matters we raise.

## **B. Overarching issues: the need to legislate, sunset clause and periodic review**

11. We welcome the New Zealand Law Commission's approach to the issues and, particularly, the view that there should be a cautious approach to the use of closed procedures to minimise the risk that use of such procedures will become normalised.
12. With that in mind, we make three general observations about the need for, and wisdom of, legislation that would enact laws along the lines of those currently operating in the UK and elsewhere.
13. First, while there are increasingly well-established points of comparison on which New Zealand might draw when formulating procedures that will see the expansion of secrecy in civil (and potentially criminal) proceedings – the UK, Canada, Australia among them, and the EU has now adopted rules for closed material proceedings – the Commission is quite right when it states:

*It is timely for New Zealand to consider how, as a society, we wish to balance these interests of protecting national security and upholding the right to natural justice ... This project considers how withholding information on the grounds of national security may affect the fundamental values of natural justice and open justice, and to what degree (if at all) these values should be limited when there is a threat to New Zealand's national security. (Foreword, page iii, emphasis added).*

That is, the Commission appears to have the full suite of options on the table, including whether to legislate at all in the ways that other jurisdictions have done. Although the tenor of IP38 appears to suggest there will be some legislative reform, in our view there is much to be said for seriously exploring the option of maintaining long-established procedures and protections, and not pursuing legislation that would expand secrecy. Put simply, New Zealand should not enact general secrecy provisions based only on the fact that there is currently an international trend toward such legislation.

14. With that in mind, the experience in the UK warrants close attention. In the debates about the Justice and Security Bill there were great concerns about the proposals.
15. A submission by the special advocates (to a consultation process in this country) captures crisply and cleanly the extent to which secrecy in proceedings is a departure from established principles:

*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 not "work effectively", nor do they deliver real procedural fairness. The fact that such procedures may be operated so as to meet the minimum standards required by Article 6 of the ECHR, with such*

*modification as has been required by the courts so as to reduce that inherent unfairness, does not and cannot make them objectively fair.*<sup>1</sup>

16. In particular, one special advocate emphasised to the Joint Committee on Human Rights that *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.*<sup>2</sup>
17. The Supreme Court has similarly stated that “unlike the law relating to [public interest immunity], a closed material procedure involves a departure from both the open justice and the natural justice principles.”<sup>3</sup>
18. Secondly, as legislation becomes more widespread internationally there is a risk that individual jurisdictions see the question of normalisation not through the lens of enacting legislation, but through the application of the legislation. Such a perception would be both wrong and dangerous. Any moves to legislate to reduce equality of arms, natural justice, openness, accountability are of themselves moves that depart from fidelity to the rule of law and, as the Commission observes, should not be made lightly.
19. Having said that, the application and operation of legislation is of course very important and, in that regard, the UK laws are worrying. There are good reasons to be concerned that there is already ‘mission creep’ and that the laws are being applied in a wider range of circumstances than might be expected. As a Bingham Centre analysis of the first year of the operation of the Justice and Security Act argued:

*The Ministry of Justice has stated that [with 5 or 6 applications for CMPs] the powers have been invoked ‘sparingly’ but that is not an appropriate way to characterise their use. Sparingly is a relative concept. It suggests sparingly in relation to the number of occasions when section 6 declarations could have been sought. But, of course, no evidence is provided in that regard. We do not know whether they have been sought at every turn or only sometimes. All we know is that a declaration has been sought on five occasions in the first year. While it is a small number of cases, the early indications are that CMPs will be deployed in a very, very wide range of circumstances.*

*This is apparent from the kinds of cases where the government has thought a section 6 declaration should be sought. They include claims brought by non-British citizens abroad and by British citizens living in the UK. The claims range from those which relate to the deprivation of liberty to those which concern the imposition of economic sanctions. Some cases are focussed on the past - not least Britain’s relationship with the IRA - and others relate to much more contemporary issues such as allegations of recent misconduct by the security services. It seems nothing is off the table and, importantly, we are a long way from the archetypal case that was the impetus for the legislation, which was an action against*

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<sup>1</sup> Justice and Security Green Paper, ‘Response to Consultation from Special Advocates’ (16 December 2011), para 15, at [http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09\\_Special%20Advocates.pdf](http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf)>. The Special Advocates subsequently submitted a response to the Justice and Security Bill in June 2012, which remained critical of CMPs and of the opinion that “the case has not been made for the introduction of closed material procedures in other types of civil litigation” (para 2.1), at [http://www.parliament.uk/documents/joint-committees/human-rights/Special\\_Advocates\\_Memorandum\\_JS\\_Bill.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Special_Advocates_Memorandum_JS_Bill.pdf)> (both links accessed 29 June 2015). The use of quotation marks around “work effectively” is a reference to the government’s claim in the Justice and Security Green Paper: para 2.3.

