

JOINT COMMITTEE ON HUMAN RIGHTS

Legislative Scrutiny – Justice and Security Bill 2012

Submission by: Dr Lawrence McNamara (University of Reading), 28 June 2012

Summary

1. This submission focuses primarily on matters relating to open justice and transparency issues. It is particularly concerned with the effects the proposed legislation would have on the media and on public knowledge about matters of public interest. It addresses Part 2 of the Bill only.
2. The submission opposes the Bill in its current form. In the event, however, that reform is thought to be necessary, several recommendations are made with a view to minimising some of the most troubling aspects.
3. Paragraphs 9-13 outline key concerns about the government's claims regarding need for reform. It is not clear that proposed reforms are necessary. A better path seems to be that of the statutory reforms proposed in the JCHR's report of its *Inquiry into the Human Rights Implications of the Justice and Security Green Paper*.
4. Paragraphs 14-22 outline key concerns about the likely effects the proposed reforms would have on open justice and transparency.
5. Paragraphs 23-32 recommend proposed amendments to clauses 6, 7 and 13. Among them, it argues for
 - requiring the consideration of competing public interests,
 - the express recognition of open justice as a factor the court must consider,
 - the requirement that there be notice of a CMP application, and
 - the rights for media and other non-party interests to be heard.
6. Paragraphs 33-45 recommend amendments by way of provisions that should be added to the Bill. Among them it argues for:
 - The recording of the application and use of CMPs
 - Reporting on the application and use of CMPs
 - Review of judgments so that they do not remain secret when secrecy is no longer necessary
 - A sunset clause and periodic review of the legislation
7. Appendix 1 provides a list of the cases potentially affected by the Bill. Appendix 2 is an article from the The Guardian online which was published on 16 May 2012 and addresses the reporting and recording issues.
8. The author is a Reader in Law and ESRC/AHRC Fellow at the University of Reading. He runs the 'Law, Terrorism and the Right to Know' ('LTRK') research project. This 3-year project (2009-12) is funded by Research Councils UK under its Global Uncertainties priority. LTRK

examines how different arms of the state control and manage information about terrorism and security, how the media access that information, and how the media report that information. The LTRK project includes around 60 interviews with, among others, the judiciary (with the support of the office of the Lord Chief Justice), government (including the Home Office, RICU, OSCT, the Ministry of Defence, and the Cabinet Office), ACPO and police forces, the CPS and criminal defence lawyers, and journalists, media lawyers and editorial decision-makers.

Key concerns about the need for the proposed reforms

9. The rationale for the reforms is heavily tied up with protection of UK relationships with its intelligence partners. The need for reform is said to be on the one hand that there are a small number of cases but that these cases may affect those relationships adversely under the current laws. Two points may be made here.
10. First, UK courts take secrecy very seriously. Indeed, the Independent Reviewer of Terrorism Legislation recently stated, ‘to the best of my knowledge no United Kingdom court has ever let anything remotely secret out into the open in violation of the control principle’.¹ It is clear that the courts defer heavily to Executive judgments about security and international relationships. The decision in *Binyam Mohammed* made it clear that there is still a very strong judicial deference to the executive on these matters, and the disclosure of material in this case would not have occurred but for its disclosure in US litigation.² In the eyes of Lord Neuberger MR, it appears that even a slender risk to national security would be sufficient to prevent disclosure.³ Most recently, see *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 1737 (26 June 2012), paras 106-107. It is not at all clear that reforms are required with respect to either Norwich Pharmacal or CMPs in order to avoid disclosure in the courts.
11. Second, of course, is the question of whether reform required in order to obtain justice between the parties where this would not otherwise be possible. Here, the reforms are troubling because it is not clear that they would achieve justice. The well-known comments of Lord Kerr in *Al Rawi* are compelling in this regard: ‘To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.’⁴ The Independent Reviewer’s comments are also, again, notable: ‘this plainly does not guarantee equality of arms or the equal treatment of the two parties to litigation’⁵
12. In sum, it is not clear that reforms are necessary or will achieve the stated goals. A better path seems to be that of the statutory reforms proposed in the JCHR’s report of its *Inquiry into the Human Rights Implications of the Justice and Security Green Paper*.

