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Justice and Security Bill [HL] Committee Stage Report

Bill No 134 of 2012-13

RESEARCH PAPER 13/13 22 February 2013

This paper has been produced following the Committee Stage of the *Justice and Security Bill* in the House of Commons, which took place between 29 January and 7 February 2013. 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. Second Reading took place on 18 December 2012. A number of noteworthy and controversial amendments were made to the Bill in Committee.

Alexander Horne

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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 (ISC), 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 (CMPs) 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 CMPs 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 CMPs have existed in a number of contexts for some years; however, in a recent court case, the Supreme Court determined that a court was not entitled to adopt a CMP in an ordinary civil claim for damages (and that it was for Parliament to legislate to make CMPs available in such proceedings, if it wished to do so).

Second Reading of the Bill in the House of Commons took place on 18 December 2012 and the Bill had its Committee Stage between 29 January and 7 February 2013. At Committee stage, certain amendments which had been introduced by the House of Lords (namely additional safeguards relating to the use of CMPs which had been recommended by the Joint Committee on Human Rights) were overturned by the Government. The Government has claimed that its amendments to the Bill meet the same concerns as the amendments made in the House of Lords. The Joint Committee on Human Rights is expected to issue a report on the Government amendments prior to Report stage. Amendments were also made to the provisions relating to the ISC. In particular, under Clause 1 and Schedule 1 it was renamed the 'Intelligence and Security Committee of Parliament' and further amendments were made relating to witness evidence under oath, the publication of information received in private and protection for witnesses. A number of human rights NGOs and others are campaigning to have the CMP measures contained in Part 2 of the Bill removed in their entirety. Lord Pannick QC who had proposed the Lords amendments was quoted by *The Times* as being "very concerned" that these amendments were removed.

1 Introduction

A full background to the *Justice and Security Bill* can be found in the House of Commons Library document *Justice and Security Bill: Research Paper 12-80*, which was produced for the Second Reading Debate and this material will not be rehearsed here.

As mentioned above, 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 (ISC), 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' (CMPs) 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.[1] Part 3 of the Bill contains general consequential and transitional provisions and also sets out the Bill's territorial extent (the vast majority of the provisions would extend UK wide). In November 2012, the Scottish Justice Secretary, Kenny MacAskill MSP, wrote to the Scottish Parliament to express concerns about Part 2 of the Bill.[2] He said:

> [T]he Scottish Government has concluded that it is unable to support any extension – under any circumstances – of the Bill into devolved areas, and has made this clear to the UK Government. In response, the UK Government has made appropriate amendments to ensure the Bill does not encroach on these areas.[3]

2 Second Reading

The Bill had its Second Reading on 8 December 2012. Kenneth Clarke (Minister without Portfolio in the Cabinet Office) introduced the Bill. He accepted that the proposals contained in the Bill had "aroused quite a bit of passion and debate among those interested in the subject."[4] He referred to the amendments proposed by the Joint Committee on Human Rights (JCHR) and passed in the House of Lords, but stated that the while the Government would accept some of the amendments, it was "not wholly convinced that every one of the amendments is quite right, or even that some of them would have the effect that the Joint Committee proposed."[5] These amendments are discussed in significant detail at section 3 below and were also examined in *Research Paper 12-80*.

Sadiq Khan, the Shadow Justice Secretary and Lord Chancellor was critical of the way that the Government had proceeded with the legislation, noting that it had moved straight from a contentious Green Paper to legislation, without a White Paper.[6] He spoke in favour of the amendments to CMPs proposed by the JCHR and passed in the House of Lords and noted that the Opposition would "oppose any attempts to water down the improvements that have already been made."[7] Sadiq Khan concluded by observing that:

> We do not intend to oppose the Bill on Second Reading. However, I hope that I have made it clear that we wish not only to hold on to the improvements that were made to the Bill in the other place, but to use the Committee stage to seek further

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[1] See, for example: JUSTICE, *JUSTICE and others condemn Government's rewrite of the Secret Courts Bill*, 6 February 2013
[2] Letter from Kenny MacAskill MSP, 22 November 2012
[3] *Ibid*
[4] HC Deb 18 December 2012 c713
[5] HC Deb 18 December 2012 c714
[6] HC Deb 18 December 2012 c731
[7] HC Deb 18 December 2012 c733

> improvements. How we vote on Report and Third Reading will be determined by the Government's actions in Committee between now and then.[8]

During the course of Second Reading, the current Chair of the ISC, Sir Malcolm Rifkind spoke on the measures contained in Part 1 of the Bill on oversight by the ISC. He said that it was "easy for me and the Committee to welcome part 1, because 95% of it is exactly what we recommended to the Government many months ago."[9] He also announced that the ISC would be holding its first public evidence session in early 2013 and that if it was seen to be successful, "it should indeed become a regular event."[10]

On Part 2 of the Bill, he argued that:

> It goes without saying that closed material proceedings are not very satisfactory, but in the imperfect world in which we live, the choice is sometimes between good solutions and bad solutions but more often between bad solutions and worse solutions. As has been said, public interest immunity is not a feasible alternative.[11] The £2 million settlement that was made just a couple of weeks ago was a case to which intelligence material would have been central if it had gone to court. There could not have been PII, because that would have excluded all the material. That leaves us to introduce a system that, as the former Lord Chief Justice Lord Woolf has said, is certainly preferable to PII. I say to hon. Members who still have their doubts that the system is not perfect, but it is a lot better than the one we have at the moment. That is why it is in the national interest to support the Bill.[12]