<sup>2</sup> *Ibid*, Response to Green Paper, para 12.

<sup>3</sup> *Al Rawi v The Security Service* [2011] UKSC 34, 14 (Dyson LJ).

*the government by returning Guantanamo detainees. In the scope of cases, if not in the number, the use of the powers is anything but 'sparing'.<sup>4</sup>*

20. Before moving to legislate at all there are good reasons to wait and see how the effects play out and whether the dangers of normalisation and expansion are realised.
21. Thirdly, New Zealand, like the comparator jurisdictions discussed in IP38, has a strong rule of law culture. It is also, like those comparator jurisdictions, a model for other countries, including those where the rule of law is fragile. If New Zealand joins the jurisdictions that have enacted sweeping secrecy provisions it potentially has an effect that goes beyond its borders.
22. In our view, in spite of the widespread moves to travel these legislative paths, a fundamental question remains: are the laws necessary, justifiable and wise? The fact that other jurisdictions have chosen to enact such laws does not answer that question.
23. A decision to implement legislation of the kind generally envisioned in IP38 would see New Zealand depart from longstanding and fundamental rule of law commitments. Even if the Commission proposes and ultimately secures safeguards that "can help mitigate the impact that non-disclosure ... might have on what are fundamental principles of our rule of law system" (Foreword, iii), the enactment of legislation would be profoundly significant.
24. ***Recommendation 1 – not legislating or deferring legislation:*** *The Law Commission should recommend either that no general secrecy laws be implemented at this point in time or, alternatively, that the enactment of such provisions be delayed for three to five years, pending a review of the ways the laws unfold in foreign jurisdictions. To do so would be a potentially valuable and influential recommendation.*

### C. Key protections: sunset clause and periodic review

25. In the event the Commission takes the view that legislative reform is necessary, it is important to consider that there may come a point in time when either the changes are no longer deemed to be necessary, or when the laws are considered to function poorly. It is therefore important to include provisions in any legislative proposal contemplating these eventualities.
26. Although IP38 commendably marks the need to be cautious in its approach to these issues (6.96), it does not discuss the potential need to include, in any scheme adopted, a legislative provision such that the scheme would have a limited lifespan or be subject to periodic review.
27. ***Recommendation 2 – sunset clause:*** *Any legislative proposal should include a sunset clause which gives the legislation a lifetime of five years.*
28. ***Recommendation 3 – periodic review:*** *The legislative proposal should also include a provision for independent review of the operation of all aspects of the law prior to the expiration of that time period that can be taken into account in the context of any debates on renewal of the legislation.*
29. In the UK the Justice and Security Act includes a provision (section 13) for a five-year review of the operation of sections 6-11 of the Act. While this was a welcome improvement to the Bill during the debates, it still falls some way short of what is desirable and appropriate because it does not require a review of the section 12 reporting requirements or the *Norwich Pharmacal* provisions. As the recommendation above indicates, all aspects of the law should be reviewed.

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<sup>4</sup> L McNamara, D Locke and L Hamzi (Bingham Centre for the Rule of Law), 'Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State' (with Supplement (December 2014) [http://binghamcentre.biicl.org/documents/442\\_cmps\\_the\\_first\\_year\\_-\\_bingham\\_centre\\_paper\\_2014-03\\_supplement.pdf](http://binghamcentre.biicl.org/documents/442_cmps_the_first_year_-_bingham_centre_paper_2014-03_supplement.pdf), p 8.

#### D. Open justice, transparency, accountability: the matters raised in IP38 and the questions asked

30. The Issues Paper (IP38) raises a wide range of important matters. However, the specific questions that are raised do not address all of those matters. Specifically, IP38 points to the importance of open justice and openness, but none of the 23 questions asked relate directly to those concerns. It will be helpful to take these in turn.
31. IP38 includes the following:
- The foreword makes explicit the need to balance national security interests with natural justice principles, including open justice, and that any closed procedures should mitigate the negative impact on rule of law principles.
  - Chapter 2 considers a number of interests to be taken into account, and focuses on open justice and the public hearing principle in paragraphs 2.47 to 2.51. In particular, paragraph 2.47 states that “[the principle of open justice] is regarded as an important safeguard against judicial bias, unfairness and incompetence, ensuring judges are accountable in the performance of their judicial duties” and in paragraph 2.48 that open justice must therefore “permeate all political and legal institutions”.
32. In some instances, IP38 points out possible solutions (eg, 2.53) However, for the most part the consultation questions do not address open justice and transparency issues. Rather, they direct attention to core themes relating to equality of arms, the respective roles of the Crown and the judiciary in protecting national security and fair trial rights.
33. Only one question (Q 6) raises open justice, and it is framed somewhat narrowly around suppression orders, and only in the criminal context. Some questions leave room indirectly for raising these issues, being framed in terms that could be interpreted as encompassing the open justice issues mentioned above. For instance, question 11 asks what features a single framework should include and what mechanisms might include a fair hearing (though it is fairness to the non-Crown party that seems to be in mind.) Question 23 asks:

Do you favour a generic legislative approach that establishes one closed proceedings regime with natural justice safeguards that can be applied across all the relevant administrative and civil contexts and (possibly) aspects of criminal proceedings, or should specific regimes be retained and developed? (emphasis added).