¹ David Anderson QC, Evidence to the JCHR, 19 June 2012, Uncorrected Evidence HC370-I, answer to Q 16, http://www.parliament.uk/documents/joint-committees/human-rights/Uncorrected_Transcript_Justice_and_Security_Bill_David_Anderson_19062012.pdf

² *R (Binyam Mohammed) v Sec of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [191], [295].

³ *Ibid* at [191].

⁴ *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [93].

⁵ Anderson, above n 1, answer to Q 12.

13. To anticipate the response that this is unfair as a case may be untriable, given that there appears only to be *Carnduff v Rock* where this has really reached its limits, it is likely this would be the position on a very, very small number of occasions. In those circumstances, if they ever arise, it may be better that the burden of that unfairness should fall on the broader shoulders of the Executive, and not those of the individual.

Key open justice and transparency concerns about the effects of the proposed reforms

14. In the event that the reforms are thought to be necessary, the Bill is deeply troubling for several reasons.

15. The Bill would establish an unnecessary, unjustifiable and unwise regime of secrecy which has the clear potential to become widespread in a category of cases that is already beset by secrecy and in which it is by no means clear that CMPs would necessarily result in fairer trials. There is much in the observation made by Lord Brown in *Al Rawi* that closed procedures would damage ‘the integrity of the judicial process and the reputation of English justice.’⁶

16. The Bill is substantially at odds with open justice traditions. Open justice should be a central consideration; it is a fundamental feature of common law trials and of British justice.⁷ In its current form the Bill does not take adequate consideration of open justice and transparency and would significantly affect:

- the ability of the press and public to know about important matters of public interest;
- the public confidence in the judiciary that flows from transparency; and
- the ability of the parties, the public, the press and researchers to see and analyse material even after secrecy is no longer needed.

17. Of special note among those and a key theme in the JCHR’s report of its *Inquiry into the Human Rights Implications of the Justice and Security Green Paper*, the Bill would have a significant detrimental impact on the ability of the press to access and report information and, consequently, on the public’s right to know. That right to know extends to both the accountability of the state and the activities of those who have been subject to the coercive powers of the state. Given that the media is effectively the eyes and ears of the public in courts, a general CMP regime represents a major retreat from open justice traditions.

18. It is deeply worrying that the Bill will capture an inappropriately wide range of cases.

19. How many cases may be affected? This is unclear. The 27 cases referred to in the Green Paper have been clarified to some extent at the Second Reading (it is now 29 cases) and a figure of 15 civil damages cases is given.⁸ However, there is good reason to think that there may be many

⁶ *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [83].

⁷ See, for e.g., the comments of Lord Dyson in *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 34 at [10].

⁸ HL Hansard, Col 1663, 19 June 2012

more cases to which the reforms would apply. The Justice Secretary has said of civil claims that “we’re going to have a lot more cases because it’s getting popular to bring these allegations”.⁹

20. What cases will be affected? In my own work in the *Law, Terrorism and the Right to Know* project at the University of Reading we have tried to identify some of the cases where the reforms may apply. This list is attached as an appendix to this submission in order to give a flavour of the significant public interests involved and the scope of the matters that appear to be in issue.¹⁰
21. How will the cases be affected? It is clear from the Bill that a case may be caught by the reforms even where there is no threat of damage to national security, or where there is a threat of damage to national security but there are competing interests which favour disclosure:
- Where CMPs are concerned, the fact that there will be no consideration of public interests other than national security means that CMPs could be used in a very wide range of cases.
 - Where Norwich Pharmacal is concerned, the category-based approach to ‘sensitive information’ at Clause 13(3), the wide scope of Clause 13(5), and the absence of any balancing process in Clause 13(2) will together exclude Norwich Pharmacal disclosure across a range of matters even where there would be no damage to national security and where there would be strong competing public interests in disclosure.
22. The combined result of the above points is that there will be many cases where information is hidden from the public eye even though it may be of overwhelming public interest. On some occasions, because there is no judicial discretion or balancing, this is almost certain to occur even though there is no risk of damage to national security. To put it another way, there may be very few cases where secrecy would be essential, but very many where it would be applied

CMPs (Clause 7): The absence of competing public interests and, especially, open justice