The Chair of the Justice Committee, Sir Alan Beith, spoke in tribute of the work of the JCHR:

> The Joint Committee's excellent work contributed hugely to their lordships making the Bill more acceptable to those of us who come at it from a more liberal standpoint. Their lordships made it quite clear that although the Executive apply for closed material proceedings, the judge decides.[13]

He argued that as a result of proceedings in the House of Lords:

> [W]e are now close to achieving a reasonably satisfactory balance in using difficult and unwelcome powers to ensure that information can be put before a court. None of us would want to have to use the process, but without it we will not be able to decide cases on the evidence available.[14]

The Chair of the JCHR, Dr Hywel Francis, said that the amendments made in the House of Lords had "improved the Bill" but contended that:

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[8] HC Deb 18 December 2012 c734
[9] HC Deb 18 December 2012 c734
[10] HC Deb 18 December 2012 c797
[11] 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
[12] HC Deb 18 December 2012 c738
[13] HC Deb 18 December 2012 c743
[14] HC Deb 18 December 2012 c744

> [...] the Government still have a long way to go in improving this measure before they can plausibly claim that it is compatible with British traditions of fairness and openness, of which this House has been a proud defender.[15]

He set out four areas where he thought improvements could be made:

> First, we need provision for full judicial balancing of interests to take place within a closed material procedure. The House of Lords—by an overwhelming majority—amended the Bill to ensure that there is full judicial balancing of interests at the gateway stage, when the court decides whether a closed material procedure is appropriate. However, the amendment to ensure that the same judicial balancing takes place within the closed material procedure, when the court is deciding whether material should be closed or open, was defeated in the Lords late at night. Labour backed the amendment recommended by my Committee in the Lords, and I hope it will do so in this House. The amendment is essential to ensure that judges have the discretion they require to ensure that the Bill does not create unfairness.
>
> Secondly, the House needs to listen to the expert views of the special advocates and act on their recommendation that the Bill must include what has become known as a "gisting" requirement, which has been referred to. My Committee recommended that such a requirement be included in the Terrorist Asset-Freezing etc. Act 2010, but the Government resisted, and the High Court last week held that such a requirement is necessary for the legislation to be compatible with human rights. The House should not leave it to the courts to correct the Government's mistakes, so we should amend the Bill to give effect to the Committee's recommendation.
>
> Thirdly, the Bill needs to make provision for regular reporting to Parliament, as has been suggested. The Secretary of State should report regularly for independent review by the independent reviewer of terrorism legislation, and for annual renewal, to ensure a regular opportunity for Parliament to review the operation of the legislation and to debate its continuing necessity.
>
> Fourthly and finally, the Bill needs to be amended to provide a more proportionate response to the problem of preventing courts ordering the disclosure of national-security sensitive information.[16]

Jack Straw (who has previously held the offices of Home Secretary, Foreign Secretary and Lord Chancellor, amongst others) argued that opponents of CMPs who instead argued in favour of the use of Public Interest Immunity (PII) procedures were being disingenuous. In particular, he contended that he had worked through many PII cases and "if there were thousands of documents, as there would be in these cases, a Minister would have to take a month or so off to operate that end." He said that:

> [...] in the absence of CMPs, there is no way of determining misconduct by members of the agencies in a civil action. The most that can happen is a settlement out of court with a payment into court but no admission of liability. That is profoundly unjust to both sides.[17]

On the question that the Bill be read a second time, the House divided (262 Ayes, 18 Noes).

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[15] HC Deb 18 December 2012 c744
[16] HC Deb 18 December 2012 c746
[17] HC Deb 18 December 2012 c759

3 Committee Stage

Full details of the Committee stage in the House of Commons, including the debates and the evidence submitted to the Public Bill Committee can be found on the Parliament website. A 'track changes' version of the Bill, showing a full list of the amendments made at Committee stage is also available. The Government issued a response to the report of the JCHR in January 2013.[18] Amendments were made to provisions relating to both the oversight of the intelligence and security activities (Part 1) and disclosure of sensitive material (Part 2). The following summary highlights noteworthy amendments made to the Bill and some of the more significant areas of debate. All references to clause numbers in this summary are references to the clause numbers which applied to the Bill which entered the Committee. An updated version of the Bill (which has new clause numbers) is available from the Bill page.

3.1 Oversight of the Intelligence and Security Service

James Brokenshire, the Parliamentary Under Secretary of State the Home Office (hereafter the Minister), moved an amendment to highlight the parliamentary character of the ISC. The amendment would change the name of the ISC to the 'Intelligence and Security Committee of Parliament' (**Clause 1** and **Schedule 1)**. The Minister said that it would "more fully realise the Government's intention that the ISC should be a Committee of Parliament, created by statute."[19]

Mr Brokenshire explained that this amendment made it necessary to make a number of consequential amendments relating to Freedom of Information (to ensure that the House of Lords and House of Commons were not subject to the Freedom of Information Act 2000 as regards information held by the ISC). He noted that this arrangement would reflect the status quo.

