HOUSE OF LORDS
Library Note

Justice and Security Bill [HL] (HL Bill 27 of 2012–13)

This Library Note provides background reading in advance of the second reading in the House of Lords of the Justice and Security Bill on 19 June 2012. The Bill would modernise and strengthen oversight of the intelligence and security agencies, and would allow civil courts, through the use of closed material procedures, to hear a greater range of evidence in national security cases. It would also prevent courts from ordering sensitive information to be disclosed in certain circumstances.

Nicola Newson
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1. Introduction

The Justice and Security Bill would modernise and strengthen oversight of the intelligence and security agencies, and would allow civil courts, through the use of closed material procedures, to hear a greater range of evidence in national security cases. It would also prevent courts from ordering sensitive information to be disclosed in certain circumstances. The Bill was introduced in the House of Lords on 28 May 2012 and is due to receive its second reading on 19 June.

Alongside the Bill, the Government has published Explanatory Notes, an Impact Assessment, an Equality Impact Assessment and a memorandum on the European Convention on Human Rights (ECHR) issues raised by the Bill.

This Note is intended to provide background reading in advance of the Bill's second reading in the House of Lords. Section 2 of the Note briefly describes how the Government has amended proposals in the Bill in response to the critical reception given to the *Justice and Security Green Paper* published last year. Section 3 of the Note examines Part 1 of the Bill, which relates to oversight of the intelligence and security agencies. Section 4 of the Note examines Part 2 of the Bill, which contains provisions relating to closed material procedures in the civil courts and in the Special Immigration Appeals Commission, and provisions restricting so-called *Norwich Pharmacal* disclosure orders in relation to sensitive information. In each case, the context behind the proposals is set out, the provisions of the Bill are examined in detail, and a summary of reactions to the proposals is set out.

2. Green Paper and Background to the Bill

The proposals in the Bill arose from the *Justice and Security Green Paper* (Cm 8194) published by the Government in October 2011. Responses to the Green Paper are available 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 in April 2012. The Government published its response to the public consultation (Cm 8364, essentially a summary of the submissions received) and a response to the JCHR report (Cm 8365) on the same day as the Bill itself was published.

The JCHR report was critical of many of the proposals contained in the Green Paper. Organisations as diverse as the *Daily Mail* and Liberty launched campaigns against "secret justice".[1] It was reported that publication of the Bill was delayed by disagreements between David Cameron and Nick Clegg on how far its provisions should go, particularly on the question of whether the law should be changed to allow closed material procedures during inquests.[2] When the Bill was published, Kenneth Clarke, the Justice Secretary and Lord Chancellor, wrote that: "The reaction to the consultation has persuaded me that some of the suggestions we made [in the Green Paper] for solving the undoubted problems were too broad".[3] He said that he been surprised by the public perception that the new legislation would be a "sweeping charter for ministers to hide the mistakes of the security services, the police and their departments from public view" or that it would result in the public finding out less about the truth in important cases. Mr

[1] James Chapman and Martin Robinson, "Climbdown on secret justice: Victory for the *Mail's* campaign", *Daily Mail*, 29 May 2012 and Liberty, "Four campaigns, four actions", 24 May 2012.
[2] Owen Boycott, Richard Norton-Taylor and Vikram Dodd, "Justice Bill delayed by inquest row between Cameron and Clegg", *Guardian*, 23 May 2012.
[3] Kenneth Clarke, "My secret justice plans were too broad and the *Mail* has done a public service in fighting them", *Daily Mail*, 29 May 2012.

Clarke declared that that had never been his intention, and that he had therefore listened to the concerns of civil liberties campaigners in drafting the Bill for publication.

In a number of areas, the measures contained in the Bill are less far-reaching than the proposals outlined in the Green Paper. The Bill contains no provision for inquests to hear intelligence material in secret. It would be a judge, rather than a minister, who would make the decision as to whether a court could hear sensitive evidence in closed session, and this procedure would only be available in cases where disclosing the information would damage national security. The Green Paper had proposed it should be available where disclosure would damage the public interest, a much wider definition. Tom Brake MP said that the proposals in the Bill had met all the Liberal Democrats' red lines.[4] The reaction of many of the Bill's critics was summed up by Lord Macdonald of River Glaven, a former Director of Public Prosecutions, who welcomed the "improvements" in the Bill but still felt that: "there remain substantial difficulties with a Bill that proposes that people's cases can be decided in secret, in their absence, and in the absence of the public and the press… I don't think that the Bill as presently described has gone far enough to reform itself".[5] Other critics of the Bill used stronger language, asking "Where is the 'Justice' in the Justice and Security Bill?", and describing the restrictions on disclosure of sensitive information as "fundamentally unfair, unnecessary and unjustified".[6]

3. Part 1—Oversight of Intelligence and Security Activities

In the Green Paper, the Government examined the independent oversight arrangements for the security and intelligence agencies. Given the increased public profile, workloads and budgets of the UK's intelligence agencies, and the need for oversight to be effective and credible in the eyes of the public, the Government considered that: "The requirement for strengthening the oversight arrangements for the Agencies has… grown".[7]

Currently, independent oversight of the intelligence agencies is provided by a parliamentary committee (the Intelligence and Security Committee), two commissioners, (the Intelligence Services Commissioner and the Interception of Communications Commissioner) and a tribunal (the Investigatory Powers Tribunal). In the Green Paper, the Government set out a possible case for overhauling these arrangements and establishing an Inspector-General, but also considered the options for strengthening the present arrangements. The Bill adopts the latter approach, by extending the remits of the Intelligence and Security Committee and the Intelligence Services Commissioner.

3.1 Intelligence and Security Committee (Clauses 1–4 and Schedule 1)

3.1.1 Background

The Intelligence and Security Committee (ISC) was established by the Intelligence Services Act 1994 to examine the policy, administration and expenditure of the Security Service (commonly known as MI5), the Secret Intelligence Service (SIS, commonly

[4] Tom Brake, "Justice and Security Bill—a good result for the Lib Dems and civil liberties", *Liberal Democrat Voice*, 29 May 2012.
[5] Lord Macdonald of River Glaven, interview on BBC Radio 4 *Today* programme, 29 May 2012.
[6] Tom Hickman, "Where is the "justice" in the Justice and Security Bill?", UK Constitutional Law Group blog, 5 June 2012 and Angela Patrick, "Justice and Security Bill—The Government is not for turning", UK Human Rights blog, 29 May 2012.
[7] HM Government, *Justice and Security Green Paper*, Cm 8194, October 2011, para 3.3, henceforth referred to as "Green Paper".

known as MI6) and Government Communications Headquarters (GCHQ). These three organisations are known collectively as the Agencies. The ISC also examines the work of other government bodies involved in intelligence work, although it does not have a statutory oversight role with respect to these.

The ISC is a cross-party committee of nine Parliamentarians drawn from both the Commons and the Lords. Although its remit is in line with that of a departmental select committee, there are special arrangements in place for the appointment of the ISC's members and the way its reports are produced in order to safeguard intelligence material. Members are appointed by the Prime Minister in consultation with the Leader of the Opposition. The ISC reports annually to the Prime Minister on its work. A copy of the report is laid before Parliament, but the Prime Minister can redact sensitive information. The Heads of the three Agencies may decline to disclose sensitive information to the ISC.[8]

In its most recent annual report, the ISC undertook a review of its own role, structure, remit and powers, and concluded:

> [...] the current arrangements are significantly out of date. The Committee's remit and powers have evolved beyond the de minimis position set out in the 1994 Act: the Committee today takes evidence from other parts of the intelligence community rather than just the three Agencies, and has retrospectively reviewed specific operations as well as the administration, policy and expenditure that the Act makes provision for. The legislation also contains safeguards that—whilst they were thought necessary in 1994—are now outdated, including the limited power of the ISC to request, rather than require, information from the Agencies. The 1994 Act therefore requires updating.[9]

The ISC recommended the following reforms:

- The Intelligence and Security Committee should become a Committee of Parliament, with the necessary safeguards, reporting both to Parliament and the Prime Minister;
- The remit of the Committee must reflect the fact that the ISC has for some years taken evidence from, and made recommendations regarding, the wider intelligence community, and not just SIS, GCHQ and the Security Service;
- The Committee's remit must reflect the fact that the Committee is not limited to examining policy, administration and finances, but encompasses all the work of the Agencies;
- The Committee must have the power to require information to be provided. Any power to withhold information should be held at Secretary of State level, and not by the Heads of the Agencies; and
- The Committee should have greater investigative and research resources at its disposal.[10]

[8] See Green Paper, Appendix H and Cabinet Office, *National Intelligence Machinery*, November 2010 and the ISC's website for further information about the ISC.
[9] ISC, *Annual Report 2010–2011*, Cm 8114, July 2011, para 273.
[10] ibid, recommendation JJ, p 90.