The same question is not asked of open justice, but it should be asked whether there are also open justice safeguards that can apply to the legislative regime.<sup>5</sup>

34. The result is that although IP38 pays much more attention to openness than did the UK government’s Justice and Security Green Paper, the same criticism may be levelled at IP38 as the Joint Committee on Human Rights made of the UK Green Paper, specifically regarding the significance of open justice and the role of the media:

It is regrettable that the Green Paper overlooks the very considerable impact of its proposals on the freedom and ability of the media to report on matters of public interest and concern. This is a serious omission. The role of the media in holding the government

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<sup>5</sup> The UK Supreme Court made a distinction between open justice and natural justice in *Al Rawi*. Noting that both are “fundamental features of a common law trial”, open justice was described as more than a “mere procedural rule”, but rather “a fundamental common law principle” and natural justice as a principle upon which the concept of a fair trial is based. Natural justice includes notice and an opportunity to be heard, as well as the ability for parties to call their own witnesses and engage in cross-examination of the other party’s witnesses. In doing so, the Court emphasised that “a closed material procedure involves a departure from both open justice and natural justice principles” (as distinguished from the UK framework for public interest immunity, which only strays from the open justice principle) (*Al Rawi*, supra note 3 at 10-15 (Dyson LJ)). Accordingly, the open justice strand warrants attention as a distinct element.

to account and upholding the rule of law is a vital aspect of the principle of open justice, as has been amply demonstrated in the decade since 9/11.<sup>6</sup>

35. Against that background, we now raise several issues that identify problems relating to open justice, transparency and accountability, and make recommendations that may go some way to addressing the shortcomings and difficulties that arise in legislative attempts to implement secrecy in proceedings.

#### **E. Balancing interests: natural justice, open justice, national security**

36. IP38 notes at 5.26 that the Justice and Security Act requires judges to balance national security against 'the fair and effective administration of justice in the proceedings'. The background to this factor – the fair and effective administration of justice – warrants attention. It reveals a deep flaw in the Act.
37. In the Green Paper<sup>7</sup> and in the Bill as originally introduced on 29 May 2012 there was no provision for balancing at all.<sup>8</sup>
38. The Joint Committee on Human Rights recommended that 'open justice' be an express criterion for consideration by the courts when engaging in a balancing exercise to determine whether to grant an application for CMPs.<sup>9</sup> Amendments were proposed to give effect to that recommendation, with the balance to be against the 'fair and open administration of justice', thus taking account of both natural justice and open justice. The Bill as amended by the Lords on report included an open justice provision (CI 6(2)(c)).<sup>10</sup>
39. In the Commons the government successfully moved 'fair and effective administration of justice in the proceedings' as an alternative amendment.<sup>11</sup>
40. 'Effective' is quite plainly not the same as 'open'.
41. Opposition and crossbench amendments were tabled again in the Commons and the Lords to secure 'fair and open' as the balancing criterion. Although the open justice amendments secured support across the political spectrum, the government ultimately prevailed and the 'fair and open' amendment was defeated 174-158 votes in the Lords.
42. The UK legislature therefore very explicitly – and very unsatisfactorily – removed the consideration of open justice as a matter to be taken into account by the courts in any balancing exercise.<sup>12</sup> The explanations of why this is such a problematic shortcoming are explained by parliamentarians of all stripes.

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<sup>6</sup> Joint Committee on Human Rights, 'The Justice and Security Green Paper', Twenty-fourth Report of Session 2010-2012, HL Paper 286, HC 1777 (4 April 2012) para 217.

<sup>7</sup> HM Government, 'Justice and Security Green Paper' (October 2011) Cm 8194

<sup>8</sup> Justice and Security Bill [HL] as introduced, 29 May 2012

<http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0027/13027.pdf>.

<sup>9</sup> Joint Committee on Human Rights, 'The Justice and Security Green Paper', Twenty-fourth Report of Session 2010-2012, HL Paper 286, HC 1777 (4 April 2012) paras 215-16.

<sup>10</sup> Justice and Security Bill [HL] as amended on report (23 November 2012), CI 6(2)(c)

<http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0056/130056.pdf>.