In response, Diana Johnson, the Shadow Home Office Minister, recorded thanks to the Clerk of the House of Commons for having provided a letter giving advice on the status of the Government amendments.[20] She indicated that the Committee ought to be clear that what was being created was a statutory committee, not a Select Committee of Parliament. Diana Johnson posed a series of questions about staffing and financing the ISC. Mr Brokenshire explained that "discussions were underway with the House authorities and the ISC" and that clearly "staff engaged would have to be develop-vetted, and specific premises would need to be attached to the ISC office accommodation given the nature of the materials that the ISC holds."[21] The Government amendment was agreed without a division.

A separate Government amendment to the effect that information held by the ISC in connection with the discharge of its functions could not be disclosed in any criminal, civil or disciplinary proceedings, or tribunal (unless the evidence was given in bad faith) was also agreed. In the course of debate it was clear that this amendment was designed, in part, to protect witnesses who give evidence to the ISC. There was some discussion as to whether this was better done through parliamentary privilege – an issue that was addressed in the letter from the Clerk of the House.

The Minister resisted an Opposition amendment seeking to have the majority of the members of the ISC drawn from the House of Commons, arguing that the balance of MPs

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[18] HM Government, *Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill*, Cm 8533, January 2013

[19] PBC Deb 29 January 2013 c6

[20] This letter can found amongst the evidence submitted to the Public Bill Committee and can be downloaded from the Parliament website

[21] PBC Deb 29 January 2013 c15

and peers was "best left to be handled by the usual channels."[22] The amendment was defeated on a division.[23]

There was a discussion about whether the Chair of the ISC ought to be treated as a Chair of a Select Committee and remunerated accordingly.[24] An amendment to this effect was withdrawn.

A series of Government amendments to **Schedule 1** of the Bill were passed. These amendments were designed (amongst other things) to allow the Committee to take evidence under oath and to regulate the Committee's consideration of operational matters. In relation to the latter, the Minister acknowledged that Lord Butler of Brockwell (representing the ISC) had raised two concerns in the House of Lords. The first concern was where there were exceptional circumstances in which it might suit the Government to have the ISC oversee an operational matter that falls outside the operational oversight specified in the Bill (i.e. one that was part of an ongoing intelligence or security operation). The second was that the Bill should not put the ISC in a less advantageous position with regard to oversight of operational matters than it is currently in. The Minister summarised the effect of the Government amendments as follows:

> Our amendments will result in three sets of circumstances in which the ISC may consider particular operational matters. The first set is where the original clause 2(3) criteria are met; the second set is the exceptional case, to meet the ISC's first concern, in which the Government request the ISC to consider a matter, notwithstanding that the original duty in clause 2(3) criteria are not met; and the third set of circumstances is where the ISC's consideration of a matter is limited to considering information provided to the ISC voluntarily by the agencies or another Government Department which, in essence, is the ISC's second concern.[25]

Diana Johnson argued that the amendment was a "slight improvement on the original drafting of the Bill", but she contended that "there are still two problems: first, the new system is still more bureaucratic than the present one, and, secondly, it demands the Prime Minister's involvement. That runs counter to the Government's stated aim of giving the ISC more independence, and it makes the system liable to delay."[26] The Minister responded that he did "not believe that anything in clause 2 or schedule 1 will restrict the Committee's work in the way that has been postulated."[27]

A Government amendment relating to the withholding of information to the ISC, ensuring that such decision had to be made by the most appropriate Ministers at the highest level was accepted without a division.[28]

Finally, the Minister moved a series of consequential amendments. He explained that:

> As a consequence of the ISC being a statutory Committee of Parliament, it will have a greater general power to publish information, which will sit alongside its express power to publish reports to Parliament. As a consequence, the new ISC could publish evidence it had received other than through its reports to Parliament. Although the Official Secrets Act gives some protection against disclosure of information that the ISC receives, particularly against disclosure of agency information, we do not think the

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[22] PBC Deb 29 January 2013 c29
[23] PBC Deb 29 January 2013 c31 (8 Ayes, 10 Noes)
[24] PBC Deb 29 January 2013, cc36
[25] PBC Deb 29 January 2013 c67
[26] PBC Deb 29 January 2013 c69
[27] PBC Deb 29 January 2013 c72
[28] PBC Deb 29 January 2013 c76

> Act alone will give sufficient protection [...] In so far as information coming to the ISC is not protected from disclosure by the Official Secrets Act, the other safeguards for protection of sensitive information in the Bill would be undermined. In other words, without some additional restriction on the power to publish, a new Intelligence and Security Committee of Parliament would be able to publish protectively marked information. The Prime Minister would not be able, as he currently is in relation to the ISC reports, to exclude material the disclosure of which would be prejudicial to the functions of the agencies, or of other parts of Government or the intelligence community.[29]

Diana Johnson described the amendment as a "specific statutory block on the ISC publishing or releasing information apart from through its annual report."[30] Paul Murphy, a former Chair of the ISC, commented that he found the Government's proposals in this area "over the top" arguing that they were a "backward step", "too complicated" and "too bureaucratic."[31] He suggested, as an example, that when the ISC reviewed the intelligence on the London terrorist attacks of 2005, it met several survivors of that incident in a private session. He said:

> Had we wanted then to put out a press notice or publish details of that meeting, under this proposal, the ISC would have had to put it into its annual report. That is nonsense and makes the situation worse than it is at the moment.[32]

Dr Julian Lewis suggested that the amendment was badly worded as it referred to "information received by the ISC in private" rather than classified or protectively marked information.

