



House of Lords
House of Commons
Joint Committee on Human
Rights

Legislative Scrutiny: Justice and Security Bill

Fourth Report of Session 2012–13

*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee is: Mike Hennessy (Commons Clerk), Mark Davies (Lords Clerk), Murray Hunt (Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Baris Tufekci (Committee Assistant), Greta Piacquadio (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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Summary

The Justice and Security Bill was preceded by the Government's Green Paper on *Justice and Security*, on which we reported in April 2012. The purpose of this Report is to focus specifically on practical ways in which the Bill could be improved by amending it to accommodate the many human rights concerns it raises.

We welcome some of the significant changes which have been made to the proposals in the Green Paper, including the decision not to extend closed material procedures to inquests and the narrowing of the scope of the proposals to national security material. However, the proposals in the Bill extending closed material procedures into civil proceedings generally still constitute a radical departure from the UK's constitutional tradition of open justice and fairness. The question for Parliament is whether or not the Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness. To the extent that the Government has in our view failed to discharge that burden of justification, we recommend amendments to the Bill.

We welcome the Bill's narrower scope compared to the much broader proposals in the Green Paper, but we believe that there is scope for the Government to clarify the sort of material that is intended to be covered by the Bill's provisions extending the availability of closed material procedures. We recommend that the Government confirm that the relevant parts of the Bill are not intended to cover material the disclosure of which would be damaging to international relations and are only intended to protect from disclosure the two narrow categories of information identified by the Intelligence and Security Committee:

- UK intelligence material which would reveal the identity of UK intelligence officers or their sources and their capability; and
- Foreign intelligence material provided by another country on a promise of confidentiality.

We also recommend that the Secretary of State's power to extend the scope of the Act by order be deleted from the Bill.

We are disappointed by the Home Secretary's refusal to allow some special advocates to see the material shown to the Independent Reviewer, which would have provided the best evidence that could be made available to Parliament as to whether there is a practical need for the Bill's provisions on closed material procedures. It is unsatisfactory that at the time of our agreeing this Report the Government has still not been able to tell us precisely how many civil damages claims are pending in which sensitive national security information is centrally relevant. We remain unpersuaded that the Government has demonstrated by reference to evidence that there exists a significant and growing number of civil cases in which a closed material procedure is "essential", in the sense that the issues in the case cannot be determined at all without such a procedure.

We recommend a number of amendments to the provisions in the Bill concerning closed material procedures in order to bring it into line with the Government's own justification

for those provisions:

- so that the court has the power to make a declaration, whether on the application of either party or of its own motion, that the proceedings are proceedings in which a closed material application may be made to the court;
- so as to make the availability of closed material procedures in civil proceedings a matter of genuine judicial discretion;
- so as to require the court to consider whether a claim for public interest immunity could have been made before making a declaration that a closed material procedure may be used;
- so as to ensure that a closed material procedure is only ever permitted as a last resort, where the court is satisfied that a fair determination of the issues is not possible by any other means;
- to ensure that, within a closed material procedure, a full judicial balancing takes place between the public interest in the fair and open administration of justice and the likely degree of harm to the interests of national security; and
- to ensure that the excluded party in a closed material procedure is always provided with at least a gist of the closed material, sufficient to enable him to give effective instructions to his legal representatives and special advocates.

On the part of the Bill reforming the courts' residual disclosure ("Norwich Pharmacal") jurisdiction, we remain of the view that legislating to provide an absolute exemption from the Norwich Pharmacal jurisdiction is not consistent with the Government's commitment to the rule of law. We recommend that the Bill be amended to replace the current absolute exemption for certain types of intelligence information with a system of certification based on the contents of the information and subject to judicial control. We also draw to Parliament's attention the commitment which has been given by the UK Government to the US Government that the Binyam Mohamed judgment will be addressed by legislation.

We recommend that the scope of any reform of the courts' Norwich Pharmacal jurisdiction be confined to the narrower categories of information identified by the Intelligence and Security Committee as information the disclosure of which would jeopardise the national security of the UK. We recommend a number of amendments to the Bill's Norwich Pharmacal provisions designed to achieve a more proportionate response to the problem that we accept exists:

- deleting the absolute exemption from disclosure for intelligence service information (including control principle information);
- leaving in place the proposed system for ministerial certification, narrowed down to apply solely to the narrower categories of information identified by the Intelligence and Security Committee;
- expanding the grounds on which the ministerial certificate can be judicially reviewed to include the ground that any harm to national security caused by disclosure is outweighed by the need to ensure that effective remedies are available

for serious human rights violations.

We also recommend amendments to the Bill designed to address the serious concerns about its impact on the freedom of the media and public confidence in the administration of justice.

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

1 Background

Date introduced to first House	28 May 2012
Date introduced to second House	
Current Bill Number	HL Bill 27

Introduction

1. The Justice and Security Bill was introduced in the House of Lords on 28 May 2012.¹ Lord Wallace of Tankerness, the Advocate General for Scotland, has certified that, in his view, the Bill is compatible with Convention rights. The Bill received its Second Reading in the House of Lords on 19 June 2012 and after four days in Committee completed its Committee stage on 23 July. Report stage is scheduled for 19 November.

2. The Bill was preceded by the Government's Green Paper on *Justice and Security*, which was published in October 2011.² We held an inquiry into the Green Paper and published our Report on it in April 2012.³

Information provided by the Department

3. The Government published a detailed human rights memorandum to accompany the Bill. We welcome this as being in accordance with the good practice that we encourage departments to follow when introducing Bills.

4. At the same time as publishing the Bill, the Government also published its response to our Report on the Justice and Security Green Paper,⁴ and its response to the Justice and Security Consultation.⁵

Our scrutiny of the Bill

5. We identified the Bill as one of our priorities for legislative scrutiny in this session and called for evidence in relation to it.⁶

6. We received written evidence from British Irish Rights Watch, fifty Special Advocates, the Independent Police Complaints Commission, Dr. Lawrence McNamara, Leigh Day & Co., the Immigration Law Practitioners' Association, Professor Clive Walker, Professor Adrian Zuckerman and Sir Daniel Bethlehem QC. All of the written evidence we have received is available on our website.

1 HL Bill 4.

2 *Justice and Security Green Paper*, Cm 8194 (October 2011).

3 Twenty-fourth Report of Session 2010–12, *The Justice and Security Green Paper*, HL Paper 286/HC 1777 (hereafter "JCHR Report on the Green Paper").

4 *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights 2010–12: The Justice and Security Green Paper*, Cm 8365 (May 2012) (hereafter "Government Response to JCHR Report").

5 *Government Response to the Justice and Security Consultation*, Cm 8364 (May 2012).

6 See Press Notice on the Committee's Legislative Scrutiny Priorities 2012–13 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/jchr-legislative-scrutiny-priorities-for-2012-13/>

7. We have also corresponded with various individuals and organisations, including the Government, on specific aspects of the Bill. That correspondence is published in annexes to this Report.

8. We held three formal evidence sessions, the transcripts of which are also published on our website:

19 June 2012: David Anderson QC, the Independent Reviewer of Terrorism Legislation

26 June 2012: Martin Chamberlain and Angus McCullough QC (special advocates) and Ben Jaffey (open advocate)

16 October 2012: David Anderson QC.

9. Members of our Committee and our Legal Adviser have also had two meetings with the Minister and the Bill team to discuss particular aspects of the Bill.

10. We are very grateful to all those who have assisted with our scrutiny of the Bill's human rights implications.

The purpose of this Report

11. We have received a lot of evidence, written and oral, about the Bill's human rights implications and we make this available to inform the continuing debates in Parliament about the Bill. The purpose of this Report, however, is to focus very specifically on practical ways in which the Bill could be improved by amending it to accommodate the many human rights concerns it raises. We therefore focus in particular on the issues on which amendments to the Bill are most likely to be debated as it completes its passage in the Lords and moves on to the Commons. While we have carefully taken into account all of the evidence we have received, this Report refers only to those parts which are most relevant to its narrow focus. We look forward to positive and constructive engagement with our recommendations by the Government.

Changes from the Green Paper

12. The Bill as introduced differs in a number of significant respects from the proposals in the Green Paper. The most significant substantive changes are:

- The Bill makes no provision for the extension of closed material procedures to inquests;
- The scope of the proposals has been significantly narrowed by confining the proposed extension of closed material procedures to national security material;
- SIAC's jurisdiction will be extended to include judicial reviews of decisions about citizenship and exclusion from the UK.

13. We welcome these significant changes from the proposals in the Green Paper, all of which are positive responses to recommendations made by this Committee in our Report on the Green Paper and by others in their responses to the consultation.

14. Other changes which the Government claims to have made to the proposals in the Green Paper, however, require more careful scrutiny. In particular, one of the most significant changes that the Government says it has made in response to consultation and to our Report is that the final decision as to whether a CMP should be used in civil proceedings will now be a judicial decision, as opposed to a ministerial decision subject to judicial review as originally proposed in the Green Paper. How far in practice this change goes towards meeting the substance of the concerns expressed about that aspect of the Green Paper is one of the most significant human rights issues raised by the Bill as currently drafted. It is considered in detail in chapter 3 below.

