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Justice and Security Bill

Bill No 99 2012-3

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This paper has been prepared for the Second Reading of the *Justice and Security Bill* in the House of Commons, which is due to take place on 18 December 2012. The Bill, which has proved contentious, was originally introduced in the House of Lords on 28 May 2012. It is aimed at modernising and strengthening the oversight of the intelligence and security services and would allow the civil courts to use closed material procedures to hear sensitive evidence in cases that raised national security concerns. It would also preclude the courts from ordering the disclosure of sensitive information in certain circumstances. The Bill was revised significantly in the Lords and was introduced in the House of Commons on 28 November 2012.

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Summary

The first part of the *Justice and Security Bill* is aimed at modernising and strengthening the oversight of the intelligence and security services. It would reform the Intelligence and Security Committee, making it a statutory committee of Parliament. The second part of the Bill would introduce controversial statutory provisions to allow the civil courts to use 'closed material procedures' to hear sensitive evidence in cases that raised national security concerns. It would preclude the courts from ordering the disclosure of sensitive information in certain circumstances. Opponents of the second part of the Bill (which is entitled "disclosure of sensitive material") often dub the plans "secret justice" and argue that closed material procedures are unfair and unjustified.

The proposals contained in the Bill stem from an earlier consultation and Green Paper, also entitled *Justice and Security*. The Green Paper indicated that over recent years, the security and intelligence agencies had been affected by an increasing number of court cases, such as civil damages claims filed by former Guantanamo detainees, appeals over immigration decisions and judicial reviews of Government decisions in the national security context. The Government has made clear that it sees the need for a balance to be struck between the "transparency that accountability normally entails and the secrecy that security demands". The Government acknowledged the need to ensure that the security and intelligence agencies are subject to effective judicial and non-judicial scrutiny in order that the public has confidence that they are working lawfully, effectively and efficiently. When introducing the Bill, the Government argued that the introduction of closed material procedures in civil cases would allow courts to consider all material relating to a case, even where national security prevented that material from being made public, to ensure that claims were properly investigated and scrutinised by the courts.

It is worth noting that closed material procedures have existed in a number of contexts for some years (section 3 of this paper provides an overview); however, in a recent court case, the Supreme Court determined that a court was not entitled to adopt a closed material procedure in an ordinary civil claim for damages (and that it was for Parliament to legislate to make closed material procedures available in such proceedings, if it wished to do so).

Second Reading of the Bill in the House of Commons is due to take place on 18 December 2012.

The Bill extends to the whole of the United Kingdom (with the exception of certain consequential amendments). The explanatory notes state that the Bill deals with reserved matters in Scotland and excepted matters in Northern Ireland: the provisions primarily relate to national security, international relations, defence and immigration and nationality. There is no effect on the Welsh Ministers or the National Assembly and no other particular effect on Wales. Provisions in the Bill, relating to the use of closed material procedures in certain exclusion, naturalisation and citizenship decisions could also be extended (with or without modifications) by Order in Council, to any of the Channel Islands or to the Isle of Man.

1 Introduction

The proposals contained in the *Justice and Security Bill* emerged from a consultation, *The Justice and Security Green Paper* (Cm 8194), which was published in October 2011. The proposals, particularly those relating to 'closed material procedures' (CMPs) which are discussed in detail below, were extremely contentious. Responses to the original consultation can be found on the Cabinet Office website.

The Joint Committee on Human Rights (JCHR) undertook an inquiry into the human rights issues raised by the Green Paper and published a report, *The Justice and Security Green Paper* in April 2012 (HL Paper 286/HC 1777). The JCHR was extremely critical of the proposals, which (following adverse media comment from publications as varied as the *Daily Mail* and the *Guardian*, amongst others) were swiftly dubbed "secret justice."[1] The result of this was that the then Lord Chancellor, Kenneth Clarke, indicated that the consultation had persuaded him that the proposals in the Green Paper had been "too broad."[2] The Government published a response (Cm 8365) to the JCHR and a separate response (Cm 8364) to the consultation on the day that the Bill was published in May 2012. The Cabinet Office website has republished a summary of a consultation event (drafted by the rapporteur, Iona Ebbenheld) at Chatham House. The Government also produced an initial memorandum on the Human Rights issues raised by the Bill. Critics of the Bill remained unimpressed with the changes for example, the human rights NGO, JUSTICE, argued that the "proposal to introduce closed material procedures into all civil proceedings is unfair, unnecessary and unjustified."[3]

The Bill is aimed at modernising and strengthening the oversight of the intelligence and security services and would allow the civil courts to use closed material procedures to hear sensitive evidence in cases that raised national security concerns. It would also preclude the courts from ordering the disclosure of sensitive information in certain circumstances. It was introduced in the House of Lords on 28 May 2012, and had its Second Reading on 19 June.[4] The Bill had its Committee Stage between 9-23 July and Report on 19 and 21 November. Third Reading was on 28 November 2012. Full details of these stages can be found on the Bill stages page on the Parliament website. The House of Lords Library produced a Library Note (LLN 2012/024) on the Bill prior to its Second Reading in the House of Lords. This is available from the Bill documents page on the Parliament website (along with the current explanatory notes, an impact assessment and an equality impact assessment). The material contained in these documents will not be rehearsed extensively in this paper.

The Bill has been considered by the House of Lords Constitution Committee (which published a report on the Bill on 15 June 2012 (HL Paper 18) and a further report on the 'Norwich Pharmacal' jurisdiction[5] (HL Paper 31) on 6 July. In its first report, the Committee stated that the Bill was a "constitutionally significant reform, challenging two principles of the rule of law: open justice and natural justice."[6] The Government published a response (Cm 8404) to the first report in July 2012 and a second response (Cm 8460) in October.

The JCHR produced an influential report on the Bill on 13 November 2012. That report, entitled *Legislative Scrutiny: Justice and Security Bill* (HL Paper 59/HC 370), recognised that "significant changes" had been made to the proposals contained in the Green Paper. In

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1 See for example, "Climbdown on secret justice; Victory for the Mail's campaign", *Daily Mail*, 29 May 2012

2 "My secret justice plans were too broad and the Mail has done a public service in fighting them", *Daily Mail*, 29 May 2012

3 JUSTICE, *House of Lords Report Stage Briefing*, November 2012

4 HL Deb 19 June 2012, cc1660-1758

5 An issue which is discussed in more detail below

6 House of Lords Constitution Committee, *Justice and Security Bill [HL] Report*, 3rd Report of Session 2012-13, HL Paper 18, paragraph 4

particular, the Bill made no direct provision for the extension of CMPs to inquests and the scope of the proposals was "significantly narrowed" by confining the proposed extension of CMPs to national security material (the Green Paper had proposed that they would have applied to the disclosure of any "sensitive material" the disclosure of which would have harmed the "public interest"). Nonetheless, the Committee recommended major changes should be made to the Bill. These recommendations were acted upon by Peers at Report stage and a series of amendments to the Bill were carried, despite Government opposition. A *Delegated Powers Memorandum* (describing the provisions in the Bill which confer powers to make delegated legislation and other relevant powers) was published by the Government following the amendment of the Bill on Report. A second *Memorandum on the ECHR issues raised by the Bill* was also published when the Bill was introduced into the House of Commons.

2 The Intelligence and Security Committee

Part 1 (and Schedules 1 and 2) of the Bill would change the oversight arrangements for the Intelligence and Security Services by reforming the Intelligence and Security Committee (ISC) and extending the remit of the Intelligence Services Commissioner. At present, independent oversight of the security and intelligence agencies is provided by the ISC, two Commissioners (the Intelligence Services Commissioner and the Interception of Communications Commissioner) and the Investigatory Powers Tribunal.

The current ISC was established under the *Intelligence Services Act 1994*. It is a cross party Committee, whose members are appointed by the Prime Minister. It operates within the "ring of secrecy" so that members are bound to observe confidentiality (members are subject to section 1(1)(b) of the *Official Secrets Act 1989*) whilst having access to highly classified information. The Committee has developed its oversight remit, with the Government's agreement, to include examination of intelligence-related elements of the Cabinet Office including: the Joint Intelligence Committee (JIC); the Assessments Staff; and the Intelligence, Security and Resilience Group. The Committee also takes evidence from the Defence Intelligence Staff (DIS), part of the Ministry of Defence.

It is not a Committee of the House (despite being made up of parliamentarians) and hence it is convened under the provisions of the 1994 Act, rather than in Standing Orders. Proposals to reform the ISC emerged under the previous Government's 'Governance of Britain' consultations. Concerns had emerged over the independence and effectiveness of the Committee (particularly following accusations that the UK Government had been complicit in the unlawful rendition of terrorist suspects).[7] The Joint Committee on Human Rights (JCHR) had also raised some issues in its reports *Allegations of UK Complicity in Torture* (HL 152/HC 230 2008-09) and *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* (HL 86/HC 111 2009-10). In the latter report, the JCHR expressed concerns that the secretariat for the Committee was provided by the Cabinet Office and that it understood that the Committee's legal advice had originated from "the same source as the Government's."