23. Clause 7(1) of the Bill removes the discretion of the court, requiring CMPs if disclosure would be damaging to national security. The effect is that no matter how strong any competing public interests may be, these cannot be considered. This is extremely troubling in many respects. It will have a detrimental effect on the extent to which security-sensitive information comes to the public eye, regardless of how important it is with respect to the accountability of the executive, the seriousness of any security threat, or the many interests that might favour disclosure.
24. It is notable by comparison that the Australian legislation which deals with parallel issues – the *National Security Information (Civil and Criminal Proceedings Act) 2004* – is *not* an appropriate model. That country’s Act does not include open justice as a criterion and that is a

⁹ BBC Radio 4, *Today*, Interview with Kenneth Clarke, 29 May 2012

http://news.bbc.co.uk/today/hi/today/newsid_9724000/9724558.stm

¹⁰ Available online at *Law, Terrorism and the Right to Know*, ‘List of potential cases that could be affected’, at 26 June 2012 <http://www.reading.ac.uk/LTRK/Securitysecrecyandcivilproceedings/ltrk-JusticeandSecurityPotentialCases.aspx>.

significant weakness.¹¹ Notably, the legislation does not follow the Australian Law Reform Commission's recommendation that open justice be a consideration in national security laws.¹²

25. Given that non-parties would be inherently limited in their ability to make informed submissions, open justice criteria are vitally important.
26. **Recommendation (A)**: The Bill should be amended so that:
- (a) the nature and extent of damage to national security must be considered; and,
 - (b) competing public interests must be considered; and
 - (c) the public interest in open justice is explicitly stated as a factor to be considered
- Should some other procedure be adopted then I would argue these factors need to be included in that alternative system.
27. Similar concerns might also be raised regarding Clause 6(2), but Clause 7(1) seems to be the more crucial point at which those matters should be considered.

CMPs (Clause 6 and 7): Notice of a CMP application and rights to make submissions about open justice

28. Neither clause 6 nor clause 7 provide for public notice that CMP application will be made or determined. Neither clause provides for submissions to be made by media interests or others representing open justice interests. This is troubling because it may be that the parties are agreed that CMPs would be the best path, whether or not disclosure would be damaging to national security. This may be especially so if gisting is used. If open justice is to be meaningful in these circumstances then the legislation should recognise it by ensuring notice is given and that media interests or others with open justice interests have a right to be heard at each stage.
29. For a notice period, seven days may be appropriate. For example, that period is prescribed under the Criminal Procedure Rules, Rule 16.10 where court closures are sought on national security grounds. A subscription-based email alert would be a possible method.
30. **Recommendation (B)**: The Bill should be amended so that:
- (a) Notice is given to the public when an application is made under Clause 6(1) and any subsequent determination
 - (b) The court must consider whether it should hear submissions on open justice matters from media interests or other interested non-parties at procedures under Clause 6 and any subsequent determination.
 - (c) The court may order that a special advocate be appointed to represent media interests at procedures under Clause 6 and any subsequent determination.

¹¹ Sections 31, 38L.

¹² Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC Report 98 (2004), Recommendation 11-19 and generally [7.15]-[7.41]; see also recommendation 7-1 on non-party access.

Norwich Pharmacal (Cl 13): Competing public interests (especially open justice) are absent

31. For the reasons stated above at paragraph 18, the Norwich Pharmacal provisions are troubling.

32. **Recommendation (C)**: The Bill should be amended so that:

- (a) the ‘sensitive information’ use and definition in Cl 13(2) and 13(3) is amended so that the focus is on damage to national security;
- (b) the court must under Cl 13(2) consider damage to national security and competing public interests
- (c) the public interest in open justice is explicitly stated as a factor to be considered (eg, at Cl 13(2) in the decision about whether disclosure is to be ordered

Should some other procedure be adopted then I would argue these factors need to be included in that alternative system.

Transparency and openness matters that are completely absent from the Bill: recording and reporting

33. The Bill makes no provision whatsoever for recording and reporting on the use of CMPs, nor for any notice to be provided for CMPs, nor is there any provision for closed judgments or materials to be reviewed or opened when secrecy is no longer required. This, in my view, is extremely worrying. Unless amendments are made then British justice may be subjected to fundamental, damaging changes without any requirement for monitoring or review.

