

# JUSTICE AND SECURITY ACT 2013

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## EXPLANATORY NOTES

### BACKGROUND

#### *General*

12. The provisions contained within the Act stem from the Government's **Justice and Security Green Paper** (Cm 8194) (the "Green Paper"), which set out proposals to (i) modernise judicial, independent and parliamentary scrutiny of the Agencies to improve public confidence that executive power is held fully to account; (ii) better equip the courts to pass judgment in cases involving sensitive information; and (iii) protect UK national security by preventing damaging disclosures of national security-sensitive material. This document can be found on the Cabinet Office's website:

<http://consultation.cabinetoffice.gov.uk/justiceandsecurity>

#### *Background on the oversight of intelligence and security activities*

13. Before the Act was passed, the system for independent oversight of government intelligence activity was principally contained in the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000. In particular, the Intelligence Services Act 1994 established the Intelligence and Security Committee, a body consisting of members of each House of Parliament, with the function of examining the expenditure, administration and policy of the Agencies. The Regulation of Investigatory Powers Act 2000 contains provisions on the oversight of certain investigatory powers, including provisions which establish two Commissioners: the Interception of Communications Commissioner and the Intelligence Services Commissioners.
14. That system of oversight had been built up over time. Where gaps had emerged in the system, they had been filled through non-statutory additions to the remits of existing oversight bodies. The Act modernises the oversight system, and ensures that it is flexible enough to cope with future changes.

#### *Background on closed material procedures*

15. The Green Paper noted an increase in the number and diversity of judicial proceedings which relate to national security-related actions. In many of these cases, the facts cannot be fully established without reference to sensitive material. However, this material cannot be used in open court proceedings without risking damage to national security. Difficulties arise both in cases in which individuals are alleging Government wrongdoing, and in cases in which executive actions or decisions taken by Government are challenged. There have been occasional cases resolved by the use of a closed material procedure with the consent of both parties. However, the Supreme Court ruled in *Al Rawi and others v Security Service and others* [2011] UKSC 34 that a court is not entitled to adopt a closed material procedure in an ordinary civil claim for damages. The court in *Al Rawi* held that it was for Parliament to decide whether or not to make closed material procedures available in such proceedings.

16. The Green Paper considered that in cases involving sensitive material the court may be prevented from reaching a fully informed judgment because it cannot hear all the evidence in the case. Under the current system, the only method available to the courts to protect material such as intelligence from disclosure in open court is through public interest immunity. A successful public interest immunity application results in the complete exclusion of that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.
17. The difficulty identified by the Green Paper was that the Government could be left with the choice of causing damage to national security by disclosing the material or summaries of it; or attempting to defend a case with often large amounts of relevant material excluded. If the material cannot safely be disclosed, the Government may be forced to concede or settle cases regardless of their merits and pay compensation, or ask the court to strike out the case. Most significantly, claimants and the public may be left without clear findings where serious allegations are made because the court has not been able to consider all the evidence.

### ***Background on “Norwich Pharmacal” and similar jurisdictions***

18. Another recent development is that claimants have sought to use what is known as the *Norwich Pharmacal* jurisdiction to apply to the courts for disclosure of sensitive Government-held information, usually to use in proceedings against third parties overseas. The jurisdiction takes its name from the case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. This case involved unlicensed importation into the United Kingdom of a chemical compound called furazolidone for which Norwich Pharmacal owned the patent. Norwich Pharmacal was unable to identify the importers; the Customs and Excise Commissioners held information that would allow the identification of the importers but would not disclose it, claiming that they had no authority to give such information. The House of Lords held, in brief, that where a third party who had been mixed up in another’s wrongdoing had information relating to that wrongdoing, the court could, in its discretion, compel the third party to assist the person suffering damage or otherwise affected by the wrongdoing by giving them that information. This is now known as a *Norwich Pharmacal* order.
19. Thus a *Norwich Pharmacal* order is a remedy developed by the courts in England and Wales, under their inherent jurisdiction, with an equivalent jurisdiction in Northern Ireland. There is no equivalent jurisdiction in Scotland. The requirements for granting a *Norwich Pharmacal* order are generally recognised to be that (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) the person against whom the order is sought must have been “mixed up” or involved in the wrongdoing, (iii) the information sought is necessary for the claimant to pursue redress or to rely on a defence in relation to proceedings concerning the wrongdoing and (iv) the court considers it should exercise its discretion in favour of granting the relief. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.
20. In a more recent development (no fewer than nine times since 2008) *Norwich Pharmacal* applications have been made by individuals seeking to obtain disclosure of Government-held sensitive information. Often this has been sensitive intelligence information shared by foreign partner governments on a confidential basis.