The *Governance of Britain Green Paper* (Cm 7170), published in July 2007, proposed a range of measures to change the way that the ISC was appointed and how it operated. It acknowledged that there were concerns about transparency. Some of the proposals in the Green Paper were taken forward in March 2008, when the Government set out those reforms that could be brought in by a resolution of both Houses in advance of future legislation. A

[7] See: HM Government, *Government Response to the Public Consultation on Justice and Security* (Cm 8364), 29 May 2012, para 3.2. See also: Horne, A. *Security Services Under the Microscope*, Criminal Law and Justice Weekly, Volume 174, 4 December 2010

short history of these events can be found in the House of Commons Library Standard Note *The Intelligence and Security Committee* (SN/HA/2178).[8]

The *Justice and Security Green Paper* contained further details of changes to make the ISC a statutory committee of Parliament and to make it more transparent. The proposals were welcomed by the current Chair of the ISC, Sir Malcolm Rifkind. He noted that if they were implemented in full, "the ISC will become a Committee of Parliament with greater authority, effectiveness, resources and credibility. It will significantly enhance oversight of the United Kingdom intelligence community in a manner in which Parliament and the public can have full confidence."[9] Further background on the proposals in the Green Paper and responses to them is available in the House of Lords Library Note (LLN 2012/024), published on 14 June 2012.

3 What are Closed Material Procedures and Special Advocates?

The Special Advocate system was set up under the *Special Immigration Appeals Commission Act 1997*. The system was introduced following a number of immigration appeal cases (notably *Chahal v United Kingdom*[10]) which called into question the compatibility of the (then) existing Home Office 'Three Wise Men' panel system with the requirements of the *European Convention on Human Rights* (the Convention) and EC Directive 64/221. This earlier system was used where the Home Secretary acted under immigration powers to deport aliens on security grounds involving classified material. In evidence to the Constitutional Affairs Committee (the predecessor to the current Justice Committee), the Attorney General set out the position as it applied prior to the 1997 Act:

> Prior to 1997, there was no mechanism in England and Wales for material withheld from an Applicant in proceedings to be considered and challenged on his behalf by a specially appointed advocate. In immigration deportation cases, a decision to deport a person from the United Kingdom on grounds of national security was taken by the Home Secretary personally, on the basis of all relevant material. There was no formal right of appeal against such deportation decisions. The Home Secretary's decision was reviewed by an Advisory Panel, colloquially known as 'The Three Advisers' or the 'Three Wise Men', which made recommendations on whether the Home Secretary's decision to deport should stand. The Panel's recommendations were purely advisory and it was able fully to review the evidence relating to national security threat—this material was not disclosed to the Applicant or his legal representatives because to do so would potentially compromise national security.[11]

The 1997 Act included provisions for use of Special Advocates (security-cleared lawyers) in Special Immigration Appeal Commission (SIAC) hearings, who are appointed to represent those appearing before the Commission (a superior court of record presided over by a High Court Judge assisted by two other members) in cases where closed (classified) material is involved.

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8 See also: HC Deb 17 July 2008 cc499-502. For a more recent discussion, see: Leigh, I. *Rebalancing Rights and National Security: Reforming UK Intelligence Oversight a Decade After 9/11* (2012) 27 (5) Intelligence and National Security 721-737

9 Intelligence and Security Committee, *Press Release*, 19 October 2011. See also: see also: HC Deb 19 October 2011 c899-910

10 (1997) 23 E.H.R.R. 413. The judgment of the European Court of Justice in the joined cases of *Shingra and Radiom*, which was revisited in a judicial review challenge in the case of *Loutchansky*, raised similar questions about the efficacy of the 'Three Wise Men' system in an EC law context, cases C/65/95 and C/111/95 *R v Secretary of State, ex parte Shingara and Radiom* [17 June 1997]. See further, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and Special Advocates*, Seventh Report Session 2004-5, HC 323-I, paragraphs 44-66

11 Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and Special Advocates*, Seventh Report Session 2004-5, HC 323-I, paragraph 45

In the aftermath of the terrorist attacks on the USA on 11 September 2001, the then Home Secretary, David Blunkett, announced (in October 2001) plans to detain indefinitely those foreign nationals who were regarded as a threat to national security and not recognised as refugees, but who could not be returned to their own country because they might be at risk of torture, inhuman and degrading treatment, or death. Relevant provisions were introduced in the *Anti-terrorism Crime and Security Act 2001.* At the time that this Act was passed, David Blunkett also announced that he expected to use Article 15 of the Convention (national emergency threatening the life of the nation) to derogate from some aspects of Article 5 (the right to liberty) in respect of the provisions. This derogation followed under the *Human Rights Act 1998 (Designated Derogation) Order 2001* on 11 November 2001. A number of individuals were detained, mainly at Belmarsh, and continued to be detained following closed proceedings.

In December 2004, the House of Lords (in its judicial capacity) declared, under the *Human Rights Act 1998*, that the provision in the *Anti-terrorism, Crime and Security Act 2001* was incompatible with the *Human Rights Act 1998* (Schedule 1, Part I, Articles 5 and 14) in so far as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. The *Human Rights Act 1998 (Designated Derogation) Order 2001* was quashed.[12]. The immediate result of this judgment was the passage of the *Prevention of Terrorism Act 2005* which introduced 'control orders'. This Act transported the Special Advocate system from SIAC to the High Court. In spite of the demise of control orders (following the passage of the *Terrorism, Prevention and Investigation Measures Act 2011*), the Special Advocate system was retained to deal with this type of case. These procedures, involving closed evidence and Special Advocates have come to be referred to as closed material procedures (CMPs). Under a CMP, courts will conduct both open and closed proceedings. During the open sessions, the party affected by the CMP is able to instruct his own legal team on the open material disclosed to him. However, his lawyers will not see the closed material, which would be seen by the Special Advocate (whose role is to represent the interests of the excluded party, but who does not have a duty to the 'client', instead owing his or her duty to the court). Although Special Advocates can take instructions from the 'client' before they have seen the closed material, they cannot normally communicate with the client thereafter (save at the rarely exercised discretion of the court).

3.1 The Spread of the Special Advocate System

The use of Special Advocates was considered by the Constitutional Affairs Committee in its report *The Operation of the Special Immigration Appeals Commission and Special Advocates* which was published in 2005. The report concluded, amongst other things, that:

> Although the use of Special Advocates is being extended in the UK, we believe that it is one which should only be operated under the most exceptional circumstances which call for material to be kept closed. (Paragraph 55)
>
> The disclosure process under the SIAC system represents a considerable weakening of the judicial protection available under the common law Public Interest Immunity rules. (Paragraph 59)

In spite of this, the use of Special Advocates expanded significantly. One of the more well known cases was the decision in *Roberts v Parole Board* in the House of Lords. The NGO JUSTICE argued that the case of *Roberts* illustrated the spread of secret evidence throughout Britain's courts and tribunals:

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[12] *A and others v Secretary of State for the Home Department* [2004] UKHL 56

> Within five years, a system that had originally been introduced to allow the use of classified material from MI5, MI6 and GCHQ had been adapted, without any obvious statutory authority, in order to protect witnesses from intimidation in a parole hearing in the East Midlands.[13]

In 2009, JUSTICE, produced a substantial report on issues relating to open justice. In that report, *Secret Evidence*, their then director of human rights policy, Dr Eric Metcalfe, set out the history around the spread of the Special Advocate system and summarised much of the main case law from 1997-2009. He also briefly explored the use of similar systems in Canada, Hong Kong and New Zealand.

The Joint Committee on Human Rights has frequently criticised the Special Advocate system in its reports and has continued to receive evidence from acting Special Advocates. The JCHR picked up on JUSTICE's criticisms in its report *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In* published in March 2010.

3.2 Some Recent Case Law on Special Advocates and CMPs

The availability of CMPs

The more recent cases of *Al Rawi v Security Service* [14] and *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs*[15] (details of which are set out between pages 12-14 of the *Justice and Security Green Paper*) have caused the Government some concern. In the case of *Al Rawi*, the Supreme Court ruled that there was no power at common law to replace Public Interest Immunity[16] with a CMP and that any such move would have to be done through legislation. By contrast, in a separate case, *Tariq v Home Office*[17], the Supreme Court ruled that the use of a statutory closed material procedure before the Employment Tribunal was lawful under article 6 of the *European Convention on Human Rights*. The UK Human Rights Blog posted a useful summary of the state of the law after the *Al Rawi* and *Tariq* judgments in a post entitled *Secret evidence v open justice: the current state of play.* The University of Reading's *Law, Terrorism and the Right to Know* project has also published a more detailed list of the "court cases that prompted concern" between 2008-2011.[18]

'Gisting'

One of the main concerns about the use of CMPs is that the affected person may never get to see the principal evidence deployed against them. This element of the procedure was challenged during the operation of the control order regime. It was argued that suspects should be provided with some account of the case against them.