The Rights and Principles at Stake

15. All of the evidence that we have received, apart from that of the Government, regards the proposals in the Bill which extend closed material procedures into civil proceedings generally as a radical departure from the United Kingdom's constitutional tradition of open justice and fairness. We agree. We remind Parliament that the starting point for scrutiny of those proposals in the Bill is that they constitute a departure from a fundamental common law right which is judicially recognised to enjoy a constitutional status, namely the right to an open and adversarial trial of a civil claim. As Lord Dyson explained in the Supreme Court in *Al Rawi*, there are a number of strands to this common law principle:⁷

A party has the right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance [...] the parties should be given an opportunity to call their own witnesses and to cross-examine the opposing witnesses.

16. According to the Government's ECHR Memorandum, the Government believes that the Bill is compliant with Article 6 ECHR.⁸ In support of this assessment, the Government points to clause 11(5)(c) of the Bill, which provides that nothing in sections 6–11 of the Bill "is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention." As well as being otiose from a legal drafting point of view (because it adds nothing to the existing duty on courts and tribunals in s. 6 of the Human Rights Act 1998), the reference in the Bill to Article 6 ECHR only addresses part of the question of the Bill's compatibility with human rights. In principle, European Convention law should be approached through our law rather than around our law. As we made clear in our previous report, the common law's protections for the right to a fair hearing, including the right to an open and adversarial trial on equal terms and to reasons for the court's decision, are both longer established and superior in content in many respects to Article 6 ECHR. **As a human rights committee we have always scrutinised bills for compatibility with indigenous human rights recognised by the common law and in our view it is particularly important to do so in relation to this Bill.**

⁷ *Al Rawi v The Security Service* [2011] UKSC 34 at [12]–[13].

⁸ ECHR Memorandum, para. 31.

The test to be applied by Parliament

17. When scrutinising the Government's justification for the provisions in the Bill we have applied the same test as that applied by the Supreme Court in *Al Rawi*: that radical departures from fundamental common law principles or other human rights principles must be justified by clear evidence of their strict necessity.

18. It is important to bear in mind, as we pointed out in our Report on the Green Paper, that the central question for Parliament is whether or not the Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness; values that are central both to our common law tradition and to the international human rights obligations that have been so influenced by that tradition.⁹

19. To the extent that the Government has in our view failed to discharge that burden of justification, we recommend amendments to the Bill to bring it into line with the case for more limited change that Parliament may consider to have been made out.

⁹ The House of Lords Constitution Committee has taken the same approach: "While the principles of open justice and natural justice are neither absolute nor inflexible, exceptions to constitutional principles such as these should be accepted only where they are demonstrated on the basis of clear evidence to be necessary", 3rd Report of Session 2012–13, *Justice and Security Bill [HL]*, HL Paper 18 at para. 10 (hereafter "Lords Constitution Committee First Report on the Bill").

2 The scope of the Bill

The Bill's narrower scope compared to the Green Paper

20. In our Report on the Green Paper, we were critical of the wide scope of the Government's proposals for extending the availability of closed material procedures in civil proceedings. The proposals would have applied to the disclosure of any "sensitive material" the disclosure of which may harm "the public interest", both of which terms were defined very broadly in the Green Paper.¹⁰

21. We welcomed the Secretary of State's reassurance to us in evidence that the Government's intentions were in fact very much narrower, and confined to the "narrow problem" of cases where relevant evidence could be given by the intelligence services and is derived by the service using either sources or technological methods of which the parties are unaware.¹¹ We recommended that the scope of the Bill reflect this much narrower intention and be confined to national security-sensitive material, that is, material the disclosure of which carries a real risk of harm to national security.¹²

22. In its response to our Report the Government said that it had considered the matter very carefully, listened to the consultation responses and had "agreed with the Committee that the provisions contained within the Justice and Security Bill for CMPs will be applied only to a small number of civil cases where the open disclosure of relevant material could cause harm to national security (or harm to other very limited public interests in exclusion or naturalisation proceedings).¹³

23. The Bill itself provides for CMPs to be available in proceedings in which there would be disclosure of material which would be "damaging to the interests of national security."¹⁴ **We welcome the narrower definition of the scope of Part 2 of the Bill, which is a significant improvement on the much broader proposals in the Green Paper for closed material procedures to be available in cases involving the disclosure of "sensitive material" which could harm a very broadly defined "public interest."**

What material is intended to be protected by CMPs?

24. There is continuing concern, however, about the scope of the Bill's coverage because of the potential breadth of the concept "the interests of national security". Some have called for the Bill to define precisely what is meant by the phrase. We recognise that a statutory definition of "national security" would be without precedent, and might be unhelpful where that term is used in other statutory contexts. We therefore do not recommend that the Bill be amended to define the interests of national security in this particular context.

10 JCHR Report on the Green Paper, paras 36–47.

11 Oral evidence of Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, 6 March 2012, Q190.

12 JCHR Report on the Green Paper, para. 45.

13 Government Response to JCHR Report, pp. 1–2.

14 Clause 6(2)(b).

25. However, we believe that there is scope for the Government to provide further reassurance to Parliament about the scope of the Bill by clarifying the sort of material that is intended to be covered by the Bill's provisions extending the availability of CMPs.

26. The scope of the proposals for CMPs in the Green Paper was also criticised by the Intelligence and Security Committee ("the ISC"). The ISC broadly welcomed the proposals in the Green Paper, but regarded the scope of the material to be protected as "key". Its view is explained in full in its Annual Report:¹⁵

149. [...] the scope of the material to be protected in this way is key, and this is where the Committee considered that the Green Paper did not offer sufficient clarity. The safety of the British public will, in very special cases, provide justification for altering the usual trial procedures. However, the Committee argued that the material to be protected must be such that it really would jeopardise the national security of the UK if it were to be made public. These special arrangements, therefore, must be the exception, not the rule, and the provisions must not be abused.

150. Not all sensitive material warrants such special treatment, for example, the Green Paper mentioned diplomatic exchanges and there were suggestions that 'the public interest' rather than national security, should be the determining factor in deciding whether closed material procedures (CMPs) should be ordered. This was too broad by far—we argued that the Committee could not support such a broad definition of 'sensitive information'. The Committee was clear that the special arrangements should not be used to avoid difficult or embarrassing situations. Nor should material be excluded simply because it is labelled as 'secret'.

151. There are only two narrow categories of information which can rightly be said to be that sensitive:

- The first is UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use);
- The second is foreign intelligence material, provided by another country on a strict promise of confidentiality.

27. In a Statement on the Green Paper issued on behalf of the Committee by its Chairman the Rt Hon Sir Malcolm Rifkind MP, in March 2012, the ISC said:¹⁶

"The focus must be only on the genuinely sensitive intelligence material of our Agencies, and the foreign intelligence material that we have given our word to protect. It is this material and this material alone that is critical to our national interest.

The current uncertainty around the scope of the proposals has been damaging and threatens to undermine the value of those parts of the proposals that are genuinely important, and not only justified but essential. This Committee believes that it is

15 Intelligence and Security Committee, *Annual Report 2011–12*, Cm 8403 (July 2012).

16 ISC Press Release on the Government's Green Paper on Justice and Security, 27 March 2012.

now vital that the Government set out, in very clear terms, exactly what material will and will not be protected under these proposals. Parliament and the public must be reassured that any changes to legal proceedings will be minimal, and restricted to those situations where the alternative would be damage to our national security and the safety of the British public.”

28. Although the scope of the CMP provisions in the Bill is narrower than the scope of the Green Paper, because they are confined to material the disclosure of which would be damaging to national security, the Government has not, to the best of our knowledge, set out in very clear terms exactly what material will and will not be protected from disclosure under the Bill’s proposals, as it was invited to do by the ISC.

29. We recommend that the Government confirm to Parliament that the material which is intended to be protected from disclosure by the provisions in Part 2 of the Bill is confined to the two narrow categories of information identified by the Intelligence and Security Committee:

- **UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use); and**
- **foreign intelligence material, provided by another country on a promise of confidentiality (that is, “control principle” material).**

30. We also recommend that the Government confirm to Parliament that clauses 6–11 of the Bill are not intended to cover material the disclosure of which would be damaging to international relations, such as diplomatic exchanges.

The scope of the Bill’s Norwich Pharmacal provisions

31. The scope of the Bill’s provisions concerning the courts’ Norwich Pharmacal jurisdiction is dealt with separately in the Bill,¹⁷ and is considered in chapter 4 below.

The power to extend the Bill’s scope

32. The Bill gives the Secretary of State the power¹⁸ to extend the scope of the Act by order, by amending the definition of “relevant civil proceedings”¹⁹ in which CMPs are to be available. Such an order would be subject to the affirmative resolution procedure. This is a wide-ranging power. In principle it would be capable of being exercised to extend the availability of CMPs to inquests. In our view such a significant step should only be taken in primary legislation. **We recommend that clause 11(2) be deleted from the Bill.**

¹⁷ Clause 13(3).