34. At the Second Reading in the Lords, a number of the peers noted these and similar problems:

- Lord Beecham noted that the government’s response was “extremely weak and unconvincing” with regard to the press freedom impact section of the JCHR report.¹³
- Baroness Berridge spoke of the worrying impact on freedom of the press.¹⁴
- Lord Hodgson noted that the Bill did not contain reporting, recording, review or notice requirements.¹⁵

35. There does not appear to be any systematically compiled evidence of the scale of the use of secret evidence. There does not appear to be any publicly accessible formal or informal recording of the total overall use of CMP, or the total use within the different contexts identified by the Government. Nor is there any indication that such evidence exists out of the public eye.

36. Where records have been requested the Executive has been largely unable or unwilling to provide records. Parliamentary questions in the Commons and the Lords have revealed a paucity of information is available to the current use of CMPs.¹⁶ (I have attached as appendix two my analysis of the question in the Commons: ‘Security Trumps Justice – Again’, *The*

¹³ HL Hansard, 19 June 2012, Col 1671

¹⁴ HL Hansard, 19 June 2012, Col 1721

¹⁵ HL Hansard, 19 June 2012, Col 1712

¹⁶ HC Hansard, 14 May 2012, Col 18W; HL Hansard, 21 June 2012, Col WA 317.

Guardian, online, 16 May 2012.¹⁷) The issue was noted in the House of Lords Constitutional Committee's recent report on the Bill.¹⁸

37. **Recommendation (D):** The Bill should be amended so that recording requirements are introduced with a clear and perhaps template-form statement of at least:
- (i) the duration of open hearings and closed hearings;
 - (ii) the number of witnesses heard in closed proceedings and the nature of those witnesses;
 - (iii) the length of a closed judgment;
 - (iv) whether national security was in issue in the proceedings;
 - (v) whether submissions were received from media or other non-party interests.
38. **Recommendation (E):** The Bill should be amended so that reporting requirements are introduced such that annual or quarterly reports must be delivered on:
- (i) the total numbers of CMP applications;
 - (ii) how many applications have been made by each Secretary of State;
 - (iii) whether submissions were received from media or other non-party interests;
 - (iv) where applications have been granted, all the matters subject to recording requirements above in Recommendation D.
39. These recommendations D and E might equally apply to jurisdictions where CMPs are currently used.

Transparency and openness matters that are completely absent from the Bill: review of judgments

40. The Bill does not provide for the possibility of closed judgments later being opened. As a consequence, material in closed judgments may remain secret long after secrecy is no longer necessary. (These recommendations might equally apply to jurisdictions where CMPs are currently used.)
41. **Recommendation (F):** The Bill should be amended so that closed judgments are accompanied by an open statement from the court that includes:
- (v) the reasons for closure;
 - (vi) any factors which would be particularly relevant in determining whether all or part of the closed judgment could be made open at a later date;
 - (vii) the date at which at the closed status of the judgment should be reviewed, with 5 years being the maximum period before review.
42. **Recommendation (G):** The Bill should be amended so that the person who reviews closed judgments is clearly identified and clearly independent. If not the original judge, a retired judge may be a suitable person.

¹⁷ Also available online: <http://www.guardian.co.uk/law/2012/may/16/secretcy-closed-material-procedures>

¹⁸ HL Paper 18, 15 June 2012, Paragraph 34.

43. These recommendations F and G might equally apply to jurisdictions where CMPs are currently used.

Sunset clause and periodic review of the legislation

44. The Bill will not be subject to any periodic review in its current form. Given the fundamental changes it envisages

45. **Recommendation (H):** The Bill should be amended so that it has a lifetime of five-years and that an independent review of its operation occurs before it expires and can be taken into account at any renewal debates.