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13 JUSTICE, *Secret Evidence*, June 2009, paragraph 184

14 *Al Rawi v Security Service and others* [2011] UKSC 34, in which the Supreme Court considered whether a power existed under the common law to order a "closed material procedure" for the whole or part of the trial of a civil claim for damages

15 *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65

16 For a basic description of the Public Interest Immunity (PII) system, see *Justice and Security Green Paper* (Cm 8194, 2011), pg 51. See also *Al Rawi and others v Security Service* [2011] UKSC 34, paragraphs 145-146. In short, however, PII is a common law mechanism devised by the courts to allow certain documents to be withheld from disclosure because it would be prejudicial to the public interest to disclose them. A minister certifies that disclosure of the material would damage the public interest and applies to the judge for PII for that material. In making the decision whether or not to grant PII, the judge must strike a balance between competing interests: the interest of open justice versus the interest in protecting national security (sometimes referred to as the *Wiley* balance after the case in which the principles were laid down). Where material is granted PII, the Government does not have to disclose it, but equally cannot rely on it as part of its case

17 *Tariq v Home Office* [2011] UKSC 35

18 See: http://www.reading.ac.uk/ltrk/ for further details (as at 12 December 2012)

In the case of *A and others v UK*[19], the European Court of Human Rights considered the detention of the above mentioned terror suspects at Belmarsh. It determined (amongst other things) that procedural fairness required a suspect to be provided with the 'gist' of the secret evidence supporting the allegations made against him. Without sufficient information, the suspect was not in able to challenge the allegations effectively.

The court stated that:

> [220] [...] While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.[20]

This judgment was applied to control orders (albeit unenthusiastically by some of the judges) by the House of Lords in the case of *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 which considered the question with reference to Article 6 of the Convention (the right to a fair trial). Following the House of Lords judgment (which is sometimes referred to by the shorthand "*AF No.3"*), reference is frequently made to the "*AF (No.3)* disclosure obligation" or the "gisting" obligation.[21]

The Government's most recent *Memorandum on the ECHR issues raised by the Bill*, published in November 2012, indicates that the issue of whether an affected person should be supplied with the gist of allegations continues to be contested:[22]

> 32. There is ongoing litigation about the reach of AF (No.3). In the case of Tariq [...] 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

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19 Application, No. 3455/05 [Grand Chamber] (judgment of 19 February 2009)

20 Article 5(4) provides that: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." In the course of the case, Article 6 of the Convention was also raised by the applicants. The court concluded that: "[233] Without coming to any conclusion as to whether the proceedings before SIAC fell within the scope of Article 6, the Court declares these complaints admissible. It observes, however, that it has examined the issues relating to the use of special advocates, closed hearings and lack of full disclosure in the proceedings before SIAC above, in connection with the applicants' complaints under Article 5 § 4. In the light of this full examination, it does not consider it necessary to examine the complaints under Article 6 § 1."

21 For more on this, see: Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraphs 72-76

22 For a recent example in the case of asset freezing, see: *Mastafa v HM Treasury* [2012] EWHC 3578 (Admin)

> 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.

The issue of whether a person subject to a CMP should be provided with a summary or the gist of the material used against them was the subject of significant debate during the passage of the current Bill through the House of Lords. Opponents of the proposals often point to the judgment of Lord Kerr in the case of *Al Rawi*, where he said:

> The central fallacy ... lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.[23]

The Norwich Pharmacal principles

The case of *Binyam Mohamed* put the Government at "risk of having to disclose sensitive material to non-UK-security-cleared individuals for use in court proceedings outside the UK."[24] The Government argued that this could lead to a breach of the 'control principle'[25] and could cause other countries (particularly the United States) to refuse to pass on intelligence material to the United Kingdom. The Law and Lawyers Blog, has provided a helpful summary of the difficulty in which it described how developments based on what are known as the 'Norwich Pharmacal' principles could have an impact. In the case of *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133 the House of Lords held that the court had jurisdiction to order persons who have information which might identify the true defendant to disclose that information. These orders are normally used to identify alleged infringers of intellectual property rights such as patents.[26] In the *Binyam Mohamed* case (which started as a request for UK Government-held sensitive material to assist the claimant in criminal military court proceedings in the USA, in which he faced a capital charge)

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23 *Al Rawi v Security Service and others* [2011] UKSC 34, paragraph 93

24 HM Government, *Justice and Security Green Paper* (Cm 8194, 2011), paragraph 141

25 The *Justice and Security Green Paper* describes this in the following way: "In all intelligence exchanges it is essential that the originator of the material remains in control of its handling and dissemination. Only the originator can fully understand the sensitivities around the sourcing of the material and the potential for the sources, techniques and capabilities to be compromised by injudicious handling. We expect our intelligence partners to protect our material when we share it with them, and we must be able to deliver the same protection of their material. Confidence built up over many years can all too quickly be undermined. That is why, if the trust of the UK's foreign 'liaison' partners is to be maintained, there should be no disclosure of the content or fact of the intelligence exchange with them without their consent. This is known as the Control Principle."

26 The Explanatory Notes to the Bill provide further information noting that: "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, and the Customs and Excise Commissioners held information that would identify the importers but would not disclose it, claiming that they had no authority to give such information. The House of Lords held that where a third party who had been mixed up in another's wrongdoing had information relating to that wrongdoing, the court could 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. 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." For more, see: Explanatory Notes, paragraphs 15-17

the judicial review of the Secretary of State's decision not to release the sensitive material drew on these Norwich Pharmacal arguments for the first time in a detention case.[27]

The JCHR noted in its most recent report that the Independent Reviewer of Terrorism Legislation, David Anderson QC, "accepted that there was a case for restricting the novel application of the Norwich Pharmacal jurisdiction to national security information", but the question that remained was the proportionality of the approach.[28]

At an evidence session with the JCHR in October 2012, Mr Anderson indicated that he had met with individuals at the White House, National Security Council, US Justice Department, State Department and intelligence agencies. He noted that "a strong preference was expressed by really all of those I met from the Government side for an unconditional assurance that information subject to the control principle would not be liable to be released into open by British courts." He also stated that:

> When I pressed them on whether they thought our judges or people in the United Kingdom generally were in the habit of spilling their secrets or, indeed, had ever really spilled their secrets, they said no. They are rather impressed that we are not leaky.

He indicated that the objections were not in relation to the actual information that had been released in the *Binyam Mohamed* case, but more that "an English court had been prepared to disclose material which the Foreign Secretary had concluded presented a likelihood of real damage both to national security and to international relations." In spite of this, he concluded that Clause 13[29] was too broad in its application. He said:

> Even if one accepts the message that I was receiving and am now transmitting about the intelligence-sharing relationship, and therefore, even if you accept the need for Clause 13(2), saying a court may not disclose sensitive information—sensitive information meaning information derived in whole or part from information obtained from or held on behalf of a foreign intelligence service, to paraphrase 13(3)(c)—it is not clear to me why the remaining (a), (b) and (d) of Clause 13(3) need to be there. They are perhaps justified in the eyes of the domestic intelligence services, but the control principle and our intelligence-sharing relationship, it seems to me, is sufficiently safeguarded by 13(3)(c). So one could delete (a), (b) and (d) and then put everything else, including domestic intelligence information, into the judicially reviewable ministerial certificate that is provided for in 13(3)(e).[30]

The Committee stated, amongst other things, that "the provisions on the Norwich Pharmacal jurisdiction in the Bill go far beyond what either we in our Report or the Independent Reviewer considered proportionate to the legitimate objective that we both accepted" and went on to say that the Independent Reviewer also found that a blanket exclusion from disclosure for all material held by or originating from one of the Agencies, regardless of its sensitivity, would be "manifestly disproportionate".[31] In its most recent report, the JCHR concluded that:

> We remain of the view expressed in our Report on the Green Paper, that legislating to provide an absolute exemption from the Norwich Pharmacal jurisdiction for control

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27 *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, para 25

28 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 78

29 Now Clause 14

30 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Corrected Oral Evidence, HC370–i–iii, 12 November 2012

31 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraphs 84 and 85

> principle information is not consistent with the Government's commitment to the rule of law. We recommend that the Bill be amended to replace the current absolute exemption for certain types of intelligence information with a system of certification based on the contents of the information and subject to judicial control.[32]

4 The Government's initial proposals on CMPs and Norwich Pharmacal

This next section of the paper sets out the Government's proposals as contained in the Green Paper and the immediate responses to them. This is a short historical background, to provide context, and it is worth noting that the proposals in the Bill itself were adjusted to take account of some of the resulting criticisms mentioned above. In relation to CMPs, in the Green Paper, the Government initially argued that:

> 13. There are already a number of specific legal contexts in which procedures are provided for in legislation so that sensitive material can be handled by the courts, most notably in the Special Immigration Appeals Commission. Such procedures have been shown to deliver procedural fairness and work effectively, and similar mechanisms are used internationally. The Government proposes introducing legislation to make closed material procedures (CMPs) more widely available in civil proceedings for use in rare instances in which sensitive material is relevant to the case.