<sup>11</sup> Justice and Security Bill [HL] as amended in Public Bill Committee (8 February 2013), CI 6(6)

<http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0134/2013134.pdf>

<sup>12</sup> By way of comparison, the Australian Law Reform Commission recommended that open justice be a consideration in national security laws: Keeping Secrets: The Protection of Classified and Security Sensitive Information, ALRC Report 98 (2004), Recommendation 11-19 and generally [7.15]-[7.41]; see also recommendation 7- 1 on non-party access. However, the Australian parliament did not follow that recommendation in enacting the National Security Information (Civil and Criminal Proceedings Act) 2004; the Act (eg, Ss 31, 38L) does not include open justice as a criterion and that is a significant weakness.

43. As Conservative peer Baroness Berridge put it when arguing for the ‘fair and open’ amendment:
- As this is such an irregular trial procedure to adopt, it should be a competition of interests, a battle even for the Government to show that national security outweighs fair and open justice and that the nature of these proceedings is so unusual and so contrary to our principles of a fair trial that it should be only when nothing else is possible.<sup>13</sup>
44. Labour leader in the House of Lords, Lord Beecham, explained the concerns succinctly:
- Openness is therefore replaced by effectiveness, a very different concept. Effective, one might ask, from whose perspective? Is it that of the party, presumably the Government? Openness now counts for nothing. The phrase “in the proceedings” is added, excluding the wider considerations of the public interest. The concept of balancing the two interests disappears.<sup>14</sup>
45. Former DPP and Liberal-Democrat peer Lord Macdonald of River Glaven said:
- In short, the judge must be empowered and permitted to pay heed to the public interest in open justice when he is faced with a government application to go into closed session. That is because closed justice is, on the face of it, so inimical and contrary to our long traditions of fair process, and openness and transparency in justice, so intrinsic to our way of life and our legal processes, that to close down a court, to expel a claimant, without first balancing the virtues of justice being seen to be done is, or should be, unthinkable.<sup>15</sup>
46. Former Treasury Counsel and Intelligence Services Commissioner Lord Brown of Eaton-under-Heywood said:
- This legislation involves so radical a departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court’s processes, that everything that can possibly help minimise the number of occasions when the power is used should be recognised and should appear in the legislation itself.<sup>16</sup>
47. ***Recommendation 4 – open justice as a criterion in legislation:*** *Open justice should be a part of any legislative framework that might be adopted. It should expressly be a criterion to be taken into account in balancing.*
48. A formulation used in the Justice and Security Bill [HL], as amended on report was the following: Cl 6(2)(c) where a condition of closed material proceedings was that the “degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice.” Added to that was Cl 6(2)(d): “a fair determination of the proceedings is not possible by any other means.”

## **F. Open justice and media scrutiny as part of democratic accountability**

49. Courts are vitally important avenues for scrutiny and accountability, especially in matters relating to terrorism and security, where the authorities will inevitably be reluctant to disclose information that does not support their case and where individuals and communities will be unlikely to provide information. It can be almost impossible to test the information that is available or which is provided by the authorities. In courts, however, there are rules of evidence and disclosure, and open justice principles, that combat the inevitably incomplete and quite possibly misleading information that journalists can obtain.
50. The following extract from a recent empirical study by one of the authors outlines the significance of the issues in the criminal context, but the same themes apply in civil proceedings of all kinds where the behaviour of the state and of individuals is under scrutiny.

<sup>13</sup> Hansard HL Deb, 26 March 2013, Col 1035.

<sup>14</sup> Ibid, Col 1027.

<sup>15</sup> Ibid, Col 1029

<sup>16</sup> Ibid, Col 1032

Trials are about contested versions of events. The Crown has alleged a person has committed criminal offences and the accused person has pleaded not guilty. However, not every issue is contested. On the contrary, much will be uncontested and a 'much more firm' factual picture will emerge in court, as one journalist explained:

Agreed statements, admissions, facts that are just completely indisputable . . . You get the amounts of money. [You get] the travel patterns – he went here, he went there. [You get] the emails. All of that stuff comes out and that's gold dust really.

The authorities will almost certainly be pleased that this kind of uncontested information is in the public domain, even if it is many months after the arrests. At trials, journalists will 'get to see sensitive material'<sup>61</sup> and will hear first-hand accounts:

No matter how many miles you walk and no matter how many people you speak [to at the end of the day] the best stuff always comes out. [Y]ou've got the defendant speaking for themselves, or the defendant's mother speaking. You've got the cops speaking. You've got a cop saying, 'Well, I broke down the door and this is what I saw.'