The Minister responded that while the ISC was currently "in practice acting beyond its current strict capabilities in some sense" he did not believe that the amendment would preclude the issue of the sort of press release described. He undertook to re-examine the relevant provisions and reflect on the matter to

> ensure that the provision strikes the right balance in recognising the change in the nature of the ISC, while ensuring that appropriate safeguards are in place to ensure that protectively marked information is not disclosed inadvertently or without the proper process that already exists for ISC reports.[33]

The amendment was accordingly agreed.

There was a discussion as to whether the ISC might conduct pre-appointment hearings in respect of the heads of the security and intelligence agencies. Paul Murphy argued that this might give the ISC "greater stature" and noted that such meetings would be held in private.[34]

James Brokenshire responded that the pre-appointment process had "never been used for the appointment of civil servants" and that "the heads of the intelligence and security agencies are permanent secretary-level civil servants, and the recruitment process is therefore expected to follow the process for appointment of civil servants of such seniority."[35]

Mr Brokenshire also offered to provide a revised document to set out what might be included in the Memorandum of Understanding (MoU) between the ISC and the Prime Minister. The

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[29] PBC Deb 31 January 2013 cc85-86
[30] PBC Deb 31 January 2013 c88
[31] PBC Deb 31 January 2013 cc87-88
[32] *Ibid*
[33] PBC Deb 31 January 2013 c91
[34] PBC Deb 31 January 2013 c95
[35] PBC Deb 31 January 2013 c96

MoU would govern the relationship between the Prime Minister and the ISC, including the matters that it is proper for the ISC to investigate. The Minister noted that the final MoU did not yet exist as it was being drawn up in parallel with the Bill's passage through Parliament. He indicated that the final MoU would be an unclassified document and would be published and laid before Parliament.[36]

3.2 Disclosure of Sensitive Material

Issues relating to Part 2 of the Bill (namely the 'disclosure of sensitive material') were by far the most contentious aspects of proceedings throughout the passage of the Bill. This did not change in Committee and much of the Committee stage was spent in discussion of these clauses. As mentioned above, the Government's original proposals were subject to amendment in the House of Lords. These amendments had followed from a report of the JCHR entitled *Legislative Scrutiny: Justice and Security Bill* (HL Paper 59/HC 370) which was published on 13 November 2013.

At the outset in Committee, James Brokenshire reflected on the Lords amendments and stated that:

> The Government have listened to the views, expressed during the passage of the Bill so far, about judicial discretion and in particular about who may apply for a closed material procedure. I note the contributions made by the Joint Committee on Human Rights as well as the amendments discussed in the other place.
>
> The Minister without Portfolio announced on Second Reading that the Government accepted the principle behind the amendment tabled in the other place by members of the Joint Committee on Human Rights—that either party can apply for a closed material procedure and that the court, of its own motion, can also trigger the CMP process.
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> The Government have accepted that it may be particularly important for the court to be able to order a CMP as an alternative to granting a public interest immunity application, for example. That deals with the concern that the Executive could choose between PII and CMP as and when it suited them.
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> In addition, there may be circumstances in which a party to the proceedings holds national security material and wishes to apply for a CMP; they may, for instance, have been working with the Government and have been given the material during the course of their work. They should equally have the ability to defend themselves in cases in which they are required to disclose such material, without breaching the terms under which they have been entrusted with it.[37]

The Government nonetheless tabled amendments relating to these clauses. The first set of amendments to **Clause 6** (Proceedings in which Court permits closed material proceedings) were described by the Minister as "minor technical changes to the amendment carried in the other place." The Minister described the effect of the amendment as follows:

> The amendments allow for the following permutations of applications for a CMP. First, the Secretary of State, as a party to the proceedings, applies for a CMP. Secondly, the Secretary of State, as a party, applies for a CMP on behalf of another party. Thirdly, the Secretary of State, as a non-party, applies for a CMP on behalf of another party. Fourthly, a party to proceedings other than the Secretary of State applies for a CMP to protect himself or herself from having to disclose sensitive material. Finally, the court

[36] PBC Deb 31 January 2013 c99
[37] PBC Deb 31 January 2013 cc109-110

> makes a declaration for a CMP of its own motion to prevent disclosure of sensitive material.[38]

The Minister acknowledged that "there may be concern that a particular circumstance is not covered by the amendments" where "a party to proceedings other than the Secretary of State wants to apply for a declaration to require another party to disclose material into a CMP."[39] He argued that an individual in those circumstances would not know that relevant material existed and that was "why the Government's amendments allow claimants to sidestep that process and ask the court to order a CMP of its own motion."[40] The amendment was made without a division.

The Minister proceeded to move several further amendments to **Clause 6**. The Minister again indicated that the Government had "listened carefully to the concerns expressed and amendments made in the other place" and that it had therefore "brought forward a new package of measures."[41] The Government amendments effectively changed the conditions which had to be met before a CMP would be ordered by the court. The amendments left the making of a declaration for a CMP to the discretion of the court (the court *may* make such a declaration if it considers that the relevant conditions are met).

The wording of the first of the relevant conditions varied depending upon whether an application was made by the Secretary of State (or on the court's own motion) or whether the court was considering whether to make a declaration on the application of a party to the proceedings other than the Secretary of State. [42]

In relation to the a case where the court was considering whether to make a declaration on the application of the Secretary of State or of its own motion, the first the condition was that a party would be required to disclose sensitive information in the course of the proceedings (or that they would be required to do so, but for an application for PII or some other enactment). Sensitive material is material the disclosure of which would be contrary to national security. The second condition was that it was "in the interests of the fair and effective administration of justice in the proceedings to make a declaration."