Nigel Inkster, the Director of Transnational Threats and Political Risk at the International Institute for Strategic Studies (who formerly worked for the Secret Intelligence Service), has argued that the Government is acting on the issue of Norwich Pharmacal now, due to the case of Binyam Mohamed and the potential threat to intelligence sharing with the United States:

> The issue was brought to a head in 2008 when Binyam Mohamed, a former detainee at Guantanamo, asked the British government to release material provided by the US government pertinent to his trial before a US military tribunal and which showed evidence of mistreatment by the US authorities. The British government was compelled to publish this material to the severe displeasure of the US government which threatened to review the extent of intelligence sharing which took place with the UK. Given that such US intelligence has been a critical ingredient in every counter-terrorism investigation conducted by UK agencies since 2001, and that such sharing goes far beyond the counter-terrorism agenda, this was a risk which had to be addressed.[33]

Some of this reasoning (on Norwich Pharmacal) was supported by the Government's Independent Reviewer of Terrorism Legislation who acknowledged that in relation to "the flow of intelligence" provided to the UK Government, "the Green Paper accurately set out the position, at least where the US is concerned."[34] Mr Anderson also said (in relation to the use of CMPs in damages claims):

> We are in a world of second-best solutions: but it does not seem to me that the level of injustice inherent in the use of CMPs in a case of this nature necessarily exceeds either the injustice to the claimant of a case being struck out, or the moral hazard and

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32 *Ibid*, paragraph 96. For more information on the procedure (including an assessment of the more recent case of *R (Omar and others) v Secretary of State for the Foreign and Commonwealth Office*), see: House of Lords Constitution Committee, *Justice and Security Bill [HL] Norwich Pharmacal jurisdiction*, 4th Report of Session 2010-12, HL Paper 31

33 *Balancing Secrecy with Openness and Accountability*, Nigel Inkster, International Institute For Strategic Studies, 21 November 2011

34 David Anderson QC (Independent Reviewer of Terrorism Legislation), *Supplemental Memorandum to the Joint Committee on Human Rights*, 19 March 2012

> reputational damage to the intelligence agencies that is caused by settling a case which, had it been possible to adduce all the evidence, would have been fought.[35]

More generally, he indicated that:

> The cases to which I have been introduced persuade me that there is a small but indeterminate category of national security-related claims, both for judicial review of executive decisions and for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist. No one has sought to persuade me of the need for a CMP in cases not related to national security.[36]

However, in an earlier memorandum to the Joint Committee on Human Rights, Mr Anderson set out a number of concerns. He concluded (amongst other things) that:

> There are likely to be some cases in which secret evidence renders cases untriable under existing procedures. I can shed little useful light however on whether the problem is a serious as the Green Paper implies.
>
> If CMP is [to] be made available in such cases, it must be on strict conditions. The potential absence of gisting dictates great caution. The proposed scope (any case involving "sensitive material") is overbroad, and intercept evidence should be admissible as it is in other CMPs.
>
> The decision to trigger a civil CMP must be for the court, not the Government. An impartial decision-maker is essential for the appearance and the reality of justice.
>
> Continuing efforts should be made to improve the operation of CMPs. A working group chaired by a High Court Judge could be a way forward.[37]

Opponents of the proposals have suggested that the Government would be tempted to claim cases should be heard in secret in order to hide embarrassing secrets. A *Guardian* editorial argued:

> The government, in the person of the secretary of state, may be easily persuaded that embarrassing evidence of misconduct by government officials should be kept under wraps. This is contrary to fair trial procedures – no one should be judge in their own cause. And why is it that we are facing this threat to the civil trial process in the first place? The security services lost their claims to secrecy in two key cases – Binyam Mohamed and al-Rawi – concerning allegations of complicity in torture. MI5 and MI6 persuaded the government to move to prevent further embarrassing disclosures. [...]
>
> These proposals are simply a reaction to the failure to keep the lid on information suggesting UK complicity in torture and rendition. The "problem cases" have not arisen because of any failures in the judicial process. They have arisen because of British involvement in the outsourcing of inhuman and degrading treatment. Torture is an international crime, and any evidence of complicity in it must be open to scrutiny; the green paper appears to have been drafted precisely to avoid such scrutiny.[38]

The Government recognised some of the concerns that were raised about the Special Advocate system and indicated that:

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35 *Ibid*

36 *Ibid*

37 David Anderson QC (Independent Reviewer of Terrorism Legislation), *Memorandum for the Joint Committee on Human Rights*, 26 January 2012

38 "Justice and security green paper: silence in court", *The Guardian*, 2 March 2012

> 16. The role of Special Advocates, who act in the interests of the party affected by the CMP, will be critical to the success of the proposed expansion of CMPs. The Government considers that there are some improvements that could be made and will ensure that further training and support are provided to Special Advocates. One area under particular consideration is the communication between the Special Advocate and the individual concerned after sensitive material is served (which requires the court's permission). The Government is giving consideration to reforms in this area to encourage Special Advocates to make use of existing procedures. An option could be for a 'Chinese wall' mechanism between government counsel and those clearing communications within an agency. The Government does not propose involving a separate judge in this process.

The Government considered whether it ought to enshrine the common law principle of Public Interest Immunity (PII) in legislation, but determined that "if the reforms to extend CMPs are introduced, PII would have a reduced role" and that it would not pursue this option."

The Joint Committee on Human Rights summarised the key differences between PII and CMPs in its report on the Green Paper. It stated that:

> In PII, the court conducts the balancing exercise between the public interest in non-disclosure and the public interest in the administration of justice; in CMP, there is no equivalent balancing exercise by the court: the court's task is to ensure that material is not disclosed if its disclosure would cause harm to the public interest.
>
> In PII, where the judicial balance comes out against disclosure, the material is excluded altogether from the case; in CMP, the material which the court agrees to be "closed" is admissible: it is seen by the court and can be relied on by one party.[39]

Fifty seven of the Special Advocates responded to the Government's consultation on the issue of extending CMPs. They argued that:

> Substantially less restrictive regimes than the CMPs currently deployed in the United Kingdom have been successfully adopted to deal with sensitive material; most notably in the United States, to which no consideration has been given in the Green Paper. The "international comparisons" exercise at Appendix J of the Green Paper makes no mention of the United States and refers to only four countries (none of which appears to have a regime as restrictive as the UK model). More thorough research is required, including an explanation as to why a procedure involving security clearance being given to the directly instructed lawyers (akin to that used in "habeas" proceedings in the United States) could not be adopted here.[40]

The views of the Special Advocates were put to the then Lord Chancellor and Justice Secretary, Kenneth Clarke, at a session of the Joint Committee on Human Rights in March 2012. In response, he noted that:

> Of all the responses, the evidence of the special advocates most unsettled me. I was surprised by their strong reaction. It's important we take on board their strong strictures.[41]

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39 Joint Committee on Human Rights, *Justice and Security Green Paper*, Twenty Fourth Report Session 2010-12, HL Paper 286/HC 1777, paragraph 97

40 Justice and Security Green Paper Response to Consultation by Special Advocates

41 "Ken Clarke unsettled by criticism of secret courts plan", *The Guardian*, 6 March 2012

5 The specific question of Coroners and Inquests

The original *Justice and Security Green Paper* revisited plans to hold inquests in private. However this proposal predated the Green Paper and had been previously discussed during the passage of the *Coroners and Justice Act 2009* and the *Counter-Terrorism Act 2008.* The House of Commons Library Research Paper, *Coroners and Justice Bill: coroners and death certification* (RP09/07), and a separate Library Standard Note, *Coroners and Justice Bill: Lords amendments* (SN/HA/5211), provide a detailed history of these attempts to introduce what came to be known as "secret inquests." Upon the publication of the *Justice and Security Bill* it became plain that the Government had dropped plans for "secret inquests" from the face of the Bill.[42] Subsequently, concerns were expressed that the order making power contained in Clause 11 of the Bill (as introduced in the Lords) could allow the Secretary of State to reintroduce this plan.[43] The Government initially amended Clause 11 to make it plain that the order making power could not be used in this way. Eventually, the relevant part of Clause 11 containing the order making power was deleted from the Bill on Report (see further below).

6 Lords Stages

6.1 Second Reading

The Library Note (LLN2012/024), prepared by the House of Lords Library for the Second Reading of the Bill, sets out the differences between the Bill as introduced and the Government's original proposals and this material will not be repeated in any detail here.[44] In short, however, the Government excluded inquests from the scope of the Bill; allowed a greater role for the judiciary (although critics argued that the role of Ministers in the decision making process was still unacceptable); and moved to allow CMPs only in cases that involve national security (rather than when they were considered by Ministers to be in the 'public interest'). The Bill also retained a role for public interest immunity certificates.