¹⁸ Clause 11(2).

¹⁹ As defined in clause 6(7).

3 Extension of Closed Material Procedures to all Civil Proceedings

Evidence of the need for change

33. In our Report on the Green Paper we considered carefully the evidence relied on by the Government to justify making CMPs available in civil proceedings. We accepted that under the current law it is theoretically possible for there to be some cases in which a fair trial of a civil claim cannot proceed because of the amount of material which cannot be disclosed on Public Interest Immunity grounds. However, the critical question for us was whether the Government had produced evidence which shows that this is not merely a hypothetical problem, but a real, practical problem that exists on the scale suggested in the Green Paper, or on a scale sufficiently significant to warrant legislation.

34. In that Report we considered carefully the evidence of the Independent Reviewer that there is a small but indeterminate category of national security related claims, including for civil damages, in respect of which it is preferable that the option of a CMP, for all its inadequacies, should exist. However, we found persuasive the evidence of the special advocates, who fairly pointed out that the Independent Reviewer's views should not be treated as evidence that the issues in the three civil claims in which he saw the material are incapable of being determined at all without resort to a closed material procedure. We therefore concluded that, in relation to this part of the Green Paper, the Government had not demonstrated by reference to evidence that there is a real and practical problem which justifies the radical departure from common law principles contained in the proposal to extend CMPs.²⁰

35. In the Government's response to our Report, it describes the problem as "rare but damaging."²¹ At the time of the Green Paper, the Government estimated that around 27 cases were posing difficulties. The Government says it is clear that the number of such cases is increasing: since the Guantanamo claims were settled in November 2010 "six further civil damages claims against the Government have been launched where sensitive material will be centrally relevant." The Government relied on the Independent Reviewer David Anderson QC's "comprehensive independent verification of the evidence base for the existence of cases of this problematic type."²² The Independent Reviewer reached that view after being provided with a briefing at which he was talked through seven of the cases causing problems, including three civil damages claims, and given a bundle of top secret material in each case, including both evidence and internal/external advice "material that could not have been provided to members of the public or non-security cleared personnel."

36. In the Lords committee stage debate, some peers took the same view as us that the Government had not yet made out its case and asked for the Government to provide further evidence of the need for change. Lord Falconer for example, pointed out that the evidential foundation for the Government's case for change consisted of three civil

20 JCHR Report on Green Paper, paras 56–80, esp. paras 72 and 80.

21 Government Response to JCHR Report, p. 2.

22 *Ibid.*, p. 4.

damages claims in which the Independent Reviewer had looked at the material and reached the view that a CMP would be necessary in those cases. He queried whether the case for change had yet been proved: “We are willing to be persuaded, but we need to be persuaded.”

37. We are anxious to ensure that every reasonable opportunity is afforded to the Government to make out its case for the provisions on CMPs in Part 2 of the Bill. In their evidence to our inquiry into the Green Paper, the Special Advocates had pointed out that the Independent Reviewer had not had the benefit of a countervailing independent but experienced party, such as a special advocate, whose practical experience of handling sensitive material in civil claims might have pointed to a different conclusion. They thought that a way could be found to hear those claims acceptably fairly, and without unacceptable disclosure of sensitive material, without having to resort to a CMP. They considered that it was possible that their practical experience of operating procedures to deal with sensitive material would lead to a different view of those three cases. They pointed out that “there is as yet no example of a civil claim involving national security that has proved untriable using PII and flexible and imaginative use of ancillary procedures.”

38. We asked the two special advocates who had co-ordinated the Special Advocates’ collective submission on the Bill whether, if invited by the Government, they would be prepared to view the material that was shown to the Independent Reviewer, to see if they agreed with his view that a CMP was necessary in those cases.²³ They indicated that they would be prepared to do so if asked by the Government.

39. We therefore wrote to the Home Secretary on 3 July suggesting that some experienced special advocates be invited to view the material seen by the Independent Reviewer in the three civil cases, to see if the special advocates agree that they are cases which can only fairly be determined with a CMP.²⁴ We included a copy of the relevant evidence the special advocates had given to us, making clear that they would be happy to do so if asked. In her reply dated 17 July the Home Secretary declined to do so, for a number of reasons.²⁵ The briefing to the Independent Reviewer had involved making a limited waiver of privilege to be able to show him information including merits advice. The Home Secretary did not think it appropriate to extend the waiver of privilege, which was granted to the Independent Reviewer to enable him to see the information concerned, to special advocates. She noted that special advocates acted regularly against the Government in analogous cases, represented active litigants, challenged the Government’s position in high-profile cases and had “well-known views about the system.” It was therefore considered that allowing them to view the material would risk tainting them for future work, and the benefits were in any event thought to be unclear given that special advocates already have a good idea of the type of sensitive material that can necessitate a closed process.

40. In view of the comments made about the special advocates in the Home Secretary’s response, we invited the special advocates to respond to the Secretary of State’s letter. In

²³ Q27.

²⁴ Ev 1.

²⁵ Ev 2.

their reply dated 2 October the special advocates made a number of comments on the Home Secretary's reasons for declining the Committee's suggestion.²⁶

- They reiterated that their reason for disagreeing with the Independent Reviewer was that their experience of handling sensitive material in civil cases suggested to them that a way could normally be found for a claim to be heard acceptably fairly and without unacceptable disclosure of sensitive material.
- They rejected the implication that their views on the Bill were partisan, or that they were acting as advocates for the parties they represented when they commented on the Bill. Rather, they did so as interested members of the public with particularly relevant experience of the way CMPs work in practice.
- They did not consider that the risk of a special advocate having to decline to act in a future case having seen the material to be a good reason for declining the Committee's suggestion, because the special advocates were well aware of that risk and had made clear that they were prepared to take it.
- Finally, they pointed out that "there remains a real lack of clarity, both in the Home Secretary's letter and from information provided by the Government to date, as to the size of the problem arising specifically from civil damages claims which it is said necessitates the proposals in the Bill." They pointed out that it was not clear how the 15 civil damages claims referred to by Lord Wallace in the Committee stage debates on the Bill related to the six such claims referred to elsewhere in Government documents and responses.

41. When the Independent Reviewer gave evidence to us in June he told us that, in addition to the three cases he had been shown which had convinced him that there was already a problem, he suspected that "we are already beginning to see the start of a second wave of cases concerning alleged complicity in the targeting of drones. I can only imagine that those cases may raise similar sorts of issues." We asked him more recently if he knew exactly how many such cases have been started. He was aware of two cases concerning alleged complicity in the targeting of drones. However, he also said that he had been given up to date information by the Ministry of Justice concerning the number of civil damages claims that had been started that were likely to be "saturated" in national security material, but that he was not at liberty to pass this information on to the Committee.

42. In the light of the lack of clarity about whether the number of pending claims is 27, 15, 6 or 3, and in the light of the Independent Reviewer's evidence we wrote to the Minister in charge of the Bill on 23 October to ask how many civil damages claims were currently pending against the Government in which sensitive national security information is centrally relevant, and, to the extent possible, for a breakdown of those cases showing the date on which proceedings were commenced and a summary of the nature of the claim. We also asked in how many of these cases it was the Government's view that the issues in the case could not be fairly determined without a closed material procedure.

43. On 2 November we received a holding reply explaining why it had not been possible to supply this information by 31 October as requested.²⁷ The letter said that the Cabinet

26 Ev 6.

Office does not hold a central database of the case details, but the information is held in each Government department. It had been difficult to complete within the timeframe, to a sufficient degree of reliability, the necessary consultation with a significant number of individuals and departments across Government. The cases involved are sensitive and complex, and the status of cases is constantly shifting. The Government also has to consider all the impacts of any information given publicly about these very sensitive cases. It hopes to be able to provide the information to us shortly.

44. We do not underestimate the problem the Government has in demonstrating the difficulties it says it is experiencing by reference to litigation which is still ongoing. We understand that this makes it hard for the Government to prove its case. However, what is being proposed is a radical departure from some fundamental common law principles and the onus of justification on the Government is correspondingly heavy.

45. We are disappointed by the Home Secretary's refusal to allow some special advocates to see the material that had been shown to the Independent Reviewer. In our view, this would have provided the best evidence that could be made available to Parliament as to whether there really exists a practical need for the provisions on closed material procedures in Part 2 of the Bill. It is unsatisfactory that the Government at the time of agreeing our Report has still not been able to provide us with the data we had requested on the number of civil damages claims pending in which sensitive national security information is centrally relevant. Pending receipt of a response to our latest attempt to clarify the evidential basis for the Government's case for the provisions in Part 2 of the Bill, we remain unpersuaded that the Government has demonstrated by reference to evidence that there exist a significant and growing number of civil cases in which a CMP is "essential", in the sense that the issues in the case cannot be determined at all without a CMP. In our view this test of necessity is the appropriate test to apply to the evidence, not the lower standard of whether there are cases in which it would be "preferable" to have CMP as a procedural option.