3.1.2 Provisions in the Bill

The Government agreed with much of this in the Green Paper and the Bill implements all but the last of these recommendations. With regard to the final recommendation, the Government said in the Green Paper that it would "review the level of resourcing that the ISC requires to support it in the discharge of its functions and the nature of the skills the Committee requires to have at its disposal".[11]

Clause 1 changes the rules for appointing members to the ISC. There would still be nine members drawn from both Houses but each member would be appointed by the House of Parliament of which he or she was a member, rather than by the Prime Minister as at present. However, MPs and peers would only be eligible to become a member of the ISC if they had first been nominated by the Prime Minister after consultation with the Leader of the Opposition. The Government states in the Explanatory Notes to the Bill that nomination by the Prime Minister is necessary to ensure that the Government retains some control over access to the highly sensitive information which is afforded by membership of the ISC. Ministers of the Crown would not be eligible to be ISC members.

Clause 1 also gives effect to **Schedule 1**. Paragraphs 1 and 2 of Schedule 1 contain provisions regarding the tenure of members of the ISC and the Committee's rules of procedure. Paragraph 3 of Schedule 1 changes the rules for the disclosure of information to the ISC. Information held by the Agencies would have to be disclosed to the ISC unless the Secretary of State decided otherwise, whereas currently the Heads of the Agencies may decline to disclose sensitive information to the ISC. Information held by government departments would have to be disclosed to the ISC unless the relevant Minister of the Crown decided otherwise. The Secretary of State (for the Agencies) or the relevant minister (for other government departments) could withhold information from the ISC on two grounds: if it was information that a minister would not consider it proper to provide to a House of Commons departmental select committee (not necessarily on national security grounds), or if it was "sensitive information" which for national security reasons should not be disclosed. Paragraph 4 defines "sensitive information" as:

- information which might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to SIS, GCHQ or the Security Service, or any part of a government department or Her Majesty's Forces engaged in intelligence or security activities;

- information about particular operations undertaken by the Agencies, or any other government department or HM Forces engaged in intelligence or security activities; or

- information provided by a foreign government that does not consent to the disclosure of the information.[12]

The Government notes that although the power to withhold sensitive information is widely drawn, in practice it is expected to be exercised sparingly.[13] To date, the Agency Heads have rarely refused an ISC request for information.[14]

[11] Green Paper, para 3.32.
[12] This definition of "sensitive information" applies only to the non-disclosure of information to the ISC. Different definitions of "sensitive information" apply to other parts of the Bill.
[13] Explanatory Notes, para 32.
[14] Green Paper, para 3.36.

Clause 2 sets out the main functions of the ISC. Its current remit under section 10 of the Intelligence Services Act 1994 is simply to examine the expenditure, administration and policy of the Agencies. Subsection (1) of clause 2 extends this remit to include oversight of all these activities and would also give the ISC a role in examining and overseeing the Agencies' operations. Subsections (2) and (4) would enable the ISC to examine and oversee any other government activities relating to intelligence and security matters that were set out in a memorandum of understanding drawn up with the Prime Minister. This would give the ISC statutory powers to provide oversight of the intelligence and security community beyond the three Agencies, such as the Joint Intelligence Organisation in the Cabinet Office, the Office for Security and Counter-Terrorism in the Home Office and Defence Intelligence in the Ministry of Defence, formalising a role that the ISC already fulfils. The Government notes that describing these functions in a memorandum of understanding would allow flexibility in the ISC's remit as intelligence and security functions throughout the wider government machinery change over time.[15]

The Government cautioned in the Green Paper that giving the ISC a formal role in the oversight of the Agencies' operational work had "significant" consequences.[16] Subsection (3) of clause 2 therefore specifies that the ISC can only consider any operational matter if both the ISC itself and the Prime Minister are satisfied that it is not part of an ongoing operation and that it is a matter of significant national interest. The ISC noted in its response to the Green Paper that it has reported on operations—both publicly and in confidence to the Prime Minister, on its own initiative and at the Prime Minister's request—for many years.[17] This provision is also therefore a formalisation of current practice. The ISC is in agreement that its inquiries into operational matters should be retrospective and limited to matters of significant public interest.[18]

Clause 3 provides that the ISC must make an annual report to Parliament on the discharge of its functions, and can make other reports to Parliament as appropriate. The Government has described this change from the current arrangement under which the ISC reports directly to the Prime Minister as "significant".[19] Its effect is to make the ISC "demonstrably accountable to Parliament".[20] Clause 3 also sets out some safeguards for sensitive material: the ISC would have to send draft copies of its reports to the Prime Minister, and any matter which the Prime Minister considered, after consultation with the ISC, "prejudicial to the continued discharge of the functions" of the Agencies or other parts of the intelligence community, would have to be excluded from the ISC's reports to Parliament. Each report would have to contain a statement as to whether any material had been excluded in this way .The ISC could continue to report directly to the Prime Minister on matters which could not be included in a report to Parliament.

3.1.3 Reaction

In response to the Green Paper, Sir Malcolm Rifkind MP, current Chair of the ISC, commented: "This is a strong endorsement of our desire to modernise and strengthen parliamentary oversight of the intelligence community in this country".[21] When the Bill was published, Sir Malcolm predicted that: "Parliament will also be delighted that the Bill

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[15] Explanatory Notes, para 34.
[16] Green Paper, para 3.22.
[17] Sir Malcolm Rifkind MP, "Green Paper on Justice and Security: ISC Response", 7 December 2011, p 6.
[18] ibid.
[19] Green Paper, para 3.20.
[20] ibid.
[21] Sir Malcolm Rifkind MP, press release, 19 October 2011.

at last transforms the parliamentary oversight of our intelligence agencies so that we can hold them to account".[22]

However, some commentators have taken the view that the reforms proposed do not represent significant change, and that the ISC will continue to lack the ability to hold the Agencies to account. The Government summarised critical responses to the Green Paper on ISC reform as follows:

> Their general tenor was that the proposals in the Green Paper would make little difference in practice. The Bingham Centre [for the Rule of Law] said the ISC had failed to offer meaningful, robust or effective scrutiny, and pointed to perceived failures over Iraqi weapons of mass destruction, rendition, handling of detainees and 7 July 2005. Amnesty said that investigations conducted by the ISC showed a lack of capacity to detect, let alone remedy, failures by the Agencies to act consistently with the UK's international human rights obligations. JUSTICE said that the proposals were merely a formalisation of the status quo, and that without greater scope, ambition and commitment to the appointment of an independent Parliamentary Committee, any new version of the ISC would fall foul of the criticism of its existing incarnation. JUSTICE's view was that a reformed ISC would be underfunded, underpowered and entirely lacking in independence.[23]

Nigel Inkster, a former Assistant Chief and Director of Operations and Intelligence for SIS (MI6), has observed:

> Although the British media often assumes that the intelligence and security services are resistant to democratic oversight, the intelligence community itself initiated such oversight; it was not imposed by government. The only concern the intelligence and security community will have is whether sensitive information can remain as well protected under the new arrangements as it has been; the ISC has an exemplary record for not leaking secrets.[24]

3.2 Intelligence Services Commissioner (Clause 5)

3.2.1 Background

The Agencies are also overseen by two Commissioners, appointed under the Regulation of Investigatory Powers Act 2000 (RIPA). The Interception of Communications Commissioner reviews the issue and operation of warrants under RIPA that permit the interception of mail and telecommunications. The Intelligence Services Commissioner reviews the issue by the relevant Secretary of State of other types of warrant and authorisations under RIPA, as well as warrants and authorisations issued under the Intelligence Services Act 1994. The types of activity covered under such warrants and authorisations include: entry on or interference with property or with wireless telegraphy; intrusive surveillance; the investigation of encrypted electronic data; and the use of covert human intelligence sources. The Commissioners also assist the Investigatory

[22] Sir Malcolm Rifkind MP, "Government has made a move in the right direction", *Times*, 28 May 2012.
[23] HM Government, *Government Response to the public consultation on Justice and Security*, Cm 8364, 29 May 2012, para 3.2.
[24] Nigel Inskter, "Explaining the UK's 'secret justice' bill", International Institute for Strategic Studies *IISS Voices* blog, 30 May 2012.