The Minister said that:

> The amendment reflects a new approach to how CMPs should be initiated, taking account of the views of the Joint Committee on Human Rights [...] The change in the amendment maintains the Government position that judges should have discretion, but also the need to protect sensitive national security information.[43]

He explained the divergence from the House of Lords amendments:

> After careful analysis, the Government concluded that the amendments passed in the House of Lords to clause 6 would require the court to exhaust every other option for trying the case before granting a CMP declaration. In particular, they would require a full PII exercise to be conducted first in every case. We do not think that is the best way of achieving what the Government, and, indeed, the Joint Committee on Human

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[38] PBC Deb 31 January 2013 c110
[39] PBC Deb 31 January 2013 c111
[40] *Ibid*
[41] PBC Deb 31 January 2013 c126
[42] For a criticism of the condition imposed on third parties, see PBC Deb 31 January 2013 cc 148-9, where Andy Slaughter cited comments from the NGO JUSTICE that two distinct schemes should apply to applications by the Secretary of State and all other applications and that this resulted in the Government retaining a "a litigation advantage under the Bill."
[43] PBC Deb 31 January 2013 c127

> Rights, intend, as it reduces the discretion of the judges to decide whether a CMP would be in the interest of the fair and effective administration of justice in the proceedings.[44]

He went on to add that:

> The second part of the Government package puts a power in the Bill for the court to revoke a declaration through new clause 5. That measure provides the explicit power to revoke a CMP declaration at any point if the judge does not believe its continuation to be in the interests of a fair and effective administration of justice in the proceedings.[45]

Dr Julian Huppert called the new Clause 5 "a welcome step" but queried how the Government's test would work in practice. Andy Slaughter (Shadow Minister for Justice) asked about what is often referred to as the '*Wiley* balance': a test established under the common law[46] which it is argued could be used to consider whether 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. He noted that this was not included in the Government amendment. There was also a discussion about why reference to PII had been removed from the Bill. In response to the first point, the Minister replied that:

> [I]n essence that test is about the decision making on taking material out of consideration. We judge that using that test, or that language, does not necessarily reflect the changed circumstance, because we are talking about whether to consider material.[47]

In respect of PII, the Minister said that there "may be cases that are better tried by using PII, such as those where the sensitive material is peripheral to the case" and that the Bill made it clear that PII remained as a tool "but the court should not require PII to have been exhausted before granting a CMP."[48] He contended that it should be enough if the Secretary of State can give good and persuasive reasons why PII is not appropriate in that case and why a CMP would be a fair and effective way to find a sensible conclusion to the case.

The Minster also noted that it had been a policy of successive Governments and the practice of Parliament not to define the term 'national security' but added:

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[44] PBC Deb 31 January 2013 c131

[45] PBC Deb 31 January 2013 c128

[46] See *R v Chief Constable of West Midlands, ex p Wiley* [1995] 1 AC 274. It is a test used in applications for PII. The House of Lords had amended the Bill to make it a precondition of a CMP declaration that the court considers 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" – the so called "*Wiley* balance"

[47] PBC Deb 31 January 2013 c129. This issue was discussed in much more detail in the Government's response to the JCHR when it said: "The Wiley balance used in PII claims is for a specific purpose in a specific context. The result of a PII claim is that relevant material is excluded from the court and from consideration completely. A decision to do that must therefore carefully balance national security against the public interest in the fair and open administration of justice. A balance of fairness and open justice on one side and national security on the other works in PII where the question is about excluding material entirely, and the impact that could have on the proceedings. But CMPs are different – the material within the CMP is fully taken into account: the interests of the individual are represented by Special Advocates, with the judge overseeing the process to ensure proceedings are fair in Article 6 terms. Where the consequences are the inclusion of the material in the case, there is no precedent for including Wiley balancing. Closed material procedures have operated since 1997 in at least 14 different contexts and none of them involve Wiley balancing. They have been upheld by the courts as being fair and compliant with Article 6." See: HM Government, *Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill*, Cm 8533, January 2013, p 14

[48] PBC Deb 31 January 2013 cc131-2

> As an indication, the types of material sensitive to national security that may be heard in closed session could include information from a sensitive source whose life or safety would be put in danger if it were openly disclosed, information relating to current covert operations that would be compromised if they were made public, national security intelligence material shared with the UK by foreign intelligence agencies, and the content of telephone calls or e-mails intercepted by the intelligence agencies, which would not be admissible in open civil proceedings.[49]

Andy Slaughter said that the Government's amendments were "complex" but that their effect would be to undo the "necessary safeguards that the House of Lords voted overwhelmingly to include in the Bill." In particular, he argued that:

> Under the amendment, CMPs in civil proceedings will no longer be the last resort. It will remove the requirement that the judge should balance the interests of national security with the public's interest in the fair and open administration of justice. It will no longer require that the judge should decide that a fair determination of the proceedings is not available by any other means before declaring that there can be a CMP. It will also remove the explicit requirement that the judge must determine that disclosure in the case would damage the interests of national security. The amendment will also increase the unfairness of CMPs in civil proceedings, and undermine almost entirely the limited steps to equality of arms achieved by the Lords, by imposing different rules for the Government and all other parties. It will fetter judicial discretion by imposing the test of whether the CMP is in the interests of the fair and effective administration of justice in the proceedings, and will not mandate the judge to look at wider public interests in the open administration of justice.[50]

There was extensive debate on the proposed amendments to Clause 6 and alternative Opposition amendments were also discussed. The Government amendments were agreed on a division (10 Ayes, 9 Noes) and the clause as amended was ordered to stand part of the Bill.