Second Reading took place on 19 June 2012 and Lord Wallace of Tankerness (the Advocate General for Scotland) spoke for the Government. He argued that the Bill was seeking to address "three widely recognised problems", namely: the fact that a "number of civil cases cannot be heard by a judges because they hinge on national security sensitive evidence that cannot be disclosed openly"; that the Norwich Pharmacal Order procedure had been "extended to allow someone bringing a claim outside the United Kingdom to apply to a court in London to force disclosure of intelligence information held by the British"; and that "oversight of the intelligence community lacks independence from the Executive and has too limited a remit to ensure full and effective accountability."[45]

Lord Wallace argued that the proposals relating to the ISC would enhance its independence. He noted, amongst other things, that they would extend its statutory remit, clarifying that it would in future be able to oversee the agencies' operations and would ensure that the Committee was funded by Parliament, accommodated on the Parliamentary estate and that its staff would have the status of Parliamentary staff.[46]

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42 See, for example: "Nick Clegg wins fight to remove closed inquests from 'secret justice' bill", *The Guardian*, 29 May 2012

43 "Campaigners win fight over secret inquests row", *Daily Telegraph*, 14 November 2012

44 See also: Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, pg 10. For a critic's response, see, for example: Patrick A. "The Government is not for turning", UK Human Rights Blog, 29 May 2012

45 HL Deb 19 July 2012 c1660

46 HL Deb 19 July 2012 c1661

In relation to CMPs, he stressed the fact that the scope of the proposals had been "extensively revised" and "narrowed" and that safeguards had been "strengthened."[47] He also put the Government's view that the current PII system was not sufficient to guarantee open justice, arguing that:

> Under the current rules, the only way of protecting sensitive intelligence material which would otherwise be disclosed, and which would damage the public interest if disclosed in open court, is to apply for public interest immunity. If such an application is successful, the result is the exclusion of that material from the court room. An example of the difficulties which may arise is where a case is so saturated in this type of sensitive material that the PII procedure removes the evidence that one side, either the defence of the claimant, requires in order to make its case. The options then are not attractive. In judicial reviews, the Government may find themselves unable to defend an executive action taken to protect the public – for example and exclusion from the United Kingdom of a suspected terrorist or gang lord – simply because they cannot explain their decision when defending it. Equally, claimants may find themselves unable to contest a decision taken against them. [...] In claims for civil damages, typically against the Government, the defendant is either forced to seek to settle the case by paying out compensation, assuming the other side is willing to agree to settle, or it has to ask the court to strike out the case as untriable. The result is that these cases are not heard by a court at all.[48]

In response to an enquiry by Lord Morris of Aberavon, a former Attorney General, on the number of cases impacted in this way, Lord Wallace suggested that currently there were "estimated to be 29 live cases." (The figure which had been more regularly cited was 27, however the precise number of cases affected or pending is proving controversial).[49] He stated that the settlement of a civil damages claim brought by the Guantanamo Bay detainees underlined the point he was making.[50] Lord Wallace also contended that these types of cases "often contain extremely significant allegations about the actions of Government and the security and intelligence agencies" and that there was a "real public interest in being able to get to the truth of such allegations" through the CMP procedure.[51]

Finally, in relation to the Norwich Pharmacal jurisdiction, Lord Wallace argued that since the Binyam Mohamed case "there have been no fewer than nine attempts to use this jurisdiction in relation to sensitive information, including secret intelligence." He said that it was:

> a regrettable fact that uncertainty about our ability to properly protect classified information provided by foreign Governments has undermined confidence among key allies, including the United States. In some cases, measures have already been put in place to regulate or restrict intelligence exchanges.[52]

He argued that Norwich Pharmacal was "the wrong tool for national security cases" and that this was why the Government intended to legislate to exempt from disclosure under this procedure material "held by, originating from or relating to an intelligence service defined as

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47 HL Deb 19 July 2012 c1660

48 HL Deb 19 June 2012 c1662 In relation to having a case struck out, it is argued would theoretically be open to the Court strike-out a claim because it would not be in the public interest for it to proceed (relying on the precedent of *Carnduff v Rock* [2001] EWCA Civ 680)

49 In March 2012, the University of Reading published a list of cases that it believes might be affected by the changes proposed and this has subsequently been updated. This list is available at the website of the Law Terrorism and the Right to Know project (as at 12 December 2012). The precise number of cases does not seem entirely clear. See: Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 42

50 HL Deb 19 June 2012 c1663

51 *Ibid*

52 HL Deb 19 June 2012 c1667

including the intelligence agencies and those parts of Her Majesty's Armed Forces or the Ministry of Defence that engage in intelligence activities", or "where the Minister has certified that it would cause damage to national security or international relations if it were disclosed."[53] Lord Wallace sought to reassure the House that the measures "would have no impact on claims that the Government or the security and intelligence agencies have been directly involved in wrongdoing."[54]

The Bill was then subject to extensive debate, with Lord Henly (responding for the Government at the close) noting that he was the twenty third to speak. Accordingly, this short summary of the debate cannot do justice to the many arguments that were raised.

Welcoming the general thrust of the Bill, Lord Butler of Brockwell, a former Cabinet Secretary and current member of the Intelligence and Security Committee, said that he had seen "direct evidence that uncertainty over the matters covered in Part 2 of the Bill is already affecting co-operation with our intelligence allies on matters of national security."[55] He suggested that while improvements might be made to the Bill (and to the special advocate procedure) and that no one suggested that closed procedures were ideal, they seemed to be "the least worst option." He added that "a procedure on these lines is preferable to the public interest immunity procedure in the United States where Binyam Mohamed was unable to bring any action at all because the Government asserted state secrets privilege."[56]

Baroness Manningham-Buller, the former Director General of the Security Service (MI5) commented on the 'control principle' and Norwich Pharmacal, stating that "the control principle is a pretty fundamental one. If we threaten and undermine it, we will be the losers."[57] She also made the point that intelligence sharing was not just with the Americans and that we receive intelligence from countries that are not friends, whose intelligence exchange has to be carefully handled.

By contrast, Lord Pannick QC, a member of the JCHR and Lords Constitution Committee, argued that the clauses around Norwich Pharmacal would remove the jurisdiction of the courts "to order the disclosure of information to an individual who has a properly arguable case that the representatives of this country are involved in wrongdoing." He noted that this could involve "the greatest allegations of wrongdoing", such as allegations of torture or death abroad. He went on to say that it was vital to recollect that in the Binyam Mohamed case, the court made it clear that the only reason it was ordering publication of the relevant information was that that very information had already been publicly disclosed by reason of an order made by a court in the United States. In relation to CMPs, he said that he doubted that they were required at all "given the availability of a flexible public interest immunity procedure", but that the judge "must have a discretion over whether to impose a CMP" which should only be exercised if that was the best available means of securing fairness in the light of confidentiality concerns and having regard to the availability of public interest immunity.[58]

Lord Lester of Herne Hill QC, another member of the JCHR, emphasised the fact that the 'control principle' was not absolute and that fact had been recognised by the former Foreign Secretary, David Miliband.[59]

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53 HL Deb 19 June 2012 c1668
54 *Ibid*
55 HL Deb 19 June 2012 c1681-2
56 HL Deb 19 June 2012 c1683-4
57 HL Deb 19 June 2012 c1748
58 HL Deb 19 June 2012 c1695
59 HL Deb 19 June 2012 c1692

6.2 Amendments to the Bill on Report

Prior to the Report Stage in the House of Lords, the Joint Committee on Human Rights published its report, *Legislative Scrutiny: Justice and Security Bill*. The Committee said that a series of amendments should be made to the Bill. The Committee recommended, amongst other things, that the Government should confirm that the relevant parts of the Bill relating to CMPs were not intended to cover material, the disclosure of which would be damaging to international relations, but were only intended to protect from disclosure two narrow categories of information that had been identified by the Intelligence and Security Committee (in its Annual Report of 2011-12), namely: intelligence material that would reveal the identity of UK intelligence officers, their sources and their capability; or, foreign intelligence material provided on a promise of confidentiality.[60]

The Committee also recommended that the Secretary of State's power to extend the scope of the Act by order be deleted from the Bill.[61] Importantly, it concluded that a number of amendments be made to the provisions in the Bill relating to CMPs in order to bring them into line with the Government's own justification for those provisions. It emphasised "the importance of judicial balancing in any legal framework brought forward by the Government" and recommended that the Bill should ensure that there is always full judicial balancing of the competing public interests in play, both at the "gateway" stage of deciding the appropriate procedure and at the subsequent stage of deciding whether a particular piece of evidence should be heard in closed or in open session.[62]

The Committee contended that:

> the central question for Parliament is whether or not the Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness; values that are central both to our common law tradition and to the international human rights obligations that have been so influenced by that tradition.[63]

In September 2012, activists at the Liberal Democrat Party Conference voted to scrap the part of the Act that related to CMPs (voting against an amendment that CMPs be used as a "last resort"). Although the vote was not binding it was reported that the vote would carry moral force and empower Liberal Democrat ministers to seek further changes to the Bill.[64]

Selected amendments that were made

This next section focuses on the amendments tabled in relation to Part 2 of the Bill, but it is worth acknowledging at the outset that there was a significant debate on Part 1 of the Bill on the first day of the Report stage.[65]

Following the publication of the JCHR's report, amendments were tabled to ensure, amongst other things, that:

(i) **a judge would decide whether a CMP should be used in any given case (and that the decision would not be taken in form or substance by the Secretary**

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60 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 29. See also: ISC Press Release on the Government's Green Paper on Justice and Security, 27 March 2012.