This, for reporters, is a part of democratic public scrutiny: 'That stuff only ever comes out in court and court reporting is so important it is fundamental to our democracy.' ... In court, 'Instead of getting the embellished stuff and the spin and the bullshit you get . . . what they have to tell the jury. That's limited to an extent but you do get more facts and I think more reliable information.'<sup>17</sup>

51. Even if imperfect, the courts are absolutely crucial avenues for obtaining information of great public interest. In terrorism and security matters, where information will be closely guarded by the state, the ability to adequately report court cases is essential if scrutiny of government is to be effective, if the threat of terrorism is to be understood, and if the public is to have confidence in the way that such threats are addressed.
52. There will inevitably be questions raised as to whether arguments that raise open justice issues are in some ways suggesting that open justice should trump all other factors. The answer is no, it should not trump all other factors. However it should be the starting point that openness is preferable, is the default position, and that what can be made public should be made public.
53. In a not dissimilar vein there will also be questions raised about whether journalists are responsible and trustworthy. From the same study, it is clear that any such suggestions are misguided:

Are journalists reckless about managing information relating to terrorism and security? The answer is, resoundingly, 'no'. Do journalists view their roles uncritically? Again, clearly, 'no'. An accountable and responsible state should not fear the media where national security or natural justice are at issue. In the practice of journalism, as it emerged in the research interviews, the public interest in openness and the application of open justice principles are of vital importance, but they are ultimately secondary and will yield to primary priorities of natural justice and the public interest in national security. However, state controls over information currently make the gulf between these primary and secondary commitments unacceptably and unhealthily wide. There is still considerable scope to maintain and improve access to information before either natural justice or national security is threatened.<sup>18</sup>

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<sup>17</sup> L McNamara, 'Secrecy, the media and the state: controlling information about terrorism and security' in G Martin, R Scott-Bray and M Kumar, *Secrecy, Law and Society*, Routledge, 2015, ch 8 (pp 139-157) at 148-149. See also on the Australian experience, L McNamara, 'Closure, caution and the question of chilling: how have Australian counter-terrorism laws affected the media?' (2009) 14 *Media and Arts Law Review* 1-30.

<sup>18</sup> L McNamara, 'Secrecy, the media and the state: controlling information about terrorism and security' in G Martin, R Scott-Bray and M Kumar, *Secrecy, Law and Society*, Routledge, 2015, ch 8 (pp 139-157) at 153-154.

## G. Recognising media interests to give effect to open justice principles

54. IP38 references media issues peripherally in connection with discussion of specific statutes, such as that on suppression orders in criminal law matters (3.34), a discussion of the UK experience in the *Incedal* case (5.35) (though refers to that case as being related to CMPs, whereas it was quite different) and with regard to existing types of protection orders that may result in exclusion of the media from the court room (6.50). It also acknowledges in paragraph 2.52 that despite the value of public proceedings, it may be necessary in light of national security interests to exclude the media (and others) from all or part of the proceedings.
55. The ability of the press to access and report information is an integral part of the public's right to know. The right to know extends to both the accountability of the state and the activities of those who have been subject to the coercive powers of the state.
56. As mentioned above in paragraph 34, the UK Justice and Security Green Paper was criticised by the Joint Committee on Human Rights for failing to take into account "the very considerable impact of its proposals on the freedom and ability of the media to report on matters of public interest and concern", and was considered "a serious omission".<sup>19</sup>
57. Given that the media is effectively the eyes and ears of the public in courts, any proposal for closed procedures should therefore take into account:
  - the ability of the press and public to know about important matters of public interest;
  - the public confidence in the judiciary that flows from transparency; and
  - the ability of the parties, the public, the press and researchers to see and analyse material even after secrecy is no longer needed.

### *Notice and opportunity to make submissions (non-parties)*

58. IP38 does not contemplate the possibility for non-parties to receive notice of applications for closed proceedings and to make submissions on such applications. The role of non-parties in this regard is vital especially in cases where the parties may have agreed that closed procedures are appropriate, whether or not disclosure would be damaging to national security. This may be especially so if gisting (or similar) is used.
59. ***Recommendation 5 – notice to media and a right to be heard:*** *For open justice to be meaningful in these circumstances, any legislative proposal should ensure that the media receive notice of applications to use closed material proceedings (or the like) and that media interests or others with open justice interests (eg, professional associations, NGOs) have a right to be heard at each stage.*
60. For the above recommendation we suggest a notice period of 7 days may be appropriate. We base that figure on the period prescribed under the UK Criminal Procedure Rules, Rule 16.10 where court closures are sought on national security grounds. A subscription-based email alert would be one possible method.
61. By way of illustration, in the UK an amendment was tabled by Crossbench, Conservative and Liberal-Democrat peers which would give effect to this:

"( ) Rules of court relating to section 6 proceedings must make provision—

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<sup>19</sup> Joint Committee on Human Rights, 'The Justice and Security Green Paper', Twenty-fourth Report of Session 2010-2012, HL Paper 286, HC 1777 (4 April 2012) para 217.