Equality of arms

46. The Bill provides that in any civil proceedings in the High Court, Court of Appeal or Court of Session, the Secretary of State may apply to the Court for a declaration that a closed material procedure may be used in those proceedings.²⁸

47. Under the Bill it is therefore only the Government that can apply for a CMP. As the Special Advocates pointed out in their written evidence on the Bill, the Government can therefore still decide not to trigger a CMP if it considers that its own interests would be better served by not doing so (for example, because it does not want the court to reach its decision on the basis of sensitive material which is embarrassing to the Government). In the Special Advocates' view, if a power to hold CMPs is to be introduced, both parties, and not just the Government, should have the right to apply for them.

27 Ev 10.

28 Cl. 6(1) of the Bill.

48. The Independent Reviewer agreed. In his view, the Bill does not treat the parties to civil litigation on an equivalent basis.²⁹ His evidence was that the Bill, as drafted, “plainly does not guarantee equality of arms or the equal treatment of the two parties to litigation.”³⁰

I am a little baffled by this. It is very much part of the Government’s justification for the Green Paper and the Bill that a closed material procedure can achieve fairness for individuals whose claims would otherwise have been struck out. I do not understand where the incentive is for the Government to request a closed material procedure if they reckon that in the absence of such a procedure they might win a strike-out. As one sees from the judgment in *AHK*, it is not a fanciful possibility. Mr Justice Ouseley said in that case that if there is no closed material procedure, some of these cases will be struck out.³¹

49. The House of Lords Constitution Committee also made the same point in its first Report on the Bill, criticising the one-sided scheme of CMPs provided for in the Bill. It found it to be constitutionally inappropriate and an unjustified inroad into the principle of equality of arms for the executive to be a party to litigation and at the same time have the power to apply for a CMP which is not a power enjoyed by the other party to the litigation.³²

50. The Government’s entire justification for extending CMPs to all ordinary civil proceedings is that this will provide a fairer way of litigating cases in which national security material is central to the claim or the defence. As the Government’s response to our Report on the Green Paper makes clear, the absence of a CMP may in some cases cause unfairness to the non-state party to litigation. The Government cites Lord Clarke’s comments in *Al Rawi*, that a closed procedure might be necessary in a case in which it is the non-state-party which wishes to rely upon the material which would otherwise be subject to PII in order to defend itself in some way against the state; and the recent *AHK* case in which Ouseley J. pointed to the scope for unfairness towards a claimant who might have to have their claim struck out if there is no means by which sensitive intelligence can be heard in court. In our view, both the principle of the equality of arms and the Government’s own “fairness” rationale for the extension of CMPs in civil proceedings require that if CMPs are to be available at all in civil proceedings, it should be possible for either party to litigation to initiate the process. For reasons which we explain in more detail below,³³ we also think it would be desirable for the court itself to have the power to raise the question whether a closed material procedure is necessary.

51. We recommend that the Bill be amended so that the court has the power to make a declaration, whether on the application of either party or of its own motion, that the proceedings are proceedings in which a closed material application may be made to the court. Such an amendment is necessary in order to make the Bill compatible with the requirement of equality of arms, and to make it consistent with the Government’s own

29 Q10.

30 Q12.

31 Q10.

32 Lords Constitution Committee First Report on the Bill, paras 18–20.

33 See section on “judicial balancing” below.

justification for extending CMPs in civil proceedings, which is to increase the fairness of such proceedings for both parties.

52. The following amendments to clause 6(1) of the Bill would give effect to this recommendation:

Clause 6, Page 4, Line 18, leave out ‘The Secretary of State may apply to’

Clause 6, Page 4, Line 19, after the first ‘proceedings’ leave out ‘for’ and insert ‘may, on application of either party or of its own motion, make’

Judicial balancing at the “gateway”

53. In our Report on the Green Paper, we were critical of the proposal that the decision to trigger a closed material procedure in civil proceedings should be for the Minister and not the court.³⁴ We agreed with the Independent Reviewer of Terrorism Legislation who described the proposal in evidence to us as “profoundly wrong in principle”. The decision whether to order a CMP must be one for the court, not the Government. We also emphasised the importance of judicial balancing in any legal framework brought forward by the Government: we recommended that the forthcoming Bill should ensure that there is always full judicial balancing of the competing public interests in play, both at the “gateway” stage of deciding the appropriate procedure and at the subsequent stage of deciding whether a particular piece of evidence should be heard in closed or in open session.

54. The Bill provides that in any civil proceedings in the High Court, Court of Appeal or Court of Session, the Secretary of State may apply to the Court for a declaration that a CMP may be used in those proceedings.³⁵

55. The Government says that this is one of the significant changes from the proposals in the Green Paper, because it means that the final decision that a CMP could be used will be a judicial one, not a ministerial one. In his foreword to the Government’s response to the Committee’s Report, for example, the Secretary of State for Justice and Lord Chancellor said that “This will ensure that the decision will be taken free of political influence, and can only be taken where evidence a Closed Material Procedure is necessary on national security grounds is found to be persuasive by an independent judge.” As the response itself described the provision in the Bill, “the Minister triggers the process by deciding that a CMP is needed, and applying to the judge who determines whether it goes ahead.”³⁶ The Intelligence and Security Committee, in its Annual Report, appears to have taken this assertion at face value, noting that “it is now judges who will have the final decision on whether the request by Ministers for a case, or part of a case, to be held under CMP conditions should be granted.”³⁷

56. The Government’s assertion requires closer scrutiny. The Bill provides that the court “must” allow a CMP if it considers that a party to the proceedings would be required to

34 JCHR Report on the Green Paper, paras 99–103.

35 Cl. 6(1) of the Bill.

36 Government Response to JCHR Report, p. 7.

37 ISC Annual Report 2011–12, at para. 163.

disclose material in the course of the proceedings to another person and that such disclosure would be damaging to the interests of national security.³⁸ Moreover, when deciding whether a party would be required to disclose material, the court is expressly required to disregard the possibility that there might not be disclosure because the material can be withheld on PII grounds.³⁹

57. As the Special Advocates said in their written evidence, the Bill therefore cannot really be said to provide for a judge to take the decision as to whether a CMP is needed, because of the extent to which clause 6(2), as currently drafted, ties the judge's hands when considering the Government's application. In the words of Angus McCullough QC, "there is, in reality, no discretion provided for the role of the judge in relation to determining what the fairest way of determining any particular case is."⁴⁰

58. The Independent Reviewer agreed. He said:⁴¹

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

59. In his more recent evidence to us the Independent Reviewer said that he maintained his view that, although the provisions concerning CMPs in Part 2 of the Bill address a genuine question, they do so in a disproportionate manner. He proposed some possible amendments to the Bill; the principal change suggested was to give the judge a genuine discretion to decide whether a CMP should be used:⁴²

At the gateway stage I would allow the judge to exercise discretion as to whether it is a case in which a CMP application could, in the future, be made to the court. He is currently required to declare that it is a CMP case whenever disclosure would be damaging to the interests of national security; 6(2)(b). He is directed to ignore the fact that the PII process might result in that material being withheld; 6(3)(a). Only the Secretary of State may consider the alternative of PII; Clause 6(5). The judge ought to be able to decide, in my view, "Let's go with PII for now and see how we get on. I am not going to tell you at the outset that this case is suitable for a closed material procedure."

38 Cl. 6(2).

39 Cl. 6(3).

40 Q40 (26 June 2012).

41 Q7 (19 June 2012).

42 Q70 (16 October 2012).

I do not go so far as to say that the judge should be obliged in all cases to exhaust PII before he comes to the possibility of a CMP, but the judge should be trusted to make the relevant decision. It is ultimately a case management decision and whether CMP or PII or some combination of the two is the eventual outcome, in this type of litigation the Government's secrets are safe, so I can see no reason not to leave that discretion to the judge.

60. We agree with the suggestion of the Independent Reviewer. We recommend that the Bill be amended so as to make the availability of CMP in civil proceedings a matter of genuine judicial discretion. The decision as to whether there should be a CMP should not be the subject of a statutory duty to direct one where there is material that is relevant to the proceedings and that it would be damaging to national security to disclose. Rather it should be the product of a full judicial balancing exercise in which the court weighs the competing public interests before deciding whether there should be a CMP.

61. When exercising that judicial discretion the court should not be required to ignore the fact that the PII process might result in the material being withheld, and should actively consider whether a claim for PII could have been made in relation to the material. We therefore also recommend that clause 6(3)(a) be deleted and a new sub-clause added to the Bill requiring the court to consider whether a claim for PII could have been made in relation to the material.

62. The following amendments to clause 6 of the Bill would give effect to this recommendation:

Clause 6(2), Page 4, Line 21, leave out 'must, on an application under subsection (1)' and insert 'may'

Clause 6(2), Page 4, Line 27, after sub-paragraph (b) insert new sub-paragraph—

'() the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice'

Clause 6(3), Page 4, Line 30, leave out sub-paragraph (a)

Clause 6(5), Page 4, Line 42, after sub-clause (5) insert new sub-clause—

() Before making a declaration under subsection (2), the court must consider whether a claim for public interest immunity could have been made in relation to the material.