61 *Ibid*, paragraph 32

62 *Ibid*, paragraph 53

63 *Ibid*, paragraph 18

64 "Lib Dem conference: Leadership suffers court hearings defeat", *BBC Online*, 25 September 2012

65 See: HL Deb 19 November 2012 cc1627-88and 1691-1706 See in particular cc1680 and 1703-4 for amendments that were accepted

of State).[66] As originally drafted, Clause 6 had provided that where there is disclosable material that impacts on national security, the judge would have been required to order a CMP. The Independent Reviewer, David Anderson QC, had observed of the original clause that: "In fairness to the Government, under the procedure devised in the Bill the judge does have the last word. The only difficulty is that that word is dictated to the judge by the Secretary of State. First, the judge can make a decision only if the Secretary of State makes an application and has no other jurisdiction to consider it. Secondly, when the judge does come to consider it, it is not for him to weigh up the relative merits of PII or CMP, or to decide what the fairest way would be to decide the case. The judge's hands are effectively tied. If there is disclosable material that impacts on national security—as there obviously will be in any case in which an application is made—the judge is required to agree. The word 'must' features in Clause 6. The judge 'must' order a closed material procedure. It seems that the Government have given formal effect to the requirement that the judge should have the last word, but in substance the Secretary of State continues to pull the strings."[67]

(ii) **A CMP would only be available as a procedure of last resort, if fairness could not be achieved by other means (allowing judicial discretion to first consider alternative methods, such as the public interest immunity system and requiring the court to consider whether a claim for PII could have been made in relation to the material).**[68] This followed from the conclusion of the JCHR that the Bill, as drafted, failed to ensure that a CMP will be adopted only when strictly necessary. The JCHR had criticised the original provision because "the 'test' to be applied by the court at the gateway stage does not require the court to ask whether the case is one which can only be justly resolved using a CMP rather than the existing procedural mechanisms. This means that if the Government decides to apply to trigger a CMP, the judge will be obliged to accede to the application if there is any sensitive material relevant to the case and the disclosure of which would damage national security. This is so even if the judge considers that the case could be tried using the existing PII rules in a way that is fair to both sides, and that a CMP is not therefore needed to determine the issues in the case fairly"[69];

(iii) **The court would be required to balance the interests of national security against the interests of fairness and open justice in deciding whether to agree to the use of a CMP at the outset**;[70] and,

(iv) **It would be open to either party to apply for a CMP (not just the Government) and the court would also have jurisdiction to consider the question on its own motion**.[71]

These amendments also reflected concerns expressed by the House of Lords Constitution Committee and the Independent Reviewer of Terrorism Legislation. Lord Pannick argued that the amendments would "help to ensure that, if we are to have CMPs, there are proper

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66 See: HL Deb 21 November 2012 cc1855-6.

67 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 58

68 See HL Deb 21 November 2012 c1862-64

69 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 64

70 See HL Deb 21 November 2012 c1859

71 See: HL Deb 21 November 2012 c1850. See also: Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraphs 51-52

limits, proper controls, a proper balance and judicial discretion, and that CMPs are a last resort."[72]

Lord Lester indicated in debate that "the purpose of these amendments, recommended unanimously by the Joint Committee on Human Rights, is to achieve that result and to make Part 2 comply with the fundamental principles of justice and fairness protected by the common law." He said "we hope that the Minister and the House will agree that our report was thorough, fair and balanced, and that our recommendations are put forward to improve, not to wreck, Part 2."[73]

Other amendments which were passed included an amendment tabled by the Government to delete the abovementioned order making power (then contained in Clause 11)[74] and an amendment which added the Supreme Court to the list of courts contained in Clause 6 to "put beyond doubt the Government's intention that the Supreme Court should continue to have the ability to consider sensitive material and ensure that we are not left in the very unusual situation of the highest court in the land not being able to adopt the same procedures used in the lower courts."[75]

An amendment was agreed in relation to intercept evidence in employment cases involving national security.[76] This is discussed further at section 7 of this paper (below).

Other proposed amendments and debate

Although the abovementioned amendments were passed, the response to them (and whether they met the more general concerns expressed about CMPs) was mixed and there was a separate vote, which sought to remove the CMP provisions from the Bill. Supporters of that move argued that the JCHR's report had not identified sufficient evidence to justify the measures. They also pointed to evidence from the Special Advocates that "there is as yet no example of a civil claim involving national security that has proved untriable using PII and flexible and imaginative use of ancillary procedure."[77]

Baroness Kennedy of the Shaws argued that:

> I should say immediately that I am a member of the Joint Committee on Human Rights, and I supported the amendments that have just gone through this House. But in fact my position is quite a clear one; I do not approve of the closed material procedure at all. I was prepared to make concessions and vote for the amendments that have just gone through, but really I do not think that it is needed at all.[78]

Lord Macdonald of River Glaven, the former Director of Public Prosecutions, said that:

> In its outstanding report, the JCHR was careful to give its considered assessment of the case the Government have made for the insertion of this quite extraordinary procedure into our [...] justice system. It was very frank. It said that the Government have not made a convincing case. For my part, I would not introduce these processes

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72 HL Deb 21 November 2012 cc1816-17
73 HL Deb 21 November 2012 c1820
74 HL Deb 21 November 2012 c1872
75 HL Deb 21 November 2012 c1871
76 HL Deb 21 November 2012 c1913
77 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, pg 41
78 HL Deb 21 November 2012 c1890

> into our system without the most compelling evidence to justify this extraordinary change, and I do not see it.[79]

Lord Pannick also voted in favour of the removal of CMPs. This proposal was defeated by 164 votes to 25.[80]

During the course of the debate, a variety of viewpoints were expressed. A number of former senior judges, including Lord Woolf, a former Lord Chief Justice and Lord Phillips of Worth Matravers, the former President of the Supreme Court, commented on the proposals. Lord Phillips, who sat in a judicial capacity in the case of *Al Rawi*, said that he was "reluctantly persuaded of the need, in the interests of justice, for a closed material procedure in exceptional cases where the Government would otherwise have no alternative but to submit to a civil claim for damages because to defend it would necessarily involve putting into the public domain material that would cause disproportionate harm to national security." He added that it was for those reasons that he supported the batch of amendments tabled by Lord Pannick.[81] Lord Woolf described himself as "a hedger, not a ditcher" and argued that we should "take advantage of the general proposals of my noble friend Lord Pannick."[82]

The former Home Secretary, Lord Reid, contended that:

> I find that one of the astonishing things about these debates is that there is never any context about the nature of national security. It is paraded camouflaged in words such as murky, corrupt, and lapdog the disparaging avalanche of comments against our security services. Politicians can take it. We are used to it from the Opposition, from people outside and from some of our errant Back-Benchers, but the intelligence services do not deserve that. Were it not for them, I can tell you, thousands of British citizens would have had their basic human right of life removed from them. In one incident in August 2006, 2,500 people would have been blown out of the skies over the Atlantic were it not for our intelligence services and, yes, their colleagues in the American intelligence services.[83]

Although there were proposed amendments to introduce a sunset clause, or compulsory reporting on CMPs, these were not put to a vote.[84] The JCHR and Lords Constitution Committee had recommended such provisions. The former observed that:

> in view of the significance of what is being provided for in the Bill, and its radical departure from fundamental common law traditions, we recommend that the Bill be amended to require the Secretary of State to report regularly to Parliament about the use of the exceptional procedures contained in the Bill, and providing for both independent review by the Independent Reviewer and for annual renewal.[85]

The Constitution Committee had said that:

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79 HL Deb 21 November 2012 c1900

80 For an analysis of this by an critic of the proposals, see: Hickman, T. *Justice and Security Bill: Defeat or Not a Defeat: That is the Question*, UK Const. L. Blog (27th November 2012) (available at http://ukconstitutionallaw.org) See also: "Are secret courts one step closer?", *BBC Online*, 28 November 2012

81 HL Deb 21 November 2012 c1830

82 HL Deb 21 November 2012 cc1833-35

83 HL Deb 21 November 2012 c1893

84 HL Deb 21 November 2012 c1911

85 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, pg 5

> The House may [...] wish to consider whether the Government should report annually to Parliament on the use made of CMP under the Bill and whether the Bill should be independently reviewed five years after it comes into force.[86]

Lord Wallace argued that "it is right and proper that we should leave it to the Select Committee to decide the form that independent post-legislative scrutiny should take."[87] He also said that "sunset clauses are not necessarily appropriate here" on the grounds that litigation could go on over a period of time "and it is difficult to think that you might have to sunset something. A case might start under a particular form of procedure and, if the sunset clause was effective, that procedure could be reverted in midstream."[88]

An amendment to ensure that any litigant who was excluded from the open hearing by the CMP was always given at the very least a summary and the gist of the closed material, sufficient to enable him or her to give instructions to his legal representative and the special advocates (so far as was possible to do so) was not moved.