Powers Tribunal (IPT) which investigates complaints by individuals about the Agencies' conduct towards them or about interception of their communications.[25]

In addition to their statutory remit to monitor compliance with the relevant legislation, the Government has occasionally asked the Commissioners to undertake other tasks, such as monitoring compliance with new policies. For example, the Prime Minister requested the Intelligence Services Commissioner to monitor the Agencies' compliance with the *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*, issued in July 2010 in response to serious allegations made about the role the UK had played in the treatment of detainees held by other countries. The Government proposed in the Green Paper that the Commissioners' ability to discharge this type of duty should be placed on a statutory footing "in order to ensure transparency, coherence and a clear basis of authority".[26]

3.2.2 Provisions in the Bill

Accordingly, **clause 5** inserts a new section 59A into RIPA which would give the Prime Minister the power to direct the Intelligence Services Commissioner to keep under review the carrying out of any aspect of the functions of the Agencies, the Heads of the Agencies, or any part of the armed forces or the Ministry of Defence engaged in intelligence activities, excluding anything that falls under the remit of the Interception of Communications Commissioner. The Prime Minister would have to publish details of any such directions given to the Intelligence Services Commissioner, unless it would be detrimental to do so, for example if it would prejudice national security. The Government envisages that the Prime Minister will issue directions by writing to the Commissioner, with a copy of the letter being deposited in the House of Commons Library.[27] If the Bill is passed, the Government plans to formally direct the Commissioner to monitor compliance with the *Consolidated Guidance* on detainees, as mentioned above.[28]

3.2.3 Reaction

The ISC has expressed some concerns that this could represent a blurring of the boundaries between its role in operational oversight and that of the Intelligence Services Commissioner:

> It is the Commissioners' function to monitor compliance with legislation, rules and procedures. This is a quasi-judicial role, the purpose of which is to reassure Ministers, Parliament and the public that the rules governing the covert and intrusive work of the Agencies are being complied with. The Commissioners also provide advice to the Agencies to develop better rules, procedures and guidance, in order to improve compliance over time. General responsibility for oversight of the appropriateness and effectiveness of policy, including policy which impacts on the operational work of the Agencies, is now the remit of the Intelligence and Security Committee. This should not change, nor should it be a shared

[25] For further information about the Commissioners and the IPT, see Green Paper, Appendix G; Cabinet Office, *National Intelligence Machinery*, November 2010; the Commissioners' Office website and the IPT website.
[26] Green Paper, para 3.43.
[27] Explanatory Notes, para 44.
[28] Explanatory Notes, para 43.

> responsibility between the Committee and the Commissioners since this would risk confusion and duplication.[29]

The current Intelligence Services Commissioner, Sir Mark Waller, has stated that as a former member of the judiciary (this background is a requirement for holding the post), he would feel comfortable overseeing the legality of operational policy, but not overseeing other aspects of operational policy.[30] Sir Paul Kennedy, the current Interception of Communications Commissioner, agreed that there was "no compelling reason to change the nature of [his] role or the boundaries".[31]

4. Part 2—Restrictions on Disclosure of Sensitive Material

4.1 Closed Material Procedures (Clauses 6–11 and Schedules 2 and 3)

4.1.1 Background

A major theme set out in the Green Paper was the need to establish a "framework which will enable the courts to consider material which is too sensitive to be disclosed in open court, but which will also protect the fundamental elements which make up a fair hearing".[32] The Green Paper explained that over recent years, the Agencies had been affected by an increasing number of court cases, such as civil damages claims filed by former Guantanamo detainees, appeals against decisions relating to control orders and immigration decisions, and judicial review of government decisions in the national security context. The Government made clear that "it is essential that the 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 for the good of the public".[33] At the same time, however, the Government expressed the need to "strike a balance between the transparency that accountability normally entails, and the secrecy that security demands".[34]

There are already some mechanisms in place to protect sensitive information during legal proceedings. However, in the Government's view the current framework is not effective in allowing the courts to consider sensitive information securely in all circumstances where it is central to the case. Kenneth Clarke stated that:

> This has rendered the UK justice system unable to pass judgment on these vital matters: cases either collapse or are settled without a judge reaching any conclusion on the facts before them.
>
> The Government is clear that this situation is wrong. It leaves the public with questions unanswered about serious allegations, it leaves the security and intelligence agencies unable to clear their name, and it leaves the claimant without a clear legal judgment on their case.[35]

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[29] Sir Malcolm Rifkind MP, "Green Paper on Justice and Security: ISC Response", 7 December 2011, p 5.
[30] Sir Mark Waller, Response to Green Paper, December 2011, para 18.
[31] Sir Paul Kennedy, Interception of Communications Commissioner's response to Justice and Security Green Paper, undated, p 1.
[32] Green Paper, para 6.
[33] ibid, para 1.5.
[34] ibid, para 1.6.
[35] ibid, Foreword.

The Government therefore maintained that changes to the legal system were necessary to better enable the courts to pass judgment in cases involving sensitive information, whilst also preventing the disclosure of sensitive information that could damage national security. The Government argued that, while it is committed to the principles of natural justice and of open justice—the need for procedural fairness and for justice to not only be done, but be seen to be done—in some circumstances, "the benefits of transparency have to be balanced against important imperatives, such as national security".[36]

Currently, sensitive information can be protected from disclosure in court by a claim of public interest immunity or, in specific circumstances, by holding a closed material procedure (CMP). Public interest immunity (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 as to whether or not to grant PII, the judge must strike a balance between competing public interests: the interest in 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. It has been noted that:

> When striking the balance, the courts will of course have regard for the context to the case and it may be that they would be reluctant to second-guess an argument that the interests of national security militate against disclosure. But that does not also mean that such disclosure would not be ordered as the court may still conclude that disclosure is necessary in the interests of "open justice". In that instance, government would either have to disclose the information or, if it wished to keep it secret, concede the case in question.[37]

The areas of public interest that may be protected by PII include national security, international relations and the prevention or detection of crime, although these categories are not fixed. Where national security sensitive material is granted PII, the Government does not have to disclose it, but equally it cannot rely on this material as part of its case. The Government argued in the Green Paper that:

> The well-established and understood mechanism of PII works well when the excluded material is only of marginal or peripheral relevance. It is much less successful as a mechanism for balancing the competing public interest in the administration of justice and the protection of national security in those exceptional cases where a large proportion of the sensitive material is of central relevance to the proceedings—judgments in these cases risk being reached based only on a partial and potentially misleading picture of the overall facts. When applied to proceedings … which involve substantially all and only sensitive material, justice seems barely to be served as the case is struck out for lack of a mechanism with which to hear it.[38]

The scenario in which a court decides that a case is untriable because of the amount of relevant information subject to PII is rare. The Government has cited only one example of a case where this had happened.[39] But the Government is also concerned about civil damages claims against the Government in cases where the facts turn on highly

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[36] ibid, para 1.10.
[37] Economic and Social Research Council "Public Interest in UK Courts" project, "Public interest immunity", accessed 11 June 2012.
[38] Green Paper, para 1.52.
[39] *Carnduff* v *Rock* [2001] EWCA Civ 680.

sensitive information. Kenneth Clarke has explained that:

> In such circumstances, the security and intelligence agencies have had no way of presenting their evidence in court without putting their methods at risk and their agents in danger. The consequence has been that the Government has had to cease to defend itself, leaving state action unscrutinised, citizens with no independent judgment on very serious allegations, and the taxpayer liable for settling cases which may have no merit.[40]

An alternative way of handling national security sensitive information, known as a "closed material procedure" (CMP) has been developed. A CMP allows material that cannot be publicly disclosed for national security reasons still to be considered by the judge as part of the proceedings, rather than being excluded completely as happens with PII. It works as follows:

> Courts seized of a CMP conduct both 'open' and 'closed' proceedings using 'open' and 'closed' material (evidence), and in turn 'open' and 'closed' judgments are rendered. During the 'open' sessions a claimant can instruct his legal team fully on the 'open' material which is disclosed to him. However, the client's legal counsel cannot see the 'closed' material. This material can only be seen by a government appointed, security cleared (ie developed vetted) Special Advocate. The Special Advocate, unlike an ordinary legal counsel, does not have a duty towards his client; his duty is only towards the court. The Special Advocate can take instructions from his client before he has seen the 'closed' material, but can no longer communicate (save at the rarely exercised discretion of the court) once he has seen the 'closed' material.[41]

The JCHR summarised the key differences between PII and CMP as follows:

> 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, material which the court agrees should be "closed" is admissible: it is seen by the court and can be relied on by one party.[42]

The system of CMPs and Special Advocates was first set up under the Special Immigration Appeals Commission Act 1997. The Act established the Special Immigration Appeals Commission (SIAC) to handle appeals against immigration decisions taken by the Home Secretary on the basis of classified information.[43] Case law has established that a CMP is capable of satisfying the requirements of the ECHR regarding the right to a fair trial. Under Article 6, restrictions on the right to a fully adversarial procedure may be

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[40] Kenneth Clarke, Foreword to HM Government, *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights Session 2010-2012: The Justice and Security Green Paper*, Cm 8365, May 2012.