The Opposition tabled amendments to **Clause 7** of the Bill (Determination by the Court of Applications in Section 6 Proceedings). Andy Slaughter noted that "a second review process occurs with clause 7, following entry into the process under clause 6." He argued that:

> The House of Lords overwhelmingly supported the Wiley test as a gateway to entry into CMPs. In a sitting of the full House, the Wiley test—as endorsed by the Joint Committee on Human Rights—was approved as an essential criterion for entry to CMPs, in a vote in which the Government were defeated by 247 votes to 160. The proposal was supported by no fewer than 54 Liberal Democrat peers. The fact that a vote on inserting exactly the same words into clause 7 did not succeed might be explained by the sitting hours and the habits of their Lordships, because a much reduced House took that vote.[51]

Mr Slaughter suggested that the Bill significantly inhibited a judge's powers since rules of court would have to secure "that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security". He contended that this did "not take into account any variation in the relative strength of national security interests and other interests that are at stake." He said that this was "a considerable restriction on the usual power of the court under PII, in that disclosure may be ordered where the interests of justice outweigh those of national

[49] PBC Deb 31 January 2013 c130
[50] PBC Deb 31 January 2013 cc142-3
[51] PBC Deb 5 February 2013 c204

security."[52] He described it as a "crucial amendment" and said that the JCHR had "recommended that the Wiley balance form an integral part of any CMP procedure."[53]

The Minister responded that the amendment was "counter-productive and it is not necessary." He suggested that there was "discretion is in the existing structures and process, and through the mechanisms in relation to new clause 5."[54] The amendment was defeated on a division (9 Ayes, 10 Noes). A further amendment was proposed relating to the process of "gisting".[55] Dr Huppert argued that:

> There should be a statutory requirement in all cases to provide the excluded party with the gist of the closed material, sufficient to enable them to give effective instructions to the special advocate. Without the obligation, there are issues about unfairness and whether someone can realistically provide the information for the special advocate to do the correct testing within a CMP process.[56]

The Minister responded that:

> If a court gives permission for material not to be disclosed, it must be agreed that it is damaging to national security. Where it is possible to give gists and summaries of national security-sensitive material without causing damage, they will be supplied. There is no doubt that a court would require a non-damaging summary where one is necessary in the interests of justice. Quite often, however, it may simply not be possible to supply a gist without causing the damage to national security that the consideration of sensitive material in the closed part of proceedings seeks to prevent. The very existence of a document may, in itself, be sensitive.[57]

The Mr Brokenshire noted that the courts had not required that a gist be supplied in every single case. He added that:

> Article 6 [of the European Convention on Human Rights] requires gisting of the form required in the AF (No.3) case. Clause 11(2)(c) means that the court must order it. So there are already provisions that require the judge to consider what fairness requires in the case.[58]

There was a division on Dr Huppert's proposed amendment. It ended in a tie (9 Ayes, 9 Noes) and the Chair cast his deciding vote to leave the text in its existing form because to change it would require a majority.

There was a debate on a proposed new Clause 9 (Disclosure judge) which related to the proposed introduction of a separate judge who would make decisions about CMPs. The proposal envisaged that once the CMP decision had been made, there would then be a separate judge for the trial. The Minister resisted the argument and the proposed new clause was withdrawn. Clause 7 was then ordered to stand part of the Bill.

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[52] PBC Deb 5 February 2013 c205
[53] PBC Deb 5 February 2013 c208
[54] PBC Deb 5 February 2013 c213
[55] The gisting obligation arose in a case before the European Court of Human Rights and was applied by the UK courts in the case of *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 (sometimes referred to as *AF (No. 3).* It is essentially an obligation to disclose to the opposing party in litigation sufficient material to enable them to give effective instruction to the special advocate who represents their interests in closed material proceedings
[56] PBC Deb 5 February 2013 c218
[57] PBC Deb 5 February 2013 c223
[58] PBC Deb 5 February 2013 c224

There was a short debate on **Clause 8** about the appointment of special advocates.[59] Clauses 8 and 9 were ordered to stand part of the Bill without division.

Andy Slaughter proposed an amendment to **Clause 10** of the Bill, to delete a paragraph stating that clause 6 may make provision "enabling or requiring the proceedings to be determined without a hearing". In response, the Minister stated that the provision was "well precedented in other CMP contexts" and was designed so that the Bill did not interfere in any way with "the court's ability to exercise its normal case management powers, where decisions can be made on paper without a hearing, particularly where the parties agree to such a course of action."[60] The amendment was withdrawn. A further amendment suggesting that representative of the media ought to be notified when an application for a declaration under clause 6 was made was also withdrawn. The Minister indicated that he would reflect on the need for openness where possible.[61]

Clause 11 (Interpretation of Sections 6-10) was subject to certain minor amendments without debate.[62] **Clauses 12** and **13** were ordered to stand part of the Bill without amendment and without a division.