Strict necessity: CMPs only as a last resort

63. As we pointed out in our Report on the Green Paper, one of the options for reform was that put forward by the Independent Reviewer of Terrorism Legislation, in his evidence to us on the Green Paper. He was in favour of adding CMPs to the procedural armoury of the civil courts, provided strict conditions of necessity were satisfied. This included the requirement that "the court's power to order a CMP should be exercisable only if, for reasons of national security connected with disclosure, the just resolution of a case cannot

be obtained by other procedural means (including not only PII but other established means such as confidentiality rings and hearings in camera).” In other words, CMPs should be available in civil proceedings, but only as a very last resort to enable the resolution of claims which would otherwise be untriable.

64. The Bill as drafted fails to ensure that a CMP will be adopted only when strictly necessary. As the Special Advocates point out in their submission on the Bill, this is because the “test” to be applied by the court at the gateway stage⁴³ does not require the court to ask whether the case is one which can only be justly resolved using a CMP rather than the existing procedural mechanisms. This means that if the Government decides to apply to trigger a CMP, the judge will be obliged to accede to the application if there is any sensitive material relevant to the case and the disclosure of which would damage national security. This is so even if the judge considers that the case could be tried using the existing PII rules in a way that is fair to both sides, and that a CMP is not therefore needed to determine the issues in the case fairly. The Bill, in short, contains nothing to ensure that CMPs will only be resorted to as a matter of last resort when a trial could not otherwise proceed.

65. When we asked the Independent Reviewer whether Part 2 of the Bill as drafted contains the sort of conditions that he had in mind to ensure that a CMP is resorted to only in cases of strict necessity, he was categorical that it does not:⁴⁴

I said that I thought that a CMP could be tolerable in these sorts of cases—but only if certain conditions were satisfied. One was that a CMP should be a last resort to avoid cases being untriable, as Lord Kerr put it in the *Al Rawi* case. [...]The consequence in the way things will be done, if the clause becomes law, is that some cases will be tried by a closed material procedure that could have been fairly tried under PII. It may also be that some cases may be struck out that could more fairly have been tried by a closed material procedure. These would be cases where the Government, for whatever reason, chose not to apply for a closed material procedure.

66. The Independent Reviewer in his more recent evidence indicated that he would be supportive of building into clause 6 of the Bill a requirement that a CMP only be permitted as a last resort: as he put it, a CMP should be available only if “there is no other fair way of determining the case.”⁴⁵

67. We recommend that the Bill be amended so as to ensure that a CMP is only ever permitted as a last resort, by making it a precondition of a declaration that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means.

The following amendment to clause 6(2) would give effect to this recommendation:

Clause 6, Page 4, Line 27, insert new sub-paragraph—

43 Clause 6(2) of the Bill. The gateway is the stage at which the court decides whether to make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.

44 Qs 6 and 8 (19 June 2012).

45 Q70 (16 October 2012).

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

Judicial balancing in the CMP

68. In our Report on the Green Paper, we recommended that there should be full judicial balancing of the public interests in play within the CMP, when deciding whether material should be in closed or open, as well as at the earlier “gateway” stage of deciding the appropriate procedure.⁴⁶ The Government in its response to our Report disagreed.⁴⁷ Within the CMP, it said, the proposals envisaged full judicial involvement on whether individual documents should remain in closed, but that judicial involvement should not be based on a PII-style balancing test. “Rather, the guiding criteria must be whether open disclosure of the material is damaging or not”, subject only to the requirements of Article 6 ECHR.

69. During the Bill’s committee stage, the Government’s main substantive response to the criticism underlying the various proposed amendments to clauses 6 and 7 of the Bill on CMPs was that the proponents of amendments had failed to appreciate the extent to which an exercise “very similar to PII” would in fact take place at stage two of the proceedings, when the court considers whether each piece of evidence should be heard in closed or in open session.

70. In fact, at this stage, as the evidence of the special advocates over many years has made clear, the exercise which takes place is not at all like a PII exercise. This is because judicial balancing is ruled out completely by clause 7(1)(c) of the Bill: material the disclosure of which would be damaging to the interests of national security *must* be dealt with in the closed proceedings.

71. We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session. The following amendment would give effect to this recommendation:

Clause 7(1)(c), Page 5, line 33, after ‘security’ insert ‘and that damage outweighs the public interest in the fair and open administration of justice’.

The “AF (No. 3) disclosure obligation” (“gisting”)

72. The so-called “AF (No.3) disclosure obligation” (sometimes referred to as the “gisting” obligation) is the obligation to disclose to the opposing party in litigation sufficient material to enable them to give effective instructions to their special advocate who represents their interests in closed material procedures.

73. In our Report on the Green Paper we recommended that the obligation to disclose sufficient information to enable effective instructions to be given to an individual’s special

⁴⁶ JCHR Report on the Green Paper, paras 102–3.

⁴⁷ Government Response to JCHR Report, p.7.

advocate should always apply in any proceedings in which CMPs are used.⁴⁸ The Government, however, rejected this recommendation, having concluded that “this is a complex area which is more suited to treatment by the courts on a case by case basis.”⁴⁹ The Bill therefore makes no provision for such disclosure when a CMP takes place in civil proceedings under the provisions of the Bill.

74. In our Report on the Green Paper, we noted that the former Reviewer of Terrorism Legislation, Lord Carlile of Berriew, had expressly agreed in his oral evidence to us that the disclosure obligation should apply to all proceedings, and there was no respectable argument against it in any circumstances. The current Independent Reviewer has also consistently acknowledged the importance of gisting. We asked him whether, as a matter of basic fairness, there should be a general obligation in a civil litigation CMP to disclose sufficient information to the excluded party to enable them to give effective instructions to their special advocate. He said that he could see the great attractions from a policy point of view of requiring gisting in all types of case.⁵⁰ His extensive knowledge of control orders also meant that he found it tempting in policy terms to ask, if the gist can be given to those subject to control orders, who are considered to pose the greatest risk in terms of terrorism, why it should not also be given to those who might be bringing a civil claim. He “could not agree more that the more information one can give the individual, the better it is from the point of view of the fairness of a closed material procedure.”

75. The Special Advocates in their evidence pointed out that, if a CMP is triggered, the Bill does not require the excluded party to be given a summary of the closed material. It requires only that the court consider requiring such a summary to be given.⁵¹ Importantly, however, the court is required to ensure that the summary does not contain material whose disclosure would be contrary to the interests of national security.⁵²

76. We agree with the Special Advocates’ recommendation that, if there is to be a power to hold a CMP, there should be a statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. The absence from the Bill of such a disclosure obligation seriously limits the opportunities for special advocates to mitigate the unfairness caused by the Bill’s departure from the principles of open and adversarial justice. We recommend that the Bill be amended to impose such a disclosure obligation in all cases in which a CMP is held. The following amendments would give effect to this recommendation:

Clause 7, Page 5, line 35, leave out “consider requiring” and insert “require”

Clause 7, Page 5, Line 37, at end insert ‘sufficient to enable the party to whom the summary is provided to give effective instructions on the undisclosed material to their legal representatives and special advocates’

Clause 7, Page 5, line 38, after ‘ensure’ insert ‘so far as it is possible to do so’.

48 JCHR Report on the Green Paper, para. 106.

49 Government Response to JCHR Report, p. 7.

50 Q18 (19 June 2012).

51 Clause 7(d).

52 Clause 7(e).

4 Reform of the courts' residual disclosure ("Norwich Pharmacal") jurisdiction

Introduction

77. In our Report on the Green Paper we accepted that the Government had made out a case for legislating to provide greater legal certainty about the application of the Norwich Pharmacal principles to national security sensitive material.⁵³ We accepted that Norwich Pharmacal applications carry a heightened risk of disclosure of material which is damaging to national security, because the very purpose of the application is to obtain an order for disclosure. We also accepted that the novel application of the Norwich Pharmacal jurisdiction to intelligence information in the *Binyam Mohamed* litigation had given rise to a nervousness on the part of intelligence partners about the risk of their shared intelligence being disclosed and that it was a legitimate aim to seek to reassure such partners by providing greater legal certainty.

78. The Independent Reviewer of Terrorism Legislation, David Anderson QC, also accepted that there was a case for restricting the novel application of the Norwich Pharmacal jurisdiction to national security information. The question, for both us and the Independent Reviewer, was one of proportionality: what would be a proportionate restriction on the jurisdiction to order disclosure in order to meet the Government's national security objectives?