[41] Hayley Hooper, "The Justice and Security Bill: Some serious concerns", UK Constitutional Law Group blog, 4 June 2012.

[42] JCHR, *The Justice and Security Green Paper*, HL Paper 286 of Session 2010-12, 4 April 2012, para 97, henceforth referred to as "JCHR Report".

[43] For further information, see House of Commons Library, *Special Advocates and Closed Material Procedures,* SN/HA/6285, 13 April 2012.

acceptable where strictly necessary in the light of a strong countervailing public interest, such as national security.[44]

The use of CMPs and Special Advocates has subsequently spread to other courts. However, in a recent ruling, the majority of the Supreme Court held that the court does not have the power to order a CMP for all or part of a civil claim for damages. In *Al Rawi and others* v *Security Service and others*, a number of former Guantanamo detainees brought a civil claim for damages against the Government, alleging that the Security Service and others had been complicit in their detention and ill treatment. The Government wished to rely on material in its defence without disclosing it publicly, as it contended that disclosure would cause harm to the public interest. If the Government had sought PII for this material, it could not have relied on it in defending its case—that material would have been excluded completely. The Government argued that it should be able to defend itself by relying on important evidence in a CMP.

The Court of Appeal ruled in May 2010 that the court had no power in an ordinary civil claim for damages to order a CMP.[45] In November 2010, Kenneth Clarke announced that the Government had reached a mediated settlement with the former Guantanamo detainees over their civil damages claims.[46] The details of the settlement were subject to a confidentiality agreement (although according to press reports the former detainees received £20 million[47]), but no admissions of culpability were made, and the claimants did not withdraw their allegations. Mr Clarke said that the Government had decided to settle the case in order to avoid litigation which could have cost £30 million to £50 million and lasted three to five years.

Despite having settled the case, the Government pursued an appeal in the Supreme Court against the Court of Appeal's earlier ruling that CMPs could not be ordered in civil damages claims. The Supreme Court agreed to hear the appeal, on the grounds that an important point of principle arose. However, the Supreme Court upheld the view that in the absence of statutory authority, it was not open to the court to order a CMP in such a claim.[48] Many of the Supreme Court Justices took the view that it should be for Parliament, not the courts, to decide whether CMPs should be allowed in these circumstances. For example, Lord Dyson stated that: "The common law principles [...] are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consultation and proper consideration of the sensitive issues involved".[49] The judgment left open the question of whether CMPs could be used in civil proceedings if all parties consented to it.

Following the Supreme Court judgment in *Al Rawi,* the Government proposed in the Green Paper introducing legislation to make closed material proceedings more widely available in civil proceedings for use "in rare instances in which sensitive material is relevant to the case".[50] It argued that making CMPs an option for the parts of any civil proceeding in which sensitive material was relevant would have a number of benefits:

- In contrast to the existing PII system, CMPs allow the court to consider **all** the relevant material, regardless of security classification. A judgment

[44] See Green Paper footnotes 22 and 23 for references to the relevant case law.
[45] *Al Rawi and Others* v *Security Service and Others* [2010] EWCA Civ 482.
[46] HC *Hansard*,16 November 2010, col 752.
[47] Jack Doyle, "Time to stop paying out to terrorists, says Clarke", *Daily Mail*, 30 May 2012.
[48] *Al Rawi and Others* v *Security Service and Others* [2011] UKSC 34.
[49] ibid, para 48.
[50] Green Paper, para 13.

based on the full facts is more likely to secure justice than a judgment based only on a proportion of relevant material.

- With both sides able to present their case fully to the court, it would be less likely that cases would have to be dropped or settled as was the case in the Guantanamo civil damage claim or struck out altogether as in *Carnduff*. CMPs would provide a mechanism for cases to be heard where at present the Government has no choice but to settle a claim against it, owing to its primary duty to safeguard national security.
- A broad extension would enable the courts to deal effectively with the challenges in all the contexts in which they arise.
- The contexts in which CMPs are already used have proved that they are capable of delivering procedural fairness. The effectiveness of the Special Advocate system is central to this [...]
- CMPs reduce the risk of damaging disclosure of sensitive material.[51]

4.1.2 Provisions in the Bill

Clause 6 enables the Secretary of State to apply to a court that is hearing a civil case for a declaration that the case is one in which a closed material procedure (CMP) may be used. Under subsection (7), this only applies to civil cases before the High Court, the Court of Appeal or the Court of Session. Subsection (2) specifies that the court must agree to the use of a CMP if a party to the proceedings (which may or may not be the Secretary of State) would be required to disclose material during the proceedings and that disclosure would be damaging to the interests of national security. In making this decision, the court must ignore the fact that the material could be withheld on the grounds of PII, but the Secretary of State must consider whether to make a PII claim before applying for a CMP. In making its decision, the court must also ignore the fact that the material would not have to be disclosed if the person concerned chose not to rely on it.

The rules of court for proceedings where an application for a CMP has been granted under section 6 ("section 6 proceedings") are set out in subsection (1) of **Clause 7.** The "relevant person" (the party whose disclosures would be damaging to the interests of national security) would be allowed to apply for permission from the court only to disclose material to the court, Special Advocates and the Secretary of State (if the Secretary of State is not the "relevant person"). This application would be considered by the court in the absence of other parties to the proceedings and their legal representatives. The court must grant such permission if disclosure would be "damaging to the interests of national security". If permission is granted, the court must consider requiring the "relevant person" to provide a summary (or "gist") of the withheld material to other parties and their legal representatives, but the gist could not itself contain material which would be damaging to the interests of national security if disclosed.

Subsections (2) and (3) of Clause 7 provide that if the "relevant person" chooses to withhold material without the permission of the court, or fails to provide a gist when required by the court to do so, then the court can direct that that material cannot be relied upon by the "relevant person".

Clause 8 provides that the appropriate Attorney General, the Advocate General for Scotland or the Advocate General for Northern Ireland as appropriate may appoint a

[51] ibid, para 2.3.

Special Advocate to represent the interests of any party excluded from a CMP. A Special Advocate is not responsible to the party they have been appointed to represent.

Clause 9 states that, apart from the special provisions set out in clauses 7, 8 and 10, the normal rules of disclosure that would otherwise apply to the proceedings will continue to apply.

Clause 10 allows for rules of court to be made for section 6 proceedings on matters such as the type of proof and evidence that can be accepted, enabling or requiring the proceedings to be determined without a hearing, or without full particulars of the reasons for decisions taken to being given to a party, about legal representation and the functions of a special advocate and so on. The person making such rules must have regard to "the need to secure that disclosures of information are not made where they would be damaging to the interests of national security". Paragraph 3 of Schedule 3 gives the Lord Chancellor powers to draw up the rules of court to be used for the first closed material proceedings held under section 6 in each court in England and Wales, and Northern Ireland after the Act is passed.

Subsections (2) and (3) of **Clause 11** gives the Secretary of State the power to make an order amending the definition of "relevant civil proceedings", and in particular to add or remove a court or tribunal. Subject to the approval in both Houses of Parliament of an affirmative order, this would allow the Secretary of State to extend the use of CMPs to other courts, not just the High Court, Court of Appeal and the Court of Session. Angela Patrick, Director of Human Rights Policy at the campaign organisation JUSTICE, argues that this clause "opens the door to the further expansion of secret justice in the future, without the benefit of parliamentary scrutiny". She speculates that it could potentially be used to bring in secret inquests.[52]

Subsection (5) of Clause 11 specifies that the Bill's provisions on the CMP do not affect the common law rules on public interest immunity. Additionally, they should not be read as requiring a court or tribunal to act inconsistently with Article 6 of the ECHR, which guarantees the right to a fair trial. The Government notes in its ECHR memorandum that "Different versions of the closed material procedure have been considered by domestic courts and the European Court of Human Rights, and have been found in their particular contexts to be ECHR compliant".[53] The memorandum quotes jurisprudence which "provides authority for the proposition that a CMP can be used in compliance with Article 6 where to do so is necessary and proportionate in the interests of national security and where there are adequate procedural safeguards".[54]

Paragraph 6 of **Schedule 2** of the Bill would make a consequential amendment to the Senior Courts Act 1981 to allow judges to refuse an application for a jury or to dismiss a jury in cases involving closed material proceedings. Paragraph 5 makes equivalent provision for Northern Ireland.