- (a) requiring the court concerned to notify relevant representatives of the media of proceedings in which an application for a declaration under section 6 has been made,
- (b) providing for any person notified under paragraph (a) to be permitted to intervene in the proceedings,
- (c) providing for a stay or sist of relevant civil proceedings to enable anyone notified under paragraph (a) to consider whether to intervene in the proceedings,
- (d) enabling any party to the proceedings or any intervener to apply to the court concerned for a determination of whether there continues to be justification for not giving full particulars of the reasons for decisions in the proceedings, and
- (e) requiring the court concerned, on an application under paragraph (d), to publish such of the reasons for decision as the court determines can no longer be justifiably withheld.”<sup>20</sup>

## H. Open statements for closed judgments

62. It is important to systematically record the scale of the use of secret evidence as a matter of democratic accountability. Such information should be recorded in a manner that is sufficient so as to enable a lawyer, researcher or journalist to ascertain from publicly available information the types of situations in which closed procedures are sought and to make a judgment about whether the report is accurate and comprehensive.
63. ***Recommendation 6 – open statements to accompany closed judgments:*** Any legislative proposal should include a provision that requires closed judgments to be accompanied by a clear and perhaps template-form statement that requires a court to record as an open statement:
- the duration of open hearings and closed hearings;
  - the number of witnesses heard in closed proceedings and the nature of those witnesses;
  - the length of a closed judgment;
  - whether national security was an issue in the proceedings;
  - whether submissions were received from media or other non-party interests.
64. By way of illustration in the UK, in the UK an amendment was tabled by Opposition peers which would give effect to this

“Open statements for closed judgments

Closed judgments must be accompanied by an open statement from the court, which shall include—

- (a) the reasons for the closed material procedure;
- (b) any factors which would be particularly relevant in determining whether all or part of the closed judgment could be made open at a later date;
- (c) the duration of open hearings and closed hearings;
- (d) the number of witnesses heard in closed proceedings, and the nature of those witnesses;
- (e) the length of a closed judgment;

<sup>20</sup> Amendment 69ZA, Baroness Berridge, Lord Pannick, Lord Lester of Herne Hill, Fourth marshalled list of amendments to be moved in Committee of the whole House, 27 June 2012, <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0027/amend/ml027-iv.htm>

- (f) whether national security was an issue in the proceedings; and
- (g) the date at which the closed status of the judgment should be reviewed, which must be no later than five years from the date of the judgment.”<sup>21</sup>

65. The final provision in the above amendment relates also to the further recommendation below on Opening Up Closed Judgments. All provisions in the above would provide material which could be consolidated in annual reports.

## I. Reporting to parliament

66. IP38 raises briefly the issues of reporting, noting at 6.96 that the legislative framework ‘could probably contain provisions requiring periodic reports on the use of those procedures.’ Such reporting should be essential and the legislation should be prescriptive.
67. Such a requirement did not feature in the Green Paper or the Justice and Security Bill as introduced, and this shortcoming was criticised during debate on the Bill.<sup>22</sup> Ultimately, the Justice and Security Act included in section 12 a requirement of the Secretary of State to make an annual report stating how often in the preceding 12 months applications for closed material procedures were made, granted and revoked, and how many of the associated final judgments are closed or not closed.<sup>23</sup> However, experience has revealed problems with the reporting regime.
68. As the Bingham Centre argued in its analysis of the first report by the Secretary of State after one year of operation of the Act:
- The information reported was not sufficient to enable to a meaningful understanding of how closed proceedings had been used.
  - More information could have been provided under section 12(3) but was not provided, even though information was in the public domain and would clearly not have damaged national security.
  - The information reported was not accurate, with the Secretary of State reporting only five of the six occasions on which a CMP declaration was sought.<sup>24</sup>
69. ***Recommendation 7 – reporting to Parliament:*** *Subject only to any secrecy requirements imposed by the courts or unless the fact of identifying the cases would imperil national security, Parliament should require that the relevant Minister report annually on the use of closed proceedings and that reports should at least state:*
- *the cases in which closed material proceedings (or the relevant type of provision for New Zealand) were sought*<sup>25</sup>

<sup>21</sup> Amendment 67C, Lord Beecham, Baroness Smith of Basildon, Third marshalled list of amendments to be moved in Committee of the whole House, 27 June 2012, <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0027/amend/ml027-iii.htm>

<sup>22</sup> HL Hansard, 19 June 2012, Col 1712 (Lord Hodgson).

<sup>23</sup> A closed judgment is defined in section 12(5) as “a judgment that is not made available, or fully available, to the public”.