The effect of the Bill

79. The Bill removes altogether the courts' jurisdiction to order a person involved (however innocently) in apparent wrongdoing by another person to disclose information about the wrongdoing (the so-called "Norwich Pharmacal jurisdiction") if the information is "sensitive information." The ouster of the courts' jurisdiction to order disclosure of such information is in absolute terms: "A court may not, in exercise of its residual disclosure jurisdiction, order the disclosure of information sought [...] if the information is sensitive information."⁵⁴

80. "Sensitive information" is extremely broadly defined to mean any information held by an intelligence service; obtained from, or held on behalf of, an intelligence service; derived, in whole or in part, from information obtained or held on behalf of an intelligence service; or relating to an intelligence service.⁵⁵ The Government refers to this category of sensitive information as "intelligence service information."

81. Sensitive information also includes any information specified or described in a certificate issued by the Secretary of State in relation to the proceedings.⁵⁶ The Secretary of

53 JCHR Report on the Green Paper, paras 151–158.

54 Cl. 13(2).

55 Cl. 13(3)(a)–(d).

56 Cl. 13(3)(e).

State may issue such a certificate if they consider that it would be contrary to the interests of national security or the international relations of the UK to disclose the information, whether the information exists, or whether the person said to hold the information is in fact in possession of the information.⁵⁷

82. A party to the proceedings can apply to the court to set aside the Secretary of State's certificate on the ground that the Secretary of State ought not to have determined that disclosure of the information would be damaging to national security or international relations.⁵⁸ The court, when deciding whether or not to set aside the certificate, must apply the principles that would be applied on an application for judicial review.⁵⁹ Proceedings challenging the Secretary of State's certificate are deemed to be proceedings in which a CMP is permissible.⁶⁰

83. The provisions in the Bill are closely based on the Government's preferred option for reforming the Norwich Pharmacal jurisdiction in the Green Paper.⁶¹ They are, however, considerably wider than the option canvassed there because of the extraordinary width of the definition of intelligence service information in the Bill. The Green Paper envisaged an absolute exemption from disclosure for "material held by or originated from one of the Agencies."⁶² The Bill, as drafted, would also exempt information relating to an intelligence service, and information derived "in whole or part" from information obtained from, or held on behalf of an intelligence service, which are both potentially very broad categories of information.

84. The provisions on the Norwich Pharmacal jurisdiction in the Bill go far beyond what either we in our Report or the Independent Reviewer considered proportionate to the legitimate objective that we both accepted. We concluded that any absolute protection for the control principle, by altogether exempting from disclosure any information received in confidence from an intelligence partner, was in principle incapable of being justified because it was inconsistent with the rule of law: it would allow the possibility of a court being unable to order the disclosure of such information even where such disclosure would cause no or negligible harm to any public interest and the value of it to the individual was high, for example because it was central to his ability to contest legal proceedings in which he faced the possibility of the death penalty (as in Binyam Mohamed's case, at least at the outset of those proceedings when he still faced the prospect of a capital charge).

85. The Independent Reviewer also found that a blanket exclusion from disclosure for all material held by or originating from one of the Agencies, regardless of its sensitivity, would be "manifestly disproportionate". As far as the requirements of human rights law are concerned, the problem with any blanket exemption, of whatever scope, is that it precludes any judicial balancing of the degree of possible harm to national security on the one hand against any competing public interest in favour of disclosure on the other (even where that

57 Cl. 13(4) and (5).

58 Cl. 14(1) and (2).

59 Cl. 14(3).

60 Cl. 14(4).

61 Green Paper, paras 2.91–2.93.

62 *Ibid.*, para. 2.91.

competing interest is an individual's right to use legal process to defend themselves against charges carrying the death penalty).

86. The Government has rejected both our and the Independent Reviewer's views, however, and brought forward in the Bill a proposal which not only seeks to make the control principle absolute in the Norwich Pharmacal context, but goes beyond that by providing for an absolute exemption from disclosure for a much wider category of "intelligence service information."

Absolute protection for the control principle?

87. The Government's Response to our Report rejected our recommended approach of rebuttable presumptions against disclosure on the basis that this would provide little advance on the current system in terms of providing "certainty" to the UK's international partners and it would therefore provide no additional reassurance to those partners.

88. Since our Report on the Green Paper we have sought to understand better the Government's justification for the scope of its proposed reforms to the courts' Norwich Pharmacal jurisdiction. We invited written evidence from Sir Daniel Bethlehem QC, former Foreign Office Legal Adviser, about his experience of the impact of the Binyam Mohamed litigation and other relevant cases on the UK's intelligence partners, including but not confined to the US.⁶³ We appreciate the considerable constraints upon his ability to give evidence in view of his previous position in the FCO and we are grateful to him for agreeing to provide written evidence in his private capacity. We found his evidence helpful and illuminating, and demonstrative of the conscientious attempts within Government to strike the right balance between justice and security in this difficult context. We focus here on one aspect which is most relevant to our present Report, concerning the effect of the Binyam Mohamed judgment insofar as that is relied on by the Government to justify the scope of its reforms to the courts' Norwich Pharmacal jurisdiction.

89. According to Sir Daniel's evidence, the damage done by the Binyam Mohamed case was only in part a consequence of the decision requiring disclosure of the seven paragraphs of the court judgment in question in violation of the control principle. "More serious, in my view, was the decision of the Divisional Court to reject the PII certificate and substitute its own view of the balance of the public interest."⁶⁴ The "core issue" with the Binyam Mohamed judgment, according to Sir Daniel, is that it caused considerable doubt to creep into the heart of the PII process. By rejecting the Secretary of State's claim to PII, the court showed the current PII framework to be inadequate to the task of achieving a proper balance between open justice and national security in the types of cases with which the Bill is concerned.

90. Sir Daniel describes the claiming of PII by a minister in the following terms:

As a matter of established form, this assessment always concludes with a statement by the Secretary of State that this balance is ultimately a matter for determination by the court, even though the received wisdom is that a court will give a good deal of

63 Ev9.

64 Para. 24.

deference to the views of the Secretary of State and is highly unlikely to reach a conclusion different from that of the Secretary of State.⁶⁵

91. Sir Daniel Bethlehem QC's account of the disquiet in the intelligence and diplomatic communities as a result of this particular feature of the *Binyam Mohamed* judgment is directly corroborated by the Independent Reviewer's account of US perceptions of the judgment, following his recent visit to the US.⁶⁶ He said⁶⁷

What angered them about *Binyam Mohamed* [...] was not so much the outcome [...] in terms of what was disclosed as the fact that an English court had been prepared to disclose material which the Foreign Secretary had concluded presented a likelihood of real damage both to national security and international relations; a conclusion that was supported by evidence from very high-level officials in America expressing their concern. [...] The burden of the comments I had from the Americans did not relate to any damaging effect of the disclosure of that material. It related to the fact that the court was prepared to overrule the Foreign Secretary.

92. As a parliamentary committee with a particular concern for human rights and the rule of law, we are troubled by the suggestion that the Executive is only happy to acknowledge a role for the courts in the adjudication of PII claims on national security grounds so long as it always upholds the Government's claims to immunity from disclosure. In our view, the statement by the Secretary of State on a PII certificate is not merely a matter of form. Rather, as explained succinctly in the Report of the House of Lords Constitution Committee on the Bill, it reflects a fundamental constitutional settlement which is the product of many years of case-law, culminating in the landmark judgments of the House of Lords in *Conway v Rimmer* and *Wiley*. It follows from those judgments, and from the explicit recognition by the Secretary of State when claiming PII, that the possibility of the court rejecting the executive's claim is acknowledged and accepted by the Executive. The rule of law requires this.

93. We are concerned that clause 13 of the Bill, as currently drafted, amounts to a reversion to class-based claims for PII, in which ministers exercise a veto over disclosure on the ground that the information falls into a particular class, regardless of its contents. We are acutely aware of historic cases, such as the *Matrix Churchill* case, in which executive overreaching of the power to make class-based claims for PII led to the welcome abandonment of such an approach to claiming PII in favour of an approach which focused on the contents of the documents in question.

94. We note in passing that the Independent Reviewer's evidence made clear that it is accepted in the US that "the letter of the US law does not give an unconditional assurance that [...] UK-sourced intelligence was safe from disclosure in American courts."⁶⁸ He reported that, according to the American Civil Liberties Union, UK-sourced intelligence information could be requested under US Freedom of Information legislation, and it is for the courts to decide whether the exemptions in that legislation (including for national

65 Ev 9 para. 23.

66 Oral evidence of David Anderson QC, 16 October 2012.

67 Q72.

68 Q74.

security and intelligence information) apply. Although a heavy measure of judicial deference is given in the national security context when looking at those exemptions, “the courts have said that deference is only due when the Government adequately explains the basis for its withholding and that the deference does not equate to judicial abdication of the duty to review the basis for withholding. However, there did not seem to be any examples in which the classification of foreign-sourced intelligence information had been challenged. Nevertheless, that possibility exists in the US legal framework.

95. We also note with interest that the Intelligence and Security Committee has not called for an absolute exemption for control principle information, but rather has called for the protection to be given to foreign intelligence information to be bolstered by a statutory presumption against disclosure of intelligence material, to send a clear signal to the courts about Parliament’s intentions in relation to such material. The Committee was at pains to point out that this would merely be a rebuttable presumption, and the final decision would remain with the judges:⁶⁹

Any presumption would of course be rebuttable and therefore the final decision would still lie with the courts, although there would need to be compelling reasons for a judge to rule against.