Paragraph 9 of Schedule 2 would amend section 18 of RIPA to permit intercepted material to be adduced or disclosed within any section 6 proceedings. This is significant because under section 17 of RIPA, evidence from intercepted communications material is generally inadmissible in legal proceedings. The Government has stated its

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[52] Angela Patrick, "Justice and Security Bill—The Government is not for turning", UK Human Rights blog, 29 May 2012.
[53] HM Government, *Justice and Security Bill: Memorandum on ECHR issues raised by the Bill*, May 2012, para 22.
[54] ibid, para 25.

commitment to trying to find a way to allow the use of intercept evidence in court.[55] However, the issue of intercept as evidence was specifically excluded from the scope of the Justice and Security Green Paper, which focused on civil proceedings, because the use of intercept as evidence has implications for criminal proceedings.[56]

Paragraph 2 of **Schedule 3** states that the provisions relating to the general closed material procedure would apply not only to cases brought after section 6 had come into force, but also to proceedings which had begun but not yet been concluded by that time.

4.1.3 Reaction

Critics of the Government's proposals have described the inherent unfairness of CMPs. In their collective response to the Green Paper, 57 of the 69 lawyers appointed as Special Advocates (SAs) stated that:

> … CMPs represent a departure both from the principle of natural justice [the right to see and challenge all the evidence put before the judge] and from the principle of open justice. They may leave a litigant having little clear idea of the case deployed against him, and ultimately they may prevent some litigants from knowing why they have won or lost. Furthermore, and crucially, because the SA appointed on his behalf is unable to take instructions in relation to that case, they may leave the SA with little realistic opportunity of responding effectively to that case. They also systematically exclude public, press and Parliamentary scrutiny of parts of our justice system.[57]

The SAs disputed the Government's claim that CMPs "work effectively", citing serious difficulties with the operation of the present system, such as the prohibition on direct communication with open representatives, the inability effectively to challenge non-disclosure, the lack of any practical ability to call evidence and the lack of formal rules of evidence.[58] They asserted that, in many instances, there could be "no effective challenge" to closed material in the absence of both instructions on it and the practical ability to call evidence to rebut it.[59] The SAs concluded that: "Those problems lead us to believe that it would be most undesirable to extend CMPs any further".[60]

In its inquiry, the JCHR agreed with the SAs about the inherent unfairness of CMPs. It conducted its scrutiny on the basis that: "any radical departures from fundamental common law principles or other human rights principles must be justified by clear evidence of their strict necessity".[61] The Committee was not convinced of the necessity for extending CMPs, except in the limited circumstances outlined in section 4.2 below. The JCHR accepted that it was *theoretically* possible for there to be some cases in which a fair trial of a civil claim could not proceed because of the centrality of material which could not be disclosed on PII grounds.[62] However, it felt that there was a lack of evidence on the "critical question" of whether "this is a real, practical problem at all, or one that exists on the scale suggested in the Green Paper, or on a scale sufficiently significant to

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[55] Eg HC *Hansard*, 26 January 2011, col 14WS.
[56] For further information on the issues surrounding the use of intercept as evidence, see House of Commons Library, *The use of intercept evidence in terrorism cases*, SN05249, 25 November 2011.
[57] Special Advocates, *Justice and Security Green Paper—Response to Consultation from Special Advocates*, 16 December 2011, para 13.
[58] ibid, para 17.
[59] ibid, para 25.
[60] ibid, para 26.
[61] JCHR Report, para 16.
[62] ibid, para 61.

warrant legislation".[63] The JCHR was not convinced by the evidence the Government had put forward in support of extending CMPs:

> The only actual case cited by the Government is the *Al Rawi* litigation itself, and that case simply cannot bear the weight being placed upon it by the Government. The claims to compensation in those cases were settled by the Government before the PII process had been exhausted, and before it had been finally decided whether the court had the power to order a CMP to take place. In our view, the *Al Rawi* cases are clearly not examples of cases which the Government had no choice but to settle because they would have been untriable without a CMP. Rather they appear to be examples of cases in which the Government would have preferred to have a CMP rather than the usual PII process.
>
> Apart from *Al Rawi*, no other specific cases have been provided by the Government as an example of the problem which the Green Paper asserts to exist.[64]

The JCHR concluded that the evidence put forward by the Government did not "in our view come anywhere close to the sort of compelling evidence required to demonstrate the strict necessity of introducing Closed Material Procedures in civil proceedings in place of Public Interest Immunity".[65]

David Anderson QC, the Independent Reviewer of Terrorism Legislation, pointed out in his evidence to the JCHR the difficulties for the Government in making the case for reform: because it could not cite cases that were pending in the courts to demonstrate current or anticipated problems, "it is arguing for a significant change to civil procedure but must do so on the basis of what to the sceptical eye must look like a few well-worn but still controversial examples … coupled with mere assertion".[66] Mr Anderson agreed with the Government that: "There are likely to be some cases in which secret evidence renders cases untriable under existing procedures".[67] In such cases, he said that he would "favour adding a CMP to the procedural armoury of the civil courts".[68] But he also believed that:

> The CMP has the capacity to operate unfairly, particularly in cases where a gist is not provided. This dictates considerable caution. Every effort should be made to prevent its adoption in cases where it is not strictly necessary.[69]

The Independent Reviewer is security cleared to the highest level, and is therefore able to access classified documents and to speak to officers within the intelligence and security services. In March 2012, Mr Anderson met representatives of the Government and all three Agencies, and discussed with them seven of the 27 cases which the

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[63] ibid, para 63.
[64] ibid, paras 68-9.
[65] ibid, para 72.
[66] Supplementary written evidence submitted by David Anderson QC to the JCHR (JS 12A), para 3 (p 149).
[67] Written evidence submitted by David Anderson QC to the JCHR (JS 12), p 138.
[68] ibid, para 13 (p 141).
[69] ibid, para 22 (p144).

Government had identified as posing problems of the type described in the Green Paper.[70] He concluded 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.[71]

The SAs expressed reservations about these conclusions, as they believed that the presentation of the material to the Independent Reviewer was one-sided. They argued that:

> … the IR's view that it is highly unlikely that the material presented to him could be deployed in open does not entail the conclusion that a CMP is the only means by which such a claim could be tried.
>
> … the IR heard no argument on the other side. The circumstances are such that the Government has no incentive to devise a way of having the cases heard without a CMP.
>
> By contrast, our combined practical experience of handling sensitive material in civil claims (as special advocates and otherwise) indicates that, where there is no alternative (because a CMP is not available), a way can normally be found for the claim to be heard acceptably fairly, and without unacceptable disclosure of sensitive material. We have recognised the theoretical possibility that cases may exist which cannot be tried, but there is as yet no example of a civil claim involving national security that has proved untriable using PII and the flexible use of ancillary procedures (such as confidentiality rings and "in private" hearings from which the public, but not the parties, are excluded).[72]

Sadiq Khan, the Shadow Justice Secretary, echoed this view:

> If there is a need for change, rather than a misguided rush to legislation, we need a proper debate about all the options available. This includes redacting evidence, confidentiality rings, anonymity, or reinforcing public interest immunity by placing it on the statute, backed by a rebuttable presumption. These may help to preserve our precious principles of open and fair justice and address concerns about sensitive intelligence material in open trials. It's a shame the Government has considered them only half-heartedly.[73]

As well as reaching the conclusion that the Government had failed to demonstrate a problem of sufficient scale to warrant a change in the law, the JCHR disagreed with the Government's argument that extending CMPs would enhance procedural fairness. In this

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[70] Details of these cases have not been made public, although the University of Reading's "Law, Terrorism and the Right to Know" research project has drawn up a list of potential cases that could be affected.

[71] Supplementary written evidence submitted by David Anderson QC to the JCHR (JS 12A), para 19 (p 152).