The Bill, as drafted provides at Clause 7(1)(d) and (e) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party's legal representative) and that it is required to ensure that such a summary does not contain material the disclosure of which would be damaging to national security). The explanatory notes to the Bill state that the Bill provides that nothing in the provisions concerning the closed material procedure is to be read as requiring a court to act inconsistently with Article 6 of the *European Convention on Human Rights*.

A further amendment (based on the JCHR recommendations) would have introduced a 'balancing of interests approach' once a court had approved a CMP in a given case. The JCHR had argued that there should be full judicial balancing of the public interests in play within the CMP, when deciding whether material should be in closed or open, as well as at the earlier "gateway" stage of deciding the appropriate procedure.[89] Lord Pannick described this as the equivalent of the amendment that had been accepted in relation to Clause 6 on the "gateway" stage (described above). In spite of this, the amendment was defeated on a vote (87 to 123).[90]

6.3 Third Reading

At Third Reading, on 28 November 2012, Lord Wallace was asked whether the Government had reached any conclusions about the amendments that had been passed on Report. In response, he said that the Government would "want to give very careful consideration to the amendments that were passed by considerable majorities in your Lordships' House on Report" and that it would no doubt make its position plain in the Commons "bearing in mind that the amendments were based on the recommendations of the report of the Joint Committee on Human Rights."[91] A privilege amendment[92] was made to the Bill, but despite indications during the debate on Report that further amendments would be forthcoming, none were tabled or debated.

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86 House of Lords Constitution Committee, *Justice and Security Bill [HL]*, 3rd Report of Session 2012-13, HL Paper 18, paragraph 35

87 HL Deb 21 November 2012 c1913

88 HL Deb 21 November 2012 c1912

89 Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012–13, HL Paper 59/HC 370, paragraph 68

90 HL Deb 21 November 2012 c1909

91 HL Deb 28 November 2012 c196

92 See: *Erskine May: Parliamentary Practice*, 24th Edition (LexisNexis, 2011), p542 and 580-581

7 The Clauses

As mentioned above, the *Justice and Security Bill* was revised significantly in the Lords and was introduced in the House of Commons on 28 November 2012. The Bill, as brought from the Lords, has 17 Clauses and 3 Schedules. The Government has not indicated explicitly whether it intends to seek to overturn the Lords amendments. Most recently, the Prime Minister was asked about this at the Liaison Committee on 11 December. Although it was reported that he might have acceded to some of the amendments, subsequently he made clear that he did not want to make commitments on behalf of Kenneth Clarke, (now Cabinet Minister without Portfolio) who is still overseeing the Bill.[93]

7.1 The Intelligence and Security Committee

Part 1 of the Bill and Schedule 1 to the Bill make provision for oversight of the intelligence and security agencies. **Clause 1** of the Bill provides that the new Intelligence and Security Committee (ISC) would have nine members, drawn from both Houses. A person would have to be appointed by the House of Parliament from which the member is to be drawn; however, a person would not be eligible to be a member of the Committee unless he or she were nominated for membership by the Prime Minister. Before deciding to nominate a person, the Prime Minister would be obliged to consult the Leader of the Opposition. Serving Ministers of the Crown would not be eligible for membership of the Committee. The Chair of the Committee would be chosen by its members.

Clause 1 also gives effect to **Schedule 1** which makes more detailed provision. In particular, Schedule 1 states that a person appointed to the ISC would hold office for the duration of the Parliament. Schedule 1, paragraphs (2) and (3) make provision for where a person vacates office (by ceasing to be a Member of Parliament, becoming a Minister of the Crown, or because a resolution is passed in the House of Parliament by virtue of which the person is a member of the ISC) or resigns from the ISC. Paragraph 4 provides that a person who ceases to be a member of the ISC is eligible for reappointment.

Schedule 1, paragraph 3 sets out the information that the ISC would be entitled to access. Under the provision, a Minister of the Crown would be entitled to refuse access to material where:

> (a) it is (i) sensitive information (e.g. where it might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the relevant agencies or other government departments involved in intelligence or security activities; or where it is information about particular operations which have been, are being or are proposed to be undertaken; or where information is provided by, or by an agency of, the Government of a country or territory outside the United Kingdom where that Government does not consent to the disclosure of the information.), and (ii) information which, in the interests of national security, should not be disclosed to the ISC, or
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> (b) it is information of such a nature that, if the Minister were requested to produce it before a Departmental Select Committee of the House of Commons, the Minister would consider (on grounds which were not limited to national security) it proper not to do so.

The explanatory notes to the Bill indicate that this is a change from the present position. Currently, the Director-General of the Security Service, the Chief of the Intelligence Service or the Director of the Government Communications Headquarters (as well as the relevant Secretary of State), are able to decline to disclose information because it is sensitive

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93 "David Cameron hints at change of heart in secret courts policy", *The Guardian*, 11 December 2012

information which, in their opinion, should not be made available. Paragraph 3 removes this ability for the Agency heads to withhold information. The ability to decide that information is to be withheld would instead rest (solely) with the relevant Secretary of State (for the Agencies) or Minister of the Crown (for other government departments).

Under **Clause 2,** the ISC would have the responsibility for overseeing the activities of the Security Service (MI5); the Secret Intelligence Service (MI6) and Government Communication Headquarters (GCHQ). Clause 2(2) provides for the agreement of a memorandum of understanding. Clauses 2(4) and 2(5) make clear that this would be agreed between the ISC and the Prime Minister, could be altered, or replaced and would have to be published (and a copy laid before Parliament). The explanatory notes to the Bill indicate that the use of such a provision would enable the ISC:

> to provide oversight of the intelligence and security community beyond the Agencies. Intelligence and security functions, and the parts of Government departments that undertake those functions, may change over time. Describing those functions in a memorandum of understanding enables changes to be made to the ISC's remit, in response to changes to the structure and work of the wider intelligence community, by the agreement of the ISC and the Government.

Clause 2 also makes clear that he ISC would have the power to consider operational matters, but only where those matters were "not part of any ongoing intelligence or security operation" and only in circumstances where they were "of significant national interest." The consideration of such matters would have to be consistent with any principles set out in the memorandum of understanding. The explanatory notes acknowledge that this already happens under the present regime, giving an example of the ISC's *Report into the London Terrorist Attacks on 7 July 2005.* However, the explanatory notes go on to state that "with the formalisation of a role in oversight of operational matters, the Government would expect the new ISC to provide such oversight on a more regular basis."

Clause 3 would oblige the ISC to publish an annual report to Parliament on the discharge of its functions. Prior to making this report, a copy would be sent to the Prime Minister. Following an amendment on report, the word "draft" was deleted from the Bill, since the reports currently sent by the ISC to the Prime Minister were not in draft form. Clause 3(4) provides that the Committee would have to exclude from its report any matters that would be prejudicial to the continued discharge of the functions of the Security Service, the Secret Intelligence Service, the Government Communications Headquarters or any person carrying out activities in relation to intelligence or security matters as are set out in the memorandum of understanding. The report would contain a statement indicating whether any matter had been excluded pursuant to this requirement. The report would then be laid before Parliament. Clause 3(7) allows the ISC to make a report to the Prime Minister "in relation to matters which would be excluded by virtue of subsection (4) if the report were made to Parliament." **Clause 4** of the Bill is an interpretative provision.

Clause 5 relates to the Intelligence Services Commissioner. The current Intelligence Services Commissioner is Sir Mark Waller. Sir Mark served as the Vice-President of the Court of Appeal, Civil Division (2006-2010). The website of the Commissioner indicates that the Commissioner "plays a specific part within the broad architecture of intelligence oversight of the agencies and public authorities in relation to the use of their intrusive powers."[94]

Clause 5 provides a statutory extension to the Commissioner's duties. The explanatory notes state that the purpose of this extension is twofold:

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[94] For further details of his remit, see: http://www.intelligencecommissioners.com (as at 12 December 2012)

(i) to provide a clear statutory basis for the duties which the Commissioner has occasionally agreed, at the request of the Prime Minister, to take on outside the statutory remit, and (ii) to enable an extension of that remit in the future.