Clause 14 of the Bill relates to the disclosure of information under the Norwich Pharmacal jurisdiction.[63] Diana Johnson indicated that the Opposition supported the Government "amending the law to protect the control principle[64], and we accept as necessary their aim of preventing sensitive information from being disclosed under the Norwich Pharmacal principle." She added, however, that the Opposition disagreed with the Government on the definition of sensitive information as laid out in the Bill.[65] She stated that the Opposition did not "believe it is necessary to introduce a blanket exemption for all information from the security services."[66] She proposed amendments which would have had the effect of providing absolute protection for information obtained or derived from intelligence information only where such intelligence information emanates from a foreign intelligence service. In other circumstances, the amendments would limit the protection afforded to information held by a domestic intelligence service to cases where the information related to national security or the interests of the United Kingdom.

The Parliamentary Under Secretary of State for Justice, Jeremy Wright, responded that:

> For information held by, originating from or relating to an intelligence service—the Security Service, the Secret Intelligence Service, GCHQ and military intelligence—the

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[59] PBC Deb 5 February 2013 cc234-238
[60] PBC Deb 5 February 2013 c239
[61] PBC Deb 5 February 2013 c246
[62] PBC Deb 7 February 2013 c259
[63] The principle stems from 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. There have been concerns about how the Norwich Pharmacal jurisdiction applies to national security information and the relevant provisions in the Bill seek to restrict disclosure. Further background material on this issue can be found in the *Justice and Security Bill: Research Paper 12-80*
[64] The *Justice and Security Green Paper* (Cm 8194, 2011) 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."
[65] PBC Deb 7 February 2013 c263
[66] PBC Deb 7 February 2013 c264

> Bill removes the availability of Norwich Pharmacal relief. This approach is consistent with the approach in other legislation that has been passed by the UK Parliament, such as the Freedom of Information Act 2000 in which Parliament explicitly ruled out a right to access intelligence material.[67]

He stated that the fact that the Norwich Pharmacal jurisdiction has become applicable to cases involving national security sensitive information "has resulted in an adverse impact on the UK's intelligence-sharing relationships, which has real implications for the UK's national security interests."[68]

He resisted the amendments, arguing that "there are inherent difficulties in identifying what qualifies as having been obtained from a foreign intelligence service as opposed to one of our own intelligence services."[69] He also stated that the Government simply did "not believe as a matter of principle that it is right that foreign intelligence material should be afforded greater protection under these clauses than domestic intelligence material."[70] Diana Johnson pressed the Opposition amendments to a division. The Committee divided (7 Ayes, 10 Noes) and the clause was ordered to stand part of the Bill.

Clauses 15 and **16** were ordered to stand part of the Bill without significant debate.

Government amendments were made to **Schedule 2** and **3** of the Bill and **Clause 17** without any debate. New Clause 5 (relating to the review and revocation of a declaration under section 6, discussed above) was also inserted without further debate.

New clauses were proposed which sought to establish an annual review of the use of the procedures under Part 2 of the Bill and a sunset provision subject to annual renewal. James Brokenshire rejected the idea of annual renewal, but indicated that the Government would reflect on the subject of reporting and review and would return on Report with a suitable amendment.[71] There were a series of divisions on proposed new clauses relating to renewal of the powers but these were defeated.

3.3 Commentary

The Chair of the JCHR wrote to Kenneth Clarke on 6 February 2013. He indicated that the Committee regretted that the Government amendments were only published on 29 January, on the eve of the Committee stage of the Bill. He added:

> This is particularly regrettable when the purpose of the Government's amendments is to remove from the Bill some of the significant amendments made by the House of Lords on the recommendation of the Committee and to substitute different amendments which the Government says are intended to reflect the Committee's recommendations.

The letter posed a number of questions about the Government amendments; in particular about equality of arms in the ability to apply for a CMP and judicial balancing at "the gateway". It said:

> Under the Bill as it came from the Lords, a party to civil proceedings in which the Government Claims PII in respect of sensitive material would be able to apply to the Court for a CMP. The effect of the Government's amendment to clause 6 is that this

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[67] PBC Deb 7 February 2013 c272
[68] *Ibid*
[69] PBC Deb 7 February 2013 c273
[70] *Ibid*
[71] PBC Deb 7 February 2013 c292

> will not be possible: a party other than the Secretary of State can only apply for a CMP in relation to the material which *it* would be required to disclose, and not material which, but for PII, the Secretary of State would be required to disclose. [...]
>
> The Committee welcomes the Government's acceptance of the court having a discretion as to whether there should be a CMP. However, the House of Lords agreed with the Committee's view that the Bill should ensure that there is full judicial balancing of the competing public interests at play at the "gateway" stage of deciding the appropriate procedure. The House of Lords accordingly amended the Bill to make it a precondition of a CMP declaration that the court considers 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" – the so called "*Wiley* balance". The Government's new clause 6 removes the judicial balancing condition and contains no replacement. The Minister told the Public Bill Committee that the Government's view is that the *Wiley* balancing test is about the court's decision making on whether to take material out of consideration under PII, and is not appropriate for when the court is considering whether material should be allowed to be considered by the courts (PBC 31 January 2013, c129).
>
> The Committee welcomes in principle the idea behind the Government's new clause requiring the courts to keep a CMP declaration under review and enabling it to revoke the declaration if it considers it is no longer necessary. However, the effect of the Government's amendments appears to be to lower the threshold of what is "necessary". The House of Lords amended the Bill to make it a precondition of a CMP declaration that the court is satisfied that "a fair determination of the proceedings is not possible by any other means", as recommended by the Committee as a safeguard to ensure that CMPs are only ever used as a last resort. The Government's amendments would remove the condition and replace it with a new condition, "that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration." The Government's amendments also remove the Lords amendment which requires the court actively to consider whether a claim for PII could be made in relation to the material.
>
> The Government's justification for removing the "last resort" condition inserted by the Lords is that it would have the effect of requiring the court to conduct a full PII exercise in every case.[72]