[72] Note from Angus McCullough QC, Martin Chamberlain, Jeremy Johnson QC, Tom de la Mare, Charlie Cory-Wright QC and Martin Goudie, Special Advocates, on the supplementary memorandum from the Independent Reviewer of Terrorism Legislation submitted to the JCHR (JS 27), para 7 (p 232).

[73] Sadiq Khan, "Secret hearings undermine credibility of our entire legal system", *PoliticsHome*, 24 May 2012.

regard, the JCHR cited Lord Kerr's judgment in *Al Rawi*:

> 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.[74]

Commentators have welcomed the fact that the Bill would introduce greater judicial control on the use of CMPs than originally proposed in the Green Paper. The Green Paper had suggested that the decision to use a CMP would be made by the Secretary of State, subject to judicial review, whereas clause 6 requires him/her to make an application to the court for a CMP. However, both academics and practitioners have argued that the proposals in the Bill still tip the scales too far in the Government's favour. Tom Hickman, a barrister who represented former Guantanamo detainees in *Al Rawi* and *Binyam Mohamed*, has described the Bill as a win-win for the Government, creating a situation where "secrecy is absolute and scrutiny is in its gift" because of the one-sided way in which CMPs would operate:

- If it is in the Government's interests to do so, such as where it has sensitive material that supports its case, the Government can invoke CMP in cases involving national security sensitive information to ensure that such material can be put before the court.
- If CMP is invoked there is no power for the court to take into account the public interests favouring disclosure of the information, such as exposing wrongdoing, in determining whether documents should be held in "closed" session. If disclosure of the material would cause any damage to national security interests then the Court has no option but to permit a CMP.
- If the Government invokes a CMP in a case but the court rules that documents have to be disclosed because they are not damaging to national security, the Bill would permit the Government to "elect" not to disclose the material. Whilst the Government would have to make concessions as to its case, the issues would not be scrutinised.
- If the Government considers that CMP is not in its interests in a civil case, such as where there is relevant sensitive information which harms its case, it can opt instead to claim PII over the information and seek to have it excluded altogether from the proceedings. There is no mechanism by which the other party to the case can apply for a CMP or by which the court can examine the material by way of CMP.
- If the Government opts for PII and the court orders material to be disclosed the Government can make concessions as to its case to avoid the material being disclosed to the court. Moreover, if the court orders disclosure on the basis that, whilst some damage could potentially be caused to national security interests, the public interest balance favours disclosure of the material, the Bill potentially allows the Government then to apply for such material to be subject to CMP, which the court would

[74] JCHR Report, para 85.

> have no discretion to refuse (there is nothing which expressly precludes such a second bite at the cherry).[75]

Lawrence McNamara, a research fellow at the University of Reading, asserts that it is "virtually certain" that CMPs will become the norm in this area as "[t]he judiciary defer strongly to executive judgments about what will damage national security (and the Government tends to set a low threshold for damage) and, once reaching the conclusion national security would be damaged, a judge will have no discretion on the order that follows".[76] Angela Patrick of JUSTICE agreed, maintaining that in practice the proposals for the decision to order a CMP to be taken by a judge rather than a minister were "unlikely to provide for a significant degree of scrutiny".[77]

The JCHR also pointed to evidence from practitioners that the availability of a CMP would create a disincentive for the Government to apply for PII "rather than a CMP which clearly favours them".[78] The JCHR considered this "undesirable" because "there would no longer be the important judicial balancing stage at which the court holds the ring between the parties in an attempt to maximise the amount of material that can be disclosed in the interests of justice".[79] When deciding on a PII application, the court must determine where to draw the balance between the public interest in open justice and the public interest in protecting national security. But under the Bill's proposals, the court must order a CMP if the disclosure of sensitive material would damage national security, no matter what the competing public interest in disclosure. Lawrence McNamara described this as "one of the most disturbing provisions in the Bill".[80] The campaign group Liberty highlighted the fact that in deciding whether to allow a CMP, the court must specifically disregard the possibility of whether PII could be used instead to protect the sensitive material. This, argued Liberty, made "the judicial trigger a complete fig leaf."[81]

Lawrence McNamara also claims that in practice, the Government would be able to use CMPs to cover up embarrassing disclosures:

> A key rationale behind the laws is that the Government must protect relationships with other countries, and especially the United States. If embarrassment to the UK Government can be claimed to affect those international relationships then, in a kind of legal alchemy, non-damaging embarrassment can be transformed into damage. The result will be secrecy.[82]

Responses to the Bill have consisted mostly of criticism rather than expressions of support, but the people who might be most likely to welcome measures intended to protect national security sensitive information are the intelligence agencies, and it is unlikely that they would comment publicly on a Bill. The extension of CMPs under certain

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[75] Tom Hickman, "Where is the "justice" in the Justice and Security Bill?", UK Constitutional Law Group blog, 5 June 2012.
[76] Lawrence McNamara, "The Justice and Security Bill will make secrecy the norm", Index on Censorship Free Speech blog, 1 June 2012.
[77] Angela Patrick, "Justice and Security Bill—The Government is not for turning", UK Human Rights blog, 29 May 2012.
[78] JCHR Report, para 110.
[79] JCHR Report, para 110.
[80] Lawrence McNamara, "The Justice and Security Bill will make secrecy the norm", Index on Censorship Free Speech blog, 1 June 2012.
[81] Liberty press release, "'Justice' and Security: Inquests are gone but so is judicial discretion", 29 May 2012.
[82] Lawrence McNamara, "The Justice and Security Bill will make secrecy the norm", Index on Censorship Free Speech blog, 1 June 2012.

circumstances has been supported by those who have had access to intelligence material. Lord Carlile of Berriew, a former Independent Reviewer of Terrorism Legislation, agreed with his successor David Anderson's conclusions that there exist some cases which are liable to be settled but which could have been fought if a CMP were available. Lord Carlile maintained that: "CMPs offer no injustice, whereas the absence of them may well lead to injustice to intelligence agencies, and thereby to the public purse".[83] He took the view that:

> Recent civil court procedures were inadequate to protect national security. For pragmatic reasons, not connected with the merits of the issues, the State paid out large sums of money in confidential settlement of claims. This is not an acceptable way of determining civil claims. The State should not be put in the position of sometimes having to choose to pay compensation where the claimant may be the wrongdoer.
>
> My conclusion is that a system can be devised in which there is justice and accountability, without there necessarily being total transparency…[84]

Margaret Gilmore, senior research fellow at the Royal United Services Institute (RUSI), commented shortly before the Bill's publication that: "The Government should be commended for tackling the complexities of the use of secret evidence in court and for clarifying the law—a task which will always bring criticism from those who believe the UK should be working to put more secret evidence in the open".[85]

4.2 Exclusion, Naturalisation and Citizenship Decisions (Clause 12 and Schedule 2)

4.2.1 Background

As mentioned in section 4.1.1 above, the Special Immigration Appeals Commission (SIAC) was established to deal with appeals in cases where the Home Secretary had personally directed that a person be deported from the UK on national security grounds, or be excluded from the UK on the grounds that this would be conducive to the public good. CMPs can take place during SIAC proceedings, with a Special Advocate participating in the closed part of the proceedings on the individual's behalf. Prior to the Special Immigration Appeals Commission Act 1997, there had been no right of appeal in such cases. Under the British Nationality Act 1981, as amended by the Nationality, Immigration and Asylum Act 2002, SIAC also hears appeals against decisions to deprive persons of British citizenship if the Home Secretary has certified that the decision was based wholly or partly on information which s/he believes should not be made public.[86] However, appeals against some other categories of immigration decision are not currently within SIAC's jurisdiction. Such decisions can only be challenged by way of judicial review, for which a CMP is not currently available.

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[83] Lord Carlile of Berriew, "The Legislative Landscape", in RUSI, *Re-Balancing Security and Justice: The Reform of UK Counter-Terrorism Legislation*, UK Terrorism Analysis No 3, May 2012, p 6.

[84] Lord Carlile of Berriew, response to Justice and Security Green Paper, January 2012, paras 9–10.

[85] Margaret Gilmore, "Allowing secret evidence in court" in RUSI, *Re-Balancing Security and Justice: The Reform of UK Counter-Terrorism Legislation*, UK Terrorism Analysis No 3, May 2012, p 13.

[86] A person may not be deprived of their citizenship status if this would make him stateless, so in practice this provision applies to people with dual or multiple citizenship.