They also note that, if the Bill is passed, then the Prime Minister will give a direction to the Commissioner to monitor compliance with the *Consolidated Guidance on Detention and Interviewing of Detainees by Intelligence Officers and Military Personnel* in relation to detainees held overseas, which is currently an extra-statutory function. The Clause would require the Prime Minister to publish details of any directions given to the Intelligence Services Commissioner, unless it would be detrimental to do so (for example because it would prejudice national security). The Government envisages that the Prime Minister would be expected to write to the Commissioner with a copy of the letter being deposited in the House of Commons Library.

7.2 Disclosure of Sensitive Material

Part 2 of the Bill establishes a general closed material procedure (CMP) regime for civil proceedings in the High Court, Court of Appeal, Court of Session, and the Supreme Court. The mechanisms for the operation of this regime were changed significantly following the Lords Amendments discussed above. The Government's *Delegated Powers Memorandum,* published following the amendments made on Report, provides a useful summary of the proposed regime:

> Under that new regime, the court seized of relevant civil proceedings may, on application of either party or of its own motion, make a declaration that the proceedings are proceedings in which a closed material application may be made to the court. If such an application were made, the court may make such a declaration if it considers that a party to the proceedings (whether or not the Secretary of State) would be required to disclose material in the course of the proceedings to another person (whether or not another party to the proceedings); that such a disclosure would be damaging to the interests of national security; 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; and that a fair determination of the proceedings is not possible by any other means. Before making a declaration, the court must also consider whether a Public Interest Immunity claim could have been made in relation to the material. The courts are not obliged to ignore the fact that there would be no requirement to disclose if the material were withheld on grounds of PII or the person concerned chose not to rely on the material. 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.

Clauses 6 to 11 provide for the basic foundation of the proposed system. **Clause 6** provides the detail about the type of proceedings in which CMPs will be permitted and the circumstances in which a court may make an order. Following the amendments on Report (discussed above), the Clause now provides:

> (2) The court may make such a declaration if the court considers that—
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> (a) a party to the proceedings (whether or not the Secretary of State) would be required to disclose material in the course of the proceedings to another person (whether or not another party to the proceedings),

(b) such a disclosure would be damaging to the interests of national security,

(c) 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, and

(d) a fair determination of the proceedings is not possible by any other means.

Clause 6(3) would oblige the court to ignore the bar on intercept evidence (under section 17(1) of the *Regulation of Investigatory Powers Act 2000*) when deciding whether a party to proceedings would be required to disclosed material. Clauses 6(5) and (6) oblige the Secretary of State and the court respectively to consider whether a claim for public interest immunity should be made as an alternative.

Clause 6(8) would effectively require the Secretary of State to give notice of his or her intention to make an application for a declaration that closed material procedure may be used and to inform the parties of the result of the application.

Clause 6(9) defines the relevant civil proceedings sets the range of civil proceedings in which a declaration under subsection (1) may be made. These are defined as proceedings in the High Court, the Court of Appeal, the Court of Session or the Supreme Court (which are not criminal proceedings).

Clause 7 concerns the rules of court for those proceedings in which a declaration under Clause 6 has been made. The ECHR memorandum published by the Government states that 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." The rules would, amongst other things, ensure that the court has to consider requiring the person withholding material to provide a summary of it to other parties to the proceedings and their legal representatives (although the court is required to ensure that such a summary could not be damaging to national security). As mentioned above, the Clause, as drafted, would not oblige the gist of the evidence to be made available to the other party.

Clause 8 relates to the appointment of Special Advocates. Special Advocates would continue to be appointed (depending on the jurisdiction concerned) by the Attorney General, the Advocate General for Scotland or the Advocate General for Northern Ireland. The Clause reiterates the fact that the Special Advocate is not responsible to the person whose interests they represent.

Clause 9 is a savings provision which states that subject to Clauses 7, 8 and 10, rules of court relating to what are described as "section 6 proceedings" must ensure that the normal rules of disclosure applying to a particular set of proceedings in which closed material applications are permitted continue to apply.

Clause 10 contains the general provisions to be included in the rules of court relating to section 6 proceedings. These would allow (amongst other things) for proceedings to be determined without a hearing; for proceedings to take place without full particulars of the reasons for decisions in the proceedings being given to a party to the proceedings (or their legal representative); for the court concerned to conduct proceedings in the absence of any person, including a party to the proceedings or their legal representative; and, for the court to give a party to the proceedings a summary of evidence taken in the party's absence.

Clause 11 is an interpretative provision (the order making power which would have allowed the Secretary of State to make an order amending the definition of the relevant civil proceedings that could be made subject to a CMP having been removed following a

Government amendment at Report stage). Clause 11(2) confirms that nothing in the preceding Clauses (6-10) affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings.

Clause 12 inserts new sections 2C and 2D into the *Special Immigration Appeals Commission Act 1997* to provide for a right of review on judicial review principles by the Special Immigration Appeals Commission in a number of additional categories of executive action by the Secretary of State, namely:

- Directions by the Secretary of State to exclude non-EEA nationals made wholly or partly on the grounds that such exclusion is conducive to the public good and where (a) there is no right of appeal under Part 5 of the *Nationality, Immigration and Asylum Act 2002* and (b) the direction is personally certified by the Secretary of State as one that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public in the interests of national security, the relationship between the United Kingdom and another country or otherwise in the public interest; and,

- Decisions to refuse to issue a certificate of naturalisation under section 6 of the *British Nationality Act 1981* or a refusal to grant an application of the kind mentioned in section 41A of that Act for the same reasons.

The explanatory notes indicate that the "effect of these provisions is that a closed material procedure is available under the *Special Immigration Appeals Commission Act 1997* for the hearings before SIAC, whereas such a procedure would not be available if the decisions continued to be subject to ordinary judicial review." Hence a person affected by such a decision would be entitled to apply to the Special Immigration Appeals Commission for the decision to be set aside. The Commission would review the decision on judicial review principles, and the existing closed material procedure set out in *Special Immigration Appeals Commission Act 1997* would apply to any such review.

Clause 13 relates to the use of intercept evidence in employment cases involving national security.[95] The Clause would amend section 18 of the *Regulation of Investigatory Powers Act 2000* to permit the use of intercept evidence in closed proceedings before an employment tribunal or (in Northern Ireland) an industrial tribunal.

Clause 14 relates to the 'Norwich Pharmacal' jurisdiction. It would prevent the court from exercising this jurisdiction to order the disclosure of sensitive information. The *Delegated Powers Memorandum* states that the Bill would restrict:

> the granting 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 14(2) would restrict the ability of the courts to make such an order in cases where sensitive information is in issue, by providing that the court may not exercise its "residual disclosure jurisdiction" in this context to order disclosure of sensitive information, whether the disclosure would be to the applicant or to another person on whose behalf the information is sought. Sensitive information is defined principally as any information, or alleged information, that is held by or for, or obtained from, an "intelligence service" (defined in

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[95] For more general background on the question of intercept evidence, see: *The Use of Intercept Evidence in Terrorism Cases*, House of Commons Library Standard Note SN/HA/5249

subsection (6)), or which is derived from such information or relates to an intelligence service. This would amount to an automatic ban on the disclosure under the Norwich Pharmacal jurisdiction of any intelligence service information.

However, the provision would also extend to any other information referred to in a certificate issued by the Secretary of State under subsection (3)(e).

The Secretary of State would only be entitled to issue a certificate under subsection 3(e) if he or she considered it would be contrary to the interests of national security or international relations to disclose the information, whether the information exists, or whether the person said to hold the information is in fact in possession of the information. The explanatory notes state that this is to deal with the principle of "neither confirm or deny" where confirmation of the existence or possession of information would be contrary to the interests of national security or international relations. Clause 14(7) allows the Secretary of State to issue a certificate in circumstances where the disclosure is being sought from a third party.

The explanatory notes also confirm that the courts' jurisdiction to order disclosure of material other than "sensitive information" under Norwich Pharmacal relief would remain unaffected. The breadth of this provision has been criticised by the JCHR and the Independent Reviewer of Terrorism Legislation (see section 3 of this paper above).

The Clause extends to Scotland, although there is currently no Scottish equivalent to the Norwich Pharmacal jurisdiction.

Clause 15 provides a review procedure where the Secretary of State had issued a certificate under Clause 14(3)(e). The procedure would involve the court (on traditional judicial review grounds) considering whether the Secretary of State was wrong to determine that disclosure of the information (or its existence or the fact of it being held) would be damaging to the interests of national security or international relations. Such a review would take place under a CMP.

Clause 16 would introduce Schedules 2 and 3. These contain consequential and transitional provisions. These would, amongst other things, ensure that if enacted during a Parliament, the current Chair and members of the ISC would automatically become the members and Chair of the new ISC and would apply Clauses 14 and 15 (on the Norwich Pharmacal jurisdiction) retrospectively to proceedings begun but not finally determined before the coming into force of Clause 14.