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28 June 2012

Appendix 1: List of cases that would potentially be affected

Appendix 2: L McNamara, 'Security Trumps Justice – Again' *The Guardian*, online, 16 May 2012

APPENDIX ONE: LIST OF CASES THAT WOULD POTENTIALLY BE AFFECTED

Extracts from the *Law, Terrorism and the Right to Know* web site at 27 June 2012

<http://www.reading.ac.uk/LTRK/Securitysecrecyandcivilproceedings/ltrk-JusticeandSecurityPotentialCases.aspx>

The list is necessarily speculative. Unless expressly indicated, it is not known whether proceedings have actually been issued in any of the following cases, or indeed whether any proceedings will ever arise out of them. Proceedings may have been issued but then stayed while criminal or other inquiries are on-going. Depending on the precise way in which the Government determines what proceedings may be affected, the number may be greater than 27. Some of the cases mentioned below may also overlap, in part because some sources refer to potential claimants anonymously

Anonymous

On 24 June 2012, [The Mail on Sunday's David Rose reported](#) that it could reveal *new* claims of abuse carried out by British soldiers at a secret network of illegal prisons in the Iraqi desert. One civilian victim is alleged to have died after being assaulted on an RAF helicopter, while others were hooded, stripped and beaten at illegal 'black ops jails'. The Mail on Sunday reports that the whereabouts of 64 Iraqi men who were taken to another 'black site prison' remain unknown. In relation to these allegations, Lieutenant Colonel Nicholas Mercer, the chief British Army lawyer in Iraq during the 2003 invasion is reported by the Mail to have stated that "These are alleged war crimes, but what Britain did may never be disclosed. Indeed, the [Justice and Security] Bill may be specifically designed to prevent such allegations coming to light. [Phil Shiner](#) of Public Interest Lawyers is said to be bringing the cases which apparently involve 3 anonymous potential claimants. It is unclear whether these cases are related to any of those under investigation by the suspended IHAT team.

Serdar Mohammed

Two separate legal proceedings. It has been reported in the [Guardian](#) that Mr Mohammed is seeking compensation after allegedly being mistreated whilst being detained by British troops in Afghanistan. He was subsequently handed over to the Afghan intelligence services who he says tortured him. Mr Mohammed's lawyers are also seeking a judicial review of the decision to transfer him.

A & A v Security Services & Others

The claimants' lawyers, [Bhatt Murphy Solicitors](#), describe this case as involving "claims against the Security Services, the Foreign Office and the Home Office in relation to allegations of complicity in torture inflicted on British nationals detained in the custody of the Inter Services Intelligence Agency in Pakistan."

Shaker Aamer

A British resident, married to a British national and with four British children living in London. He was arrested in Afghanistan in 2001. He is currently still being held in Guantanamo Bay. Further information: [see the Reprive website](#).

Yanus Rahmatullah

Yanus Rahmatullah was captured by UK forces in Iraq in February 2004. He was handed to US forces who have since held him at Bagram Airbase. On 14 December 2011, the [Court of Appeal ordered](#) the Government to ask the US to return him to UK custody, finding that the UK remained responsible for Mr Rahmatullah's well-being. A request was made but the US refused to return him. On 23 February 2012 the [Court of Appeal decided](#) it could do no more at that point. Further information: [see the Reprive web site](#).

Operation Iden

A police investigation looked into potential complicity on the part of MI6 officers in mistreatment of a detainee at the US prison in Bagram. In the end, the CPS and the Metropolitan Police found there was [insufficient evidence](#) to press charges against any officers. However, civil proceedings relating to these allegations may have been or may still be issued (these may also potentially include actions surrounding the treatment of Yanis Rahmatullah above).

Sami al-Saadi and Abdul Hakim Belhadj

Libyan dissidents under Muammar Gaddafi's regime who allege UK involvement in their kidnap and rendition to Libya where they were detained and say they were tortured ([see final part of DPP and Met Police statement](#)). It has been reported that [Saadi's wife and four children](#) were also allegedly rendered and imprisoned, and Belhadj's wife was allegedly abducted along with Balhadj. Civil proceedings were commenced in [2011](#) and are being pursued further in [2012](#).

Noor Khan v Secretary of State for Foreign and Commonwealth Affairs

Proceedings brought by [Leigh Day & Co Solicitors](#) on behalf of Noor Khan, whose father was killed in a drone strike in North West Pakistan. The case alleges that British intelligence was unlawfully provided to be used by US agencies in the direction of drone attacks and ["targetted killings"](#).