In its report, the JCHR noted that David Anderson, the Independent Reviewer of Terrorism Legislation, having reviewed some of the cases the Government had identified as problematic, was persuaded of the need to have CMPs available in judicial review cases where individuals sought to challenge decisions to refuse naturalisation or to exclude them from the UK which had been made wholly or partly on the basis of sensitive information.[87] The JCHR subsequently concluded:

> It seems anomalous to us that decisions to deport on national security grounds and decisions to deprive of UK citizenship individuals of dual or multiple citizenship on national security grounds are dealt with in SIAC but decisions to refuse naturalisation or to exclude on national security grounds are not and therefore have to be challenged by way of judicial review. We can see no reason of practice or principle why these sorts of cases should not be within SIAC's jurisdiction. We recommend that the jurisdiction of the Special Immigration Appeals Commission be amended so as to include challenges to decisions to refuse naturalisation and exclusion decisions.[88]

4.2.2 Provisions in the Bill

The Government agreed with this recommendation.[89] **Clause 12** of the Bill 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 SIAC against decisions by the Secretary of State to:

- exclude a non-EEA national from the UK wholly or partly on the ground that the exclusion is conducive to the public good; or

- refuse to issue a certificate of naturalisation under section 6 of the British Nationality Act 1981, or to refuse to grant an application under section 41A of that act (such as an application to register an adult or young person as a British citizen),

in cases where the Secretary of State made that decision relying wholly or partly on information which in his/her opinion should not be made public in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest. The effect of Clause 12, and the consequential provisions contained in paragraph 7 of Schedule 2 of the Bill, is that these cases would be heard before SIAC and a CMP would be available.

The JCHR also recommended that the statutory framework be amended to make clear that in such proceedings the party excluded under the CMP should be entitled to receive a summary or 'gist' of the sensitive case against them (the so-called the *AF (No. 3)* obligation).[90] The Government's position is that the requirement to provide a gist should be decided on a case-by-case basis by the courts, rather than being set out in legislation.[91]

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[87] JCHR Report, para 75.
[88] JCHR Report, para 117.
[89] HM Government, *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights Session 2010–2012: The Justice and Security Green Paper*, Cm 8365, May 2012, p 9.
[90] JCHR Report, para 117.
[91] HM Government, *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights Session 2010–2012: The Justice and Security Green Paper*, Cm 8365, May 2012, p 9.

4.3 *Norwich Pharmacal* and Similar Jurisdictions (Clauses 13–14 and Schedule 3)

4.3.1 Background

In 2008, Binyam Mohamed, a UK resident then in US custody at Guantanamo Bay, brought judicial review proceedings against the Foreign Secretary in which he sought the disclosure of information and documents which he believed to be in the possession of the UK Government. Mr Mohamed had been arrested in Pakistan in 2002. He alleged that he was tortured there and subsequently in Morocco and Afghanistan, before being transferred to Guantanamo Bay in 2004. He also alleged that those who tortured him had received questions and materials from British intelligence officers.[92] Mr Mohamed sought the disclosure of information to assist his defence in his trial before a US military commission, and in particular, to show that the prosecution case against him consisted of evidence obtained through torture.[93]

The application for disclosure of this information was made under what is known as the *Norwich Pharmacal* jurisdiction. This takes its name from the case of *Norwich Pharmacal Co* v *Customs and Excise Commissioners* [1974] AC 133. In summary:

> 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.[94]

Such an order for disclosure against a third party is now known as a *Norwich Pharmacal* order. These orders can be made in England and Wales, and there is an equivalent jurisdiction in Northern Ireland, but no equivalent in Scotland. The requirements that must be satisfied in order for a *Norwich Pharmacal* order to be made can be summarised as follows:

(i) A wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;

(ii) There must be the need for an order to enable action to be brought against an ultimate wrongdoer;

(iii) The person against whom the order is sought must:

  (a) Be mixed up in so as to have facilitated the wrongdoing and

  (b) Be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.[95]

Norwich Pharmacal orders have typically been made in cases involving intellectual property rights. The *Binyam Mohamed* case, which sought the disclosure of sensitive intelligence material from the Government, was a novel application. The Government argued in *Binyam Mohamed* that the court should not order disclosure, because to

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[92] BBC News, "Profile: Binyam Mohamed", 12 February 2010.
[93] Green Paper, p 9.
[94] Explanatory Notes, para 14.
[95] *Mitsui & Co* v *Nexen Petroleum UK Ltd* [005] EWHC 625 (Ch), para 21.

release material that had been passed to the UK on intelligence channels would be a breach of what is known as the "control principle". Under this doctrine, when intelligence is shared, the originator of the material should remain in control of its handling and dissemination at all times, because only the originator can fully understand how disclosure might compromise the material's source, for example by exposing technical capabilities or the identity of a human source. The UK Government would expect any intelligence it shared with foreign partners to be protected and not passed on or disclosed, and would likewise not disclose the content or existence of intelligence material passed by other countries to the UK, unless it had the originator's consent to do so. The Government argued that to breach the control principle would undermine other countries' confidence in the UK, which would be damaging to intelligence sharing, and ultimately to national security.

The *Binyam Mohamed* case was partly resolved when the US authorities disclosed some redacted documents to Mr Mohamed's security-cleared American legal team. In the meantime, the Foreign Secretary continued to seek PII for seven paragraphs which contained a summary of material passed to the UK on intelligence channels. The case reached the Court of Appeal in 2010. By this time, a US court had already made findings of fact directly relevant to the content of the US intelligence in the seven paragraphs. In light of this, the Court of Appeal found that the publication of these paragraphs would not infringe the control principle and national security would not be at risk.[96] Following the Court of Appeal's decision, the Foreign and Commonwealth Office published the seven paragraphs in February 2010.[97] The US Government continues to assert that the information is classified.[98]

The Government is concerned about the impact of the *Binyam Mohamed* case, and other *Norwich Pharmacal* applications for the disclosure of sensitive material, on intelligence sharing and national security. The Green Paper stated:

> In the aftermath of the UK court-ordered release of sensitive US intelligence material in *Binyam Mohamed,* the UK Government has received clear signals that if we are unable to safeguard material shared by foreign partners, then we can expect the depth and breadth of sensitive material shared with us to reduce significantly. There is no suggestion that key 'threat to life' information would not be shared, but there is already evidence that the flow of sensitive material has been affected […] The fullest possible exchange of sensitive information between the UK and its foreign partners is critical to the UK's national security.[99]

The use of a CMP for *Norwich Pharmacal* applications would not enable the Government to prevent sensitive material being disclosed, since disclosure is the whole purpose of bringing such an action. Even if *Norwich Pharmacal* cases were heard using a CMP, if the claimant won the case, the Government would still be obliged to disclose the material. The Green Paper therefore proposed legislating to restrict the courts' ability to make *Norwich Pharmacal* orders with respect to sensitive information.[100]

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[96] *R (on the application of Mohamed)* v *Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.
[97] FCO, "Binyam Mohamed case", 10 February 2010.
[98] Green Paper, p 9.
[99] Green Paper, para 1.22.
[100] Green Paper, paras 2.90-2.96.

4.3.2 Provisions in the Bill

Clause 13 restricts the circumstances in which a court may exercise the *Norwich Pharmacal* jurisdiction. Subsection (2) provides that the court may not order the disclosure of "sensitive information" under the *Norwich Pharmacal* jurisdiction. Subsection (3) defines what is meant by "sensitive information": firstly, information held by, or on behalf of, or obtained from an intelligence service, in whole or in part, or information relating to an intelligence service; and secondly, information certified as "sensitive" by the Secretary of State.[101]

The Explanatory Notes give examples of the types of intelligence information that would fall into the first category:

> Information may be obtained from, or held on behalf of, an intelligence service where, for example, reporting from an intelligence service's covert human intelligence source has been shared with the Home Office to enable that department to prepare a deportation case. Information may be derived from information obtained from, or held on behalf of, an intelligence service where, for example, an all-source intelligence assessment, produced by a government department, has been compiled using intelligence shared by a foreign intelligence partner with one of the intelligence services. And information relating to an intelligence service may include, for example, the fact of an intelligence sharing relationship with another country's intelligence service.[102]

This would amount to an automatic ban on the disclosure under the *Norwich Pharmacal* jurisdiction of any intelligence service information. Subsection (6) explains that here an "intelligence service" means any part of the armed force or the Ministry of Defence which engages in intelligence activities, as well as the three main intelligence Agencies.