96. We remain of the view expressed in our Report on the Green Paper, that legislating to provide an absolute exemption from the Norwich Pharmacal jurisdiction for control principle information is not consistent with the Government’s commitment to the rule of law. We recommend that the Bill be amended to replace the current absolute exemption for certain types of intelligence information with a system of certification based on the contents of the information and subject to judicial control.

97. We also draw to Parliament’s attention the commitment which has been given by the UK Government to the US Government that the Binyam Mohamed judgment will be addressed by legislation. This is apparent from the Government’s response to the Second Report of the House of Lords Constitution Committee on the Bill (where it says that the US reaction to the judgment was tempered by the UK Government’s early commitment to do so) and the evidence of the Independent Reviewer.⁷⁰

What “sensitive information” is intended to be exempt?

98. In the Government’s response to our Report on the Green Paper it argues that there is clear justification for an exemption from the courts’ Norwich Pharmacal jurisdiction for material held by or originating from the intelligence services:⁷¹

The kind of material sought in these cases will by its very nature be security-sensitive—it invariably relates to the discharge by the agencies of their national security functions and it will in consequence inevitably involve material, for example, relating to counter-terrorist investigations, agent-recruitment operations and engagement/communications with foreign intelligence services. It is axiomatic that

⁶⁹ ISC Annual Report 2011–12, para. 161.

⁷⁰ See eg. Q 77: “My impression was that our Government has spent a good deal of effort and charm and goodwill in persuading the United States that we are going to sort this out through Clause 13 of the current Bill.”

⁷¹ Government Response to the JCHR Report, p. 13.

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.

99. We invite Parliament to compare this broad statement with the more measured approach of the Intelligence and Security Committee cited in chapter 2 above. The Government says that material held by, relating to or originating from one of the intelligence services is by definition security-sensitive information. The Intelligence and Security Committee, however, distinguishes between sensitive information and information the public disclosure of which really would jeopardise the national security of the UK. As noted above, the ISC considers that there are only two narrow categories of information which can rightly be said to be that sensitive:

- UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use); and
- foreign intelligence material, provided by another country on a strict promise of confidentiality.

100. **We recommend that the scope of any reform of the courts' Norwich Pharmacal jurisdiction be confined to the narrower categories of information identified by the Intelligence and Security Committee as information the disclosure of which would really jeopardise the national security of the UK. The amendments to this part of the Bill that we recommend below are based on the ISC's narrower definition of sensitive material the disclosure of which would be damaging to national security.**

A more proportionate response to the problem

101. To give effect to the recommendations we make above, we recommend amendments to clauses 13 and 14 of the Bill.

102. **We recommend deleting the absolute exemption from disclosure for intelligence service information (including control principle information), but leaving in place the proposed system for ministerial certification, narrowed down to apply solely to the narrower categories of information identified by the ISC (thereby tailoring the certification provision more closely to its avowed objective).** Such a ministerial certificate could be available as a longstop, to be issued only after any PII exercise has been gone through by the court which nevertheless intends to order disclosure of the information in question, and should be capable of challenge on ordinary judicial review principles and grounds.

103. The basic scheme of our proposed amendments to the Bill's Norwich Pharmacal provisions is therefore to provide a longstop ministerial certification procedure, subject to judicial review, where the PII process results in disclosure of information which the Secretary of State says would either breach the control principle or reveal the identity of UK intelligence officers or their sources, or their capability. These amendments seek to

give effect to the Independent Reviewer’s suggestion of a system of judicially reviewable ministerial certificates. The certification part of the scheme is loosely based on a provision in the Canada Evidence Act which provides for the Attorney-General of Canada to issue a certificate, after an order or decision has been made which would result in the disclosure of information obtained in confidence from a foreign entity, prohibiting such disclosure.⁷² The proper application of the PII process should normally prevent court-ordered disclosures in breach of the control principle, but the certification procedure provides an additional safeguard against such disclosure, whilst still preserving a judicial role.

104. We therefore recommend that the blanket and unreviewable exemption from disclosure for intelligence service information should be removed by deleting clause 13(3)(a)–(d). The scope of the restriction on the Norwich Pharmacal jurisdiction would be confined to the Government’s avowed rationale, namely the concern that intelligence partners are worried about disclosures in breach of the control principle since the *Binyam Mohamed* case, and that intelligence gathered and generated by our own intelligence services is also at risk of damaging disclosure. The certification system would therefore apply only to the information identified by the ISC as really requiring protection, not the much wider category of information the disclosure of which might cause damage to the interests of national security or to the interests of the international relations of the UK.

105. We also recommend that the grounds on which the ministerial certificate can be judicially reviewed (applying judicial review principles) are expanded beyond the very narrow (and difficult to meet) ground in the current clause 14(2), to include the ground that any harm to national security caused by disclosure is outweighed by the need to ensure that effective remedies are available for serious human rights violations. The Bill would then provide for courts to decide whether a very narrowly defined exception to the control principle applies in a particular case, as recommended by our Report on the Green Paper, as implicitly contemplated by the ISC, and as accepted by the Independent Reviewer to be desirable “if it can be achieved”.

106. The following amendments to the Bill would give effect to these recommendations:

Clause 13

Clause 13(2), Page 10, Line 7, before “sensitive” insert “certified”

Clause 13(3), Page 10, line 8, before “sensitive” insert “Certified”

Clause 13(3), Page 10, line 9, leave out sub-paragraphs (a)–(d)

Clause 13(3), Page 10, line 16, after “disclose” insert “because it is

UK intelligence information the disclosure of which would reveal the identity of UK intelligence officers or their sources, or their capability (including the techniques and methodology that they use); or

(b) foreign intelligence material provided confidentially by another country.”

72 Section. 38.13(1) of the Canada Evidence Act.

Clause 13(4), Page 10, line 18, leave out “contrary to the public interest” and insert “damaging to the interests of national security”

Clause 13(5), Page 10, line 23, leave out sub-clause (5)

Page 10, line 28, insert—

Clause 14

Clause 14(1), page 11, line 14, leave out “ground” and insert “grounds”

Clause 14(2), Page 11, line 15, leave out “That ground is” and insert “Those grounds are (a)”

Clause 14(2), Page 11, line 17, leave out “contrary to the public interest” and insert “damaging to the interests of national security”

Clause 14(2), Page 11, line 18, at end of sub-clause (2) insert—

“(b) that the harm caused by the disclosure of the information is outweighed by the need to ensure an effective remedy for serious human rights violations.”

Clause 14(3), Page 11, line 20, leave out “ground” and insert “grounds”

Clause 14(5), Page 11, line 27, leave out sub-clause (b).

5 Freedom of the media and public trust in the judiciary

107. In our Report on the Green Paper we expressed our concern about the effect of the proposals on the media, on court reporting and on public trust and confidence in the judiciary.⁷³ The Government's main substantive response to these concerns was in relation to the accessibility of closed judgments for special advocates. The Government said that by the end of the summer there would be in place a closed database of head notes of closed judgments. Otherwise, the Government's response to our concerns was to disagree that the proposals caused concerns about the transparency and public trust in the system. The Government believed that the proposals would "enhance transparency and public trust, not undermine it".⁷⁴ We are much less sanguine and would prefer to see provision in the Bill to address what we consider to be very serious concerns about the impact of the Bill on the freedom of the media and public confidence in the administration of justice.

108. We recommend that the Bill be amended to require rules of court to provide that the media be notified of any application for closed material procedures to be used, to ensure an opportunity for the media to make representations on that question, and to provide a mechanism for a party to apply for a closed judgment to become an open judgment.

109. The following amendment would give effect to this recommendation:

Clause 10, Page 7, line 15, after sub-clause (2) insert new sub-clause—

- '() Rules of court relating to section 6 proceedings must make provision
- (a) requiring the court concerned to notify relevant representatives of the media of proceedings in which an application for a declaration under section 6 has been made,
 - (b) providing for any person notified under sub-section (a) to intervene in the proceedings,
 - (c) providing for a stay or sist of relevant civil proceedings to enable anyone notified under sub-section (a) to consider whether to intervene in the proceedings,
 - (d) enabling any party to the proceedings or any intervener to apply to the court concerned for a determination of whether there continues to be justification for not giving full particulars of the reasons for decisions in the proceedings, and
 - (e) requiring the court concerned, on an application under sub-section (d), to publish such of the reasons for decision as the court determines can no longer be justifiably withheld.'

⁷³ JCHR Report on the Green Paper, chapter 6.

⁷⁴ Government Response to the JCHR Report, p. 15.

6 Reporting, review and renewal

110. The Independent Reviewer, in his recent evidence to us, was in favour in principle of annual review by an independent reviewer, not least because of what he described as the danger of “creep”.⁷⁵

a procedure that is introduced in a small way ends up being used quite a lot or a procedure that is introduced as one procedure then crosses the species barrier into another type of procedure and, before you know where you are, it is all around.