<sup>24</sup> L McNamara, D Locke and L Hamzi (Bingham Centre for the Rule of Law), ‘Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State’ (with Supplement (December 2014) [http://binghamcentre.biicl.org/documents/442\\_cmps\\_the\\_first\\_year\\_-\\_bingham\\_centre\\_paper\\_2014-03\\_supplement.pdf](http://binghamcentre.biicl.org/documents/442_cmps_the_first_year_-_bingham_centre_paper_2014-03_supplement.pdf)). We note also in this context that where IP38 (at 5.34) cites the Bingham Centre analysis of the first report, IP38 states that there were five applications of which three were successful. That summary does not capture the full picture. There were six applications, and the government failed on none. It succeeded on four (CF & Mohamed, McGartland, Sarkandi, Al Ghabra), a fifth did not need to be decided (Youssef), and a sixth had not been decided at the time of our analysis (McCafferty): pp 4-6, 10.

<sup>25</sup> This is in parallel to section 47(b) of the Australian National Security Information Act 2004, which requires identification of the “criminal proceedings and civil proceedings to which the certificates relate”.

- the dates on which applications were made
- whether any media or non-party submissions were made
- the outcomes of the applications
- the citations of the judgments that determined proceedings
- where there are reasons why this information cannot be included in the report, the Minister should be required to state those reasons in the report.

## J. Opening up closed judgments

70. IP38 does not consider the possibility that closed judgments might later be opened. Without such a provision, there is a real risk that the material in closed judgments may remain secret long after secrecy is no longer necessary.
71. **Recommendation 8 – statements to assist review and maximum date before review:** Any legislative proposal should include a provision requiring that closed judgments are accompanied by a statement from the court (open where possible, closed where necessary) that includes:
- the reasons for closure of the judgment;
  - any factors that would be particularly relevant in determining whether all or part of the closed judgment could be made open at a later date;
  - the date at which the closed status of the judgment should be reviewed, with 5 years being the maximum period before review.
72. **Recommendation 9 - reviewers:** We recommend that the legislative proposal should ensure that the person who reviews closed judgments is clearly independent from the Executive and is clearly identified. This person may be the original judge in the case, but a retired judge may be a suitable alternative.
73. By way of illustration, in the UK, the House of Lords considered an amendment (67C) which included a proposal that would allow for closed judgments to be reviewed at a later date.<sup>26</sup> Although the Government accepted there was an issue at stake, acknowledging ‘the force of what has been said’,<sup>27</sup> the Act as passed did not include any such provision, as the general tenor of the debate was that constructing a system of review would be too difficult.<sup>28</sup>
74. Following the entry into force of the Justice and Security Act, an attempt was made before the High Court to establish general guidance regarding the opening of closed judgments.<sup>29</sup> The Court refused, stating that Parliament had had the opportunity to legislate accordingly and had declined to do so, and therefore that fact should be taken as a signal that the courts should not be offering judicial guidance.<sup>30</sup> The corollary is that it is an important issue for a Parliament to consider.

<sup>26</sup> HL Hansard, 17 July 2012, Col 206.

<sup>27</sup> Ibid Col 209: “I want to revisit this matter and discuss it with officials because I recognise the point that has been made. I am not going to pretend that there may be an easy answer to it, but if there is no longer a national security consideration, I see the force of what has been said.”

<sup>28</sup> Ibid Col 210: “The second point is very much one of detail. Who would determine whether there was, in fact, no longer a national security consideration? Where would the responsibility lie? That is the very issue that I want to consider, because how that would be addressed does not readily present itself to me. I sought to indicate that there is an issue here. I am not pretending for a moment that there is an easy answer, but the issue is important to consider.”

<sup>29</sup> *R (Evans) v Secretary of State for Defence* [2013] EWHC 3068 (Admin).

<sup>30</sup> Ibid 41.

## K. Criminal proceedings

75. IP38 rightly acknowledges (at 5.35) the recent experience in the UK terrorism-related prosecution in the *Incedal* case.<sup>31</sup> The discussion in that paragraph somewhat conflates the secrecy measures taken in that criminal case with those associated with CMPs (which are used in civil proceedings under the Justice and Security Act 2013). Having said that, *Incedal* is not unrelated to broader concerns about CMPs. But for a trend which has seen secrecy normalised with the enactment of the Justice and Security Act, it is difficult to imagine the prosecution seeking to have an entire case heard in secret, or a first instance Court permitting it, or even the Court of Appeal permitting such extensive secrecy.
76. The measures imposed by the Court of Appeal (which included requiring journalists' notes to be locked away in a safe in the court following each day's proceedings, and then later in secure storage at MI5) were criticised by many commentators. Reporters were prevented from informing the public as to the proceedings and faced prosecution for contempt of court and possibly also imprisonment if they disobeyed the suppression order.
77. This case, which has been labelled 'unprecedented' in terms of secrecy<sup>32</sup> serves as an example of the potential for secrecy to become the default.
78. One of the authors of this submission has written three short pieces on the *Incedal* case and the following recommendation draws on the points made in those pieces.<sup>33</sup> In sum, the *Incedal* trial sets a bad precedent and is a major and unjustifiable departure from rule of law standards.
79. Among the many difficulties that arise, one of particular note is that while the media are considered (and this is important), there are no other safeguards considered. Of at least equal importance – and perhaps of far more importance – there was no consideration of seeking or allowing attendance by organisations who may be able to offer valuable insights into the extent to which the proposed process protects and is consistent with the rule of law. The court notes that, "The Rule of law is a priceless asset of our country and a foundation of our Constitution. One aspect of the Rule of Law – both a hallmark and a safeguard – is open justice." This would be enhanced if professional bodies such as the Law Society or the Bar Council were invited to have an independent observer attend the trial. Similarly, NGOs working in the areas of open justice and human rights might be invited to have observers attend. They would of course be subject to any undertakings of confidentiality that apply to others.<sup>34</sup>
80. ***Recommendation 10 – criminal cases:*** *New Zealand's current system of handling national security information in criminal proceedings should be retained, rather than moving to procedures that allow for Incedal-style trials.*