Omar Awadh Omar

A Kenyan who alleges that he was illegally rendered to Uganda from Kenya in 2010. Whilst in detention in Uganda, he alleges he was interrogated and mistreated by British and US security services. Questions were twice asked in Parliament on Mr Omar's treatment on [4 May 2011](#) and on [21 June 2011](#). In December of last year, the Court of Appeal [ruled](#) that Mr Omar should be granted permission to apply for Norwich Pharmacal disclosure in relation to British security services involvement in his questioning. These [judicial review proceedings](#) are expected to take place later this year.

Habib Suleiman Njoroge and Yahya Suleiman Mbuthia

Norwich Pharmacal cases, the applicants seek disclosure of documents from the Sec of State for Foreign & Cth Affairs. Njoroge and Mbuthia want documents relating to alleged ill-treatment whilst

in custody in Kenya and Uganda. Mr Njoroge is also seeking documents relating to his alleged rendition from Kenya to Uganda. On [20 March 2012](#) an application for permission to seek judicial review proceedings was refused on the first matter and granted on the second matter. Importantly, the Court referred to a Special Advocate being appointed "with the consent of the parties" and "on terms we hope can be agreed". The full hearing will be joined to the Omar case (above).

Azhar Khan

Former brother in law of Omar Khyam (jailed for life for his part in the fertilizer bomb plot). Khan [alleges](#) that he was detained and tortured in Egypt after flying there from the UK for a holiday in July 2008. In particular, he has alleged that he was asked about discrepancies between a statement he had given to British police and comments he had made when visiting friends in jail: information which he says indicates British [collusion in his mistreatment](#).

Jamil Rahman

[A former civil servant](#) from South Wales who was arrested in Bangladesh after moving there to marry. He has alleged that he was held by the Bangladeshi Directorate General Forces Intelligence (DGFI) and [subjected to](#) mental and physical abuse and torture at the behest of British agents who also questioned him during his detention.

Rangzieb Ahmed

[Convicted](#) in December 2008 at Manchester Crown Court of being a member of al Qaida and directing a terrorist organisation. He alleges that he was tortured in Pakistan by the Pakistani Inter-Services Intelligence Agency (ISI), with the [collusion](#) of MI5 and Greater Manchester police.

Salahuddin Amin

[Convicted](#) and given a life sentence in 2007 for his part in plotting to bomb targets in the UK. He [alleges](#) that he was questioned and tortured in Pakistan by the ISI over a 10 month period. During this time he alleges he was also questioned by MI5 officers.

CB and BP

On 3 April 2012, the Court of Appeal [ruled](#) that the Administrative Court must determine the lawfulness of two expired control orders that were imposed on CB and BP in 2010, despite the fact that the control orders were no longer in force. During their submissions, lawyers for CB and BP argued that such a determination was not entirely academic because their clients wished to establish that the orders were *void ab initio* and potentially seek damages for the period in which they were in force.

Inquiries and potential litigation

The following inquiries could potentially involve sensitive evidence. Within an inquiry, sensitive evidence will be managed under the inquiry's own rules. However, it is possible that the circumstances under inquiry may also give rise to litigation where sensitive evidence may be in issue. These cases could be affected by the Green Paper proposals.

Where potential misconduct by state agents or agencies is an issue in an inquiry or inquest, those affected (or a family member in the case of a death) may take the precaution of issuing civil

proceedings early on and then staying them pending the outcome of the inquiry. This ensures that, should they want to pursue a civil claim after the inquiry, they will not be defeated by statutory time limits. Therefore, while the Inquiries listed below are still on-going, it is likely that in some cases associated civil proceedings will also have been issued, and that these may form one of more of the 27 cases mentioned in the Green Paper.

Azelle Rodney

The [Inquiry](#) into the shooting of Azelle Rodney is ongoing. If civil proceedings are pursued after the Inquiry, then it seems almost certain that sensitive evidence would be involved because it was sensitive evidence that led to the Inquest into Azelle Rodney's death being [abandoned](#) in 2007. If this is one of the 27 cases, it is a very important one because it does not appear to concern national security or terrorism.