The letter noted that the JCHR wished to report to the House its views about the Government amendments prior to Report stage. The Committee subsequently took evidence from Mr Clarke on 12 February 2013. In relation to the question as to whether the Government had sought to remove the "last resort" condition, Mr Clarke was keen to stress that the Government had "tried to go for amendments that gave the judge the maximum amount of discretion" and that the Government had avoided using the language of "last resort" on the face of the Bill for fear that "you then have to go through every other possible resort as exhaustively, as I fear it might be argued you should." He made clear that this latter concern was that:

> The wording we removed was very open to argument—possibly successful argument—that before the judge could decide PII was not suitable, you have got to go through the full process of the PII application, because how can you decide about PII if you have not gone through the proper process that normally leads you to whether or

[72] Letter from Dr Hywel Francis, Chair of the JCHR, to Rt Hon Kenneth Clarke MP, Minister without Portfolio, Cabinet Office, 5 February 2013 (available at: Joint Committee on Human Rights, *Justice and Security Bill: Memoranda and Correspondence*)

> not you have PII? That is the reason—the only reason—why we amended the wording of the Bill.[73]

The JCHR also received a further submission from a number of Special Advocates. This emphasised their view that no compelling justification for the proposals in Part 2 of the Bill had been made, but also provided some commentary on the most recent amendments.[74]

Following the Committee stage of the Bill, a number of human rights orientated NGOs expressed renewed concerns about the Bill. JUSTICE, Amnesty, Liberty and Reprieve issued a joint press release in which they were extremely critical about the fact that the Lords amendments had been overturned in Committee. JUSTICE's Director of Human Rights Policy argued that:

> The Government failed to make the case for expanding secret justice wholesale. Now Ministers reject even minor changes to the plan to make closed hearings the default in some cases.[75]

In January 2013, the Centre for Policy Studies published a critical report on the Bill entitled *Neither Just Nor Secure* which was authored by Anthony Peto QC and Andrew Tyrie MP. The report argued that the Lords amendments, whilst valuable, had not been sufficient and that the Government had not provided sufficient justification for the legislation.[76]

On 14 February 2013, the Foreign Secretary, William Hague, gave a speech at the Royal United Services Institute entitled *Countering terrorism overseas*. Amongst other things, he discussed information sharing with third countries detainee treatment and human rights. On the *Justice and Security Bill*, he argued that:

> We are also taking steps to strengthen Parliamentary scrutiny and oversight of the agencies through the Justice and Security Bill currently being considered by Parliament. This also aims to ensure, where strictly necessary, that judges in civil cases relating to matters of national security will be able to consider all relevant material, including sensitive material, to ensure that justice is done while upholding national security. The objective is not to hide away the actions of the most secret parts of the State, but precisely the opposite: to strengthen their accountability and public confidence in them as they go about their difficult, dangerous and necessarily secret work.

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[73] Joint Committee on Human Rights, *Justice and Security Bill: Oral Evidence from Rt Hon Kenneth Clarke MP, Minster without Portfolio, Cabinet Office*, 12 February 2013, HC 370iv

[74] See: Joint Committee on Human Rights, *Justice and Security Bill: Memoranda and Correspondence*

[75] JUSTICE, *JUSTICE and others condemn Government's rewrite of the Secret Courts Bill*, 6 February 2013

[76] See also, Andrew Tyrie, "Justice and Security Bill will hide Britain's role in kidnap and torture", *The Times,* 21 February 2013. By contrast, Robert Buckland MP, a member of the JCHR recently wrote an article for *Conservative Home* entitled: "Andrew Tyrie's concerns about the Justice and Security Bill are understandable but wrong"

Appendix 1 – Membership of the Committee

The Committee consisted of the following Members:

Chairs: Mr David Crausby, Mr James Gray

Alexander, Heidi (Lewisham East) (Lab)
Brazier, Mr Julian (Canterbury) (Con)
Brokenshire, James (Parliamentary Under-Secretary of State for the Home Department)
Crockart, Mike (Edinburgh West) (LD)
Evans, Graham (Weaver Vale) (Con)
Evennett, Mr David (Lord Commissioner of Her Majesty's Treasury)
Gilmore, Sheila (Edinburgh East) (Lab)
Hillier, Meg (Hackney South and Shoreditch) (Lab/Co-op)
Huppert, Dr Julian (Cambridge) (LD)
Johnson, Diana (Kingston upon Hull North) (Lab)
Lewis, Dr Julian (New Forest East) (Con)
Murphy, Paul (Torfaen) (Lab)
Neill, Robert (Bromley and Chislehurst) (Con)
Nokes, Caroline (Romsey and Southampton North)(Con)
Paisley, Ian (North Antrim) (DUP)
Phillipson, Bridget (Houghton and Sunderland South) (Lab)
Scott, Mr Lee (Ilford North) (Con)
Slaughter, Mr Andy (Hammersmith) (Lab)
Wright, Jeremy (Parliamentary Under-Secretary of State for Justice)

Steven Mark, Lloyd Owen, Committee Clerks