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<sup>31</sup> *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861.

<sup>32</sup> Ian Cobain, 'Erol Incedal trial: media groups dispute refusal to lift reporting restrictions' *The Guardian* (16 April 2015).

<sup>33</sup> L McNamara, 'Secret Trials: Secrecy at the Expense of Justice' *Inform*, 7 June 2014, <https://inform.wordpress.com/2014/06/07/secret-trials-secrecy-at-the-expense-of-justice-lawrence-mcnamara/>; L McNamara, 'Secret Trials: A Little Transparency, A Lot to Worry About' *UK Human Rights Blog*, 12 June 2014 <http://ukhumanrightsblog.com/2014/06/12/secret-trials-a-little-transparency-a-lot-to-worry-about-lawrence-mcnamara/>; L McNamara, 'How open will this newly opened justice be?' *Inform*, 14 June 2014, <http://inform.wordpress.com/2014/06/14/how-open-will-this-newly-opened-justice-be-lawrence-mcnamara/>

<sup>34</sup> L McNamara, 'Secret Trials: A Little Transparency, A Lot to Worry About' *UK Human Rights Blog*, 12 June 2014 <http://ukhumanrightsblog.com/2014/06/12/secret-trials-a-little-transparency-a-lot-to-worry-about-lawrence-mcnamara/>

## L. Summary of Recommendations

81. We recommend as follows:

1. The Law Commission should recommend **either** that no general secrecy laws be implemented at this point in time or, **alternatively**, that the enactment of such provisions be delayed for three to five years, pending a review of the ways the laws unfold in foreign jurisdictions. To do so would be a potentially valuable and influential recommendation.
2. Any legislative proposal should include a sunset clause which gives the legislation a lifetime of five years.
3. The legislative proposal should also include a provision for independent review of the operation of all aspects of the law prior to the expiration of that time period that can be taken into account in the context of any debates on renewal of the legislation.
4. Open justice should be a part of any legislative framework that might be adopted. It should expressly be a criterion to be taken into account in balancing.
5. For open justice to be meaningful in these circumstances, any legislative proposal should ensure that the media receive notice of applications to use closed material proceedings (or the like) and that media interests or others with open justice interests (eg, professional associations, NGOs) have a right to be heard at each stage.
6. Any legislative proposal should include a provision that requires closed judgments to be accompanied by a clear and perhaps template-form statement that requires a court to record as an open statement:
  - a. the duration of open hearings and closed hearings;
  - b. the number of witnesses heard in closed proceedings and the nature of those witnesses;
  - c. the length of a closed judgment;
  - d. whether national security was an issue in the proceedings;
  - e. whether submissions were received from media or other non-party interests.
7. Subject only to any secrecy requirements imposed by the courts or unless the fact of identifying the cases would imperil national security, Parliament should require that the relevant Minister report annually on the use of closed proceedings and that reports should at least state:
  - a. the cases in which closed material proceedings (or the relevant type of provision for New Zealand) were sought
  - b. the dates on which applications were made
  - c. whether any media or non-party submissions were made
  - d. the outcomes of the applications
  - e. the citations of the judgments that determined proceedings
  - f. where there are reasons why this information cannot be included in the report, the Minister should be required to state those reasons in the report.
8. Any legislative proposal should include a provision requiring that closed judgments are accompanied by a statement from the court (open where possible, closed where necessary) that includes:
  - a. the reasons for closure of the judgment;
  - b. any factors that would be particularly relevant in determining whether all or part of the closed judgment could be made open at a later date;
  - c. the date at which the closed status of the judgment should be reviewed, with 5 years being the maximum period before review.

9. We recommend that the legislative proposal should ensure that the person who reviews closed judgments is clearly independent from the Executive and is clearly identified. This person may be the original judge in the case, but a retired judge may be a suitable alternative.
10. New Zealand's current system of handling national security information in criminal proceedings should be retained, rather than moving to procedures that allow for Incedal-style trials.