Mark Duggan

At a pre-inquest hearing touching on the death of Mark Duggan, the [IPCC alerted](#) the Coroner and other interested persons that it was in possession of "sensitive material" that it was legally unable to provide to the Coroner or other interested persons. The Coroner is [reported](#) to have acknowledged that this may mean that the inquest will have to be suspended and an inquiry set up in its place. As in the case of Azelle Rodney, an Inquiry would be able to hold closed hearings to the exclusion of the family of the deceased, the public and the press.

The Al Sweady Inquiry

"[A]n inquiry into allegations that Iraqi nationals were detained after a firefight with British soldiers in Iraq in 2004 and unlawfully killed at a British camp, and that others had been mistreated in that camp and later at a detention facility." It is likely that civil proceedings will follow the outcome of this inquiry. Further information: [see the Inquiry web site](#).

The Iraq Historic Allegations Team (and [Ali Zaka Mousa](#))

[The IHAT](#) is currently investigating alleged instances of prisoner abuse by British Service Personnel, and deaths in custody in Iraq. These allegations involve over 140 Iraqi civilians. In November 2011, [the Court of Appeal held](#) that IHAT was insufficiently independent for the purposes of Article 3 ECHR. It is currently not clear what the status of the IHAT investigations are following this ruling. Nevertheless, any civil proceedings arising out of the circumstances under inquiry could involve "sensitive evidence" and could potentially be impacted by the proposals in the Green Paper.

APPENDIX 2: Security Trumps Justice – Again

Lawrence McNamara, *The Guardian*, online, 16 May 2012

www.guardian.co.uk/law/2012/may/16/secretcy-closed-material-procedures

“The information is not readily available or held centrally and could be obtained only at disproportionate cost,” Jonathan Djanogly yesterday told Labour MP Sadiq Khan in a [written answer](#).

It says absolutely nothing, and yet speaks volumes about what is wrong with the way British justice is administered when national security is in play.

Khan asked the under-secretary of state for justice “on how many occasions a closed material procedure has been used in an employment tribunal in each of the last 10 years”. The procedural rules for these tribunals allow for closed material proceedings and the exclusion of a party and their legal representative if it is “expedient in the interests of national security” in a Crown employment matter. This can be done either at the direction of a Minister, or a tribunal may of its own volition decide to use these options.

The kinds of cases where it is relevant would very likely include matters such as the legal [action against intelligence agency GCHQ](#) alleging bullying and racial discrimination in the workplace. They would certainly include actions such as that which former police officer Abdul Rahman has taken [against the Metropolitan Police and the Home Secretary](#). Rahman’s counter-terrorism security clearance was suspended due to suspicions he had attended a terrorist training camp prior to joining the Met. He denies that and claims racial discrimination underpins the suspension of his security clearance.

But what is remarkable is not merely that tribunals like the Employment Tribunal or the Special Immigration Appeals Commission use sweeping secrecy provisions like these, but that no record is kept of how often they are used. There is no recording or reporting of how often parties are excluded or materials are closed.

The Minister’s response is even more telling. The cost of finding out how often they have been used would be disproportionate to the value to be gained from knowing how often they have been used. Disproportionate, that is, to knowing how often there are departures from what Lord Brown in the Supreme Court called ‘the integrity of the judicial process and the reputation of English justice.’ Djanogly’s answer comes as the Government sets out to implement such secret justice provisions across all civil cases in the forthcoming Justice and Security Bill.

Leaving to one side the substantive flaws in the government’s proposals – and there are many – if the proposals are to be pursued then it should be a requirement that, on every occasion such procedures are engaged, an open record is kept of the fact of closure, the nature of what was kept secret (documents, oral evidence, etc), the parties from who it was kept secret, and the length and subject of any closed judgment. There should be regular reporting to Parliament about the extent to which such procedures are used.

Khan’s question and Djanogly’s reply refer only to the jurisdiction of the Employment Tribunal, but the answer is indicative of the valuing – and contemporary de-valuing – of justice where national security comes into play.

The Green Paper on which Justice and Security Bill will be based contained no suggestions that legislation will proposed that records be kept wither in the courts where closed material proceedings are currently used, or in the courts where it is proposed they should be introduced. Any bill must contain provisions that at the very least will ensure records are kept and reports are regularly made so that an answer like Djanogly’s can never be given again. **ENDS**