Under subsection (5) of Clause 13, the Secretary of State may certify other information as "sensitive"—and therefore not able to be disclosed—if disclosure of the information would damage the interests of national security or the interests of the international relations of the United Kingdom. Subsection (4) provides that the Secretary of State may issue the certificate if s/he considers that such damage would be caused by disclosing the information itself, by disclosing whether the information even exists or by disclosing whether the person who is said to possess the information does actually have it. The Government notes that this is to deal with a situation where "not only disclosure of the information but also confirmation or otherwise of the existence or possession of that information would be contrary to the interests of national security or international relations (this is known as the principle of "neither confirm nor deny").[103] Subsection (7) allows the Secretary of State to issue a certificate whether s/he is the person from whom the disclosure is being sought, or it is being sought from someone else.

Clause 13 applies in Scotland, even though there is no Scottish equivalent to the *Norwich Pharmacal* jurisdiction, in order to prevent such a form of relief arising there in the future.[104] The Explanatory Notes make plain that the restrictions on disclosure in

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[101] This definition of "sensitive information" applies only to the non-disclosure of information under the *Norwich Pharmacal* application. Different definitions of "sensitive information" apply to other parts of the Bill.
[102] Explanatory Notes, para 70.
[103] ibid, para 71.
[104] ibid, para 67.

Clause 13 only apply to "sensitive information". Courts will continue to be able to order the disclosure of other information under *Norwich Pharmacal* relief.[105]

Clause 14 provides a limited appeals process. Any party to the proceedings may apply to the court to have the Secretary of State's certificate set aside, which would then mean that the information would not be exempt from disclosure. The only grounds on which such an application could be made are that the Secretary of State was wrong to determine that disclosure of the information (or its existence of the fact of it being held) would be damaging to the interests of national security or international relations. In determining whether to set aside the certificate, the court would have to apply judicial review principles, and the proceedings would take place as a CMP. There would be no grounds for appealing against the non-disclosure of sensitive intelligence services information.

Paragraph 4 of **Schedule 3** states that these provisions would apply not only to cases brought after section 13 had come into force, but also to proceedings which had begun but not yet been concluded by that time.

4.3.3 Reaction

In its report, the JCHR accepted the Government's argument that there is a case for legislating to provide greater legal certainty about the application of the *Norwich Pharmacal* principles to national security sensitive material.[106] The Green Paper proposed several options for dealing with this issue, and at the time of the JCHR's report, it was not yet clear which the Government would adopt. However, the Committee was of the opinion that:

> An absolute exemption, resulting in the automatic ouster of the court's jurisdiction to order disclosure, cannot in our view be considered to be consistent with the rule of law […] often the individuals seeking the disclosure are fighting not only for their liberty but for their life. Binyam Mohamed himself was facing the possibility of the death penalty in the US when he first sought disclosure of the material in the possession of the UK Government […]
>
> In our view, this fact alone means that an absolute statutory exemption from disclosure for material of a certain class can never be proportionate. It would mean that our legal framework admits of the possibility of individuals facing the death penalty being unable to obtain disclosure of material which is central to their defence, without any judicial balancing of the gravity of the harm likely to be done to the individual on the one hand and the degree of risk to national security on the other. We do not think our legal framework should countenance that possibility.[107]

The JCHR rejected the notion that there could ever be an absolute guarantee of the control principle in a legal system committed to the rule of law, and they pointed out that this had been acknowledged by both the UK and the US Governments in *Binyam Mohamed*.[108] The Committee opposed any system that would bring in a blanket ban on

[105] ibid, para 76.
[106] JCHR Report, para 157.
[107] ibid, paras 161–2.
[108] ibid, para 164.

the disclosure of intelligence service material (which would be the effect of clause 13):

> … an absolute statutory exemption for all material held by or originating from one of the Agencies, without reference to its sensitivity, is an extraordinarily broad class exemption from disclosure. It appears to assume that the disclosure of any Agency material is inherently damaging to national security. We agree with the Independent Reviewer when he describes such a blanket exclusion […] as "manifestly disproportionate".[109]

The JCHR was also critical of a system of exemptions from disclosure based on ministerial certificates which could be challenged only on judicial review principles (which would be the effect of clause 14):

> Unlike an application by a minister to a court for exemption from disclosure on PII grounds, the balancing decision, taking into account all the relevant public interests when deciding whether or not there should be disclosure, would not be a matter for the court itself, but a matter for the Secretary of State subject to the court's much narrower supervisory review.[110]

Hayley Hooper, a lecturer in constitutional law at Trinity College, Oxford has pointed out that the automatic exemption from disclosure of any intelligence services material "runs contrary to the parallel principle of Public Interest Immunity law expounded in *Conway* v *Rimmer* which states that 'class claims' for exclusion of information on public interest cannot be made, and that a judge must make a decision [on] the content of each individual piece of information".[111]

The ISC was generally supportive of reforms to protect the control principle.[112] However, it concurred with the JCHR that a blanket ban on the disclosure of intelligence services material would be "perhaps too broad an exemption", as "one can envisage circumstances when non-sensitive Agency-held material is relevant to a legitimate civil case between third parties".[113] The ISC therefore suggested that there should be an automatic statutory exclusion of *sensitive* Agency-held material, but not an automatic exclusion of all Agency-held material.[114]

Dinah Rose QC, who represented Binyam Mohamed, has argued that what happened in his case did not support the Government's case for reform:

> […] the decision that was made by the Court of Appeal in *Binyam Mohamed* was an entirely orthodox decision in which the Court of Appeal placed very great weight on the notion that intelligence should be maintained as confidential and the only reason why the Court of Appeal ordered the disclosure of seven paragraphs of information was that that information had already been put in the public domain by a United States judge in an American case. So as a matter of logic it is very difficult to see why any foreign intelligence service would be concerned about the confidentiality of its material when the message from

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[109] ibid, para 178.
[110] ibid, para 180.
[111] Hayley Hooper, "The Justice and Security Bill: Some serious concerns", UK Constitutional Law Group blog, 4 June 2012.
[112] Sir Malcolm Rifkind MP, "Government has made a move in the right direction", *Times*, 28 May 2012.
[113] Sir Malcolm Rifkind MP, "Green Paper on Justice and Security: ISC Response", 7 December 2011, pp 3–4.
[114] ibid, p 4.

> *Binyam Mohamed* is "we will only disclose your material when it is already public".[115]

Similarly, the US authorities' perception that the *Binyam Mohamed* case called into question the UK Government's ability to prevent disclosure of sensitive intelligence material in court was in fact a "misperception" in the JCHR's view.[116] Nevertheless, after his conversations with intelligence officers, David Anderson, the Independent Reviewer, was convinced that the Green Paper had accurately set out the position that the US would share less intelligence with the UK if it believed that its material could not be protected. He said that in his conversations with UK intelligence officers, he had been given specific examples, such as reduced cooperation in a particular operation, additional procedural hurdles being placed in the way of intelligence sharing with one agency, and a reduction in "corridor conversations". He said that he "detected a genuine concern that the UK was 'on probation' where its ability to safeguard secret information was concerned".[117]

In its response to the JCHR report, the Government argued that there was legal precedent and clear justification for an exemption for intelligence services material:

> It is axiomatic that disclosure of any material in these categories will cause damage to the operational effectiveness of the agencies and, in consequence, to national security or international relations. It is therefore possible to justify an absolute exemption for all intelligence service related information from the scope of the *Norwich Pharmacal* jurisdiction.[118]

The Government denied that it was trying to legislate to make the control principle absolute.[119] Courts could still order in civil cases that material subject to the control principle must be gisted or disclosed if this would be required for compatibility with the right to a fair trial under Article 6 of the ECHR. If the Secretary of State declined to disclose under such circumstances, the court could require him/her to make appropriate concessions. The Government also pointed out that the *Norwich Pharmacal* jurisdiction only applies where disclosure is being sought of information relating to wrongdoing by a third party. Anybody who alleged that the Government or the security and intelligence agencies had been directly involved in wrongdoing could still bring a direct claim against the Government.[120] In those circumstances, intelligence services information would not automatically be exempt from disclosure.

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[115] Dinah Rose QC, interview on *Law in Action* on BBC Radio 4, 5 June 2012 (author's transcript).
[116] JCHR Report, paras 156–7.
[117] Supplementary written evidence submitted by David Anderson QC to the JCHR (JS 12A), para 24 (pp 153–4).
[118] HM Government, *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights Session 2010-2012: The Justice and Security Green Paper*, Cm 8365, May 2012, p 13.
[119] ibid, p 12.
[120] ibid.

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