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

112. The following amendment would give effect to this recommendation:

Page 11, line, 36, after clause 14 insert new clauses—

Reporting and review

‘(1) As soon as reasonably practicable after the end of every 3 month period the Secretary of State must—

- (a) prepare a report about his exercise of the powers conferred on him under this Part of this Act during that period; and
- (b) lay a copy of that Report before Parliament.

(2) The person appointed by the Secretary of State to review the operation of the provisions of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 must also carry out an annual review of the operation of the provisions of this Part of this Act.’

Annual renewal

- (1) The Secretary of State’s powers under Part 2 of this Act expire at the end of the period of one year beginning with the day on which this Act is passed.
- (2) The Secretary of State may, by order made by statutory instrument, provide that the Secretary of State’s powers under Part 2 of this Act are not to expire at the time when they would otherwise expire under subsection (1) or in accordance with an order under this subsection but are to continue in force after that time for a period not exceeding one year.
- (3) An order under this section may not be made unless a draft of it has been laid before parliament and approved by a resolution of each House.’

Conclusions and recommendations

Background

1. As a human rights committee we have always scrutinised bills for compatibility with indigenous human rights recognised by the common law and in our view it is particularly important to do so in relation to this Bill. (Paragraph 16)

The scope of the Bill

2. We welcome the narrower definition of the scope of Part 2 of the Bill, which is a significant improvement on the much broader proposals in the Green Paper for closed material procedures to be available in cases involving the disclosure of “sensitive material” which could harm a very broadly defined “public interest”. (Paragraph 23)
3. We recommend that the Government confirm to Parliament that the material which is intended to be protected from disclosure by the provisions in Part 2 of the Bill is confined to the two narrow categories of information identified by the Intelligence and Security Committee: (Paragraph 29)
4. UK intelligence material which would, if disclosed publicly, reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use); and foreign intelligence material, provided by another country on a promise of confidentiality (that is, “control principle” material) (Paragraph 30).
5. We also recommend that the Government confirm to Parliament that clauses 6–11 of the Bill are not intended to cover material the disclosure of which would be damaging to international relations, such as diplomatic exchanges. (Paragraph 30)
6. We recommend that clause 11(2) be deleted from the Bill. (Paragraph 32)

Extension of Closed Material Procedures to all Civil Proceedings

7. We are disappointed by the Home Secretary’s refusal to allow some special advocates to see the material that had been shown to the Independent Reviewer. In our view, this would have provided the best evidence that could be made available to Parliament as to whether there really exists a practical need for the provisions on closed material procedures in Part 2 of the Bill. It is unsatisfactory that the Government at the time of agreeing our Report has still not been able to provide us with the data we had requested on the number of civil damages claims pending in which sensitive national security information is centrally relevant. Pending receipt of a response to our latest attempt to clarify the evidential basis for the Government’s case for the provisions in Part 2 of the Bill, we remain unpersuaded that the Government has demonstrated by reference to evidence that there exist a significant and growing number of civil cases in which a CMP is “essential”, in the sense that the issues in the case cannot be determined at all without a CMP. In our view this test of

necessity is the appropriate test to apply to the evidence, not the lower standard of whether there are cases in which it would be “preferable” to have CMP as a procedural option (Paragraph 45)

8. We recommend that the Bill be amended so that the court has the power to make a declaration, whether on the application of either party or of its own motion, that the proceedings are proceedings in which a closed material application may be made to the court. Such an amendment is necessary in order to make the Bill compatible with the requirement of equality of arms, and to make it consistent with the Government’s own justification for extending CMPs in civil proceedings, which is to increase the fairness of such proceedings for both parties. (Paragraph 51)
9. We agree with the suggestion of the Independent Reviewer. We recommend that the Bill be amended so as to make the availability of CMP in civil proceedings a matter of genuine judicial discretion. The decision as to whether there should be a CMP should not be the subject of a statutory duty to direct one where there is material that is relevant to the proceedings and that it would be damaging to national security to disclose. Rather it should be the product of a full judicial balancing exercise in which the court weighs the competing public interests before deciding whether there should be a CMP. (Paragraph 60)
10. When exercising that judicial discretion the court should not be required to ignore the fact that the PII process might result in the material being withheld, and should actively consider whether a claim for PII could have been made in relation to the material. We therefore also recommend that clause 6(3)(a) be deleted and a new sub-clause added to the Bill requiring the court to consider whether a claim for PII could have been made in relation to the material. (Paragraph 61)
11. We recommend that the Bill be amended so as to ensure that a CMP is only ever permitted as a last resort, by making it a precondition of a declaration that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means. (Paragraph 67)
12. We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session. (Paragraph 71)
13. We agree with the Special Advocates’ recommendation that, if there is to be a power to hold a CMP, there should be a statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. The absence from the Bill of such a disclosure obligation seriously limits the opportunities for special advocates to mitigate the unfairness caused by the Bill’s departure from the principles of open and adversarial justice. We recommend that the Bill be amended to impose such a disclosure obligation in all cases in which a CMP is held. (Paragraph 76)

Reform of the courts' residual disclosure ("Norwich Pharmacal") jurisdiction

14. We remain of the view expressed in our Report on the Green Paper, that legislating to provide an absolute exemption from the Norwich Pharmacal jurisdiction for control principle information is not consistent with the Government's commitment to the rule of law. We recommend that the Bill be amended to replace the current absolute exemption for certain types of intelligence information with a system of certification based on the contents of the information and subject to judicial control. (Paragraph 96)
15. We also draw to Parliament's attention the commitment which has been given by the UK Government to the US Government that the Binyam Mohamed judgment will be addressed by legislation. This is apparent from the Government's response to the Second Report of the House of Lords Constitution Committee on the Bill (where it says that the US reaction to the judgment was tempered by the UK Government's early commitment to do so) and the evidence of the Independent Reviewer. (Paragraph 97)
16. We recommend that the scope of any reform of the courts' Norwich Pharmacal jurisdiction be confined to the narrower categories of information identified by the Intelligence and Security Committee as information the disclosure of which would really jeopardise the national security of the UK. The amendments to this part of the Bill that we recommend below are based on the ISC's narrower definition of sensitive material the disclosure of which would be damaging to national security. (Paragraph 100)
17. We recommend deleting the absolute exemption from disclosure for intelligence service information (including control principle information), but leaving in place the proposed system for ministerial certification, narrowed down to apply solely to the narrower categories of information identified by the ISC (thereby tailoring the certification provision more closely to its avowed objective). (Paragraph 102)
18. We therefore recommend that the blanket and unreviewable exemption from disclosure for intelligence service information should be removed by deleting clause 13(3)(a)–(d) (Paragraph 104)
19. We also recommend that the grounds on which the ministerial certificate can be judicially reviewed (applying judicial review principles) are expanded beyond the very narrow (and difficult to meet) ground in the current clause 14(2), to include the ground that any harm to national security caused by disclosure is outweighed by the need to ensure that effective remedies are available for serious human rights violations. (Paragraph 105)

Freedom of the media and public trust in the judiciary

20. We recommend that the Bill be amended to require rules of court to provide that the media be notified of any application for closed material procedures to be used, to ensure an opportunity for the media to make representations on that question, and to provide a mechanism for a party to apply for a closed judgment to become an open judgment. (Paragraph 108)

21. In view of the significance of what is being provided for in the Bill, and its radical departure from fundamental common law traditions, we recommend that the Bill be amended to require the Secretary of State to report regularly to Parliament about the use of the exceptional procedures contained in the Bill, and providing for both independent review by the Independent Reviewer and for annual renewal. (Paragraph 111)

Formal Minutes

Tuesday 6 November 2012

Members present:

Dr Hywel Francis, in the Chair

Rehman Chishti
Simon Hughes
Mr Virendra Sharma
Richard Shepherd

Baroness Berridge
Lord Lester of Herne Hill
Baroness Kennedy of the Shaws
Baroness Lister of Burtersett

Draft Report (Legislative Scrutiny: Justice and Security Bill), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 112 read and agreed to.

Several papers were appended to the Report.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House of Commons and that Lord Lester of Herne Hill make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 17 July, 11 September, 16 October, 23 October, 30 October, and 6 November was ordered to be reported to the House.

[Adjourned till Tuesday 20 November at 2.00 pm]

Declaration of Lords' Interests

Baroness Kennedy of the Shaws

Chair, Justice

Co-Chair, International Bar Association's Human Rights Institute (IBAHRI)

Lord Lester of Herne Hill

Member, Expert Counsel Panel, Liberty

Member of Council, JUSTICE

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

Witnesses

Tuesday 19 June 2012

David Anderson QC, Independent Reviewer of Terrorism Legislation

Tuesday 26 June 2012

Martin Chamberlain, Angus McCullough QC, Special Advocates and Ben Jaffey, Barrister, Blackstone Chambers

Tuesday 16 October 2012

David Anderson QC, Independent Reviewer of Terrorism Legislation

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4	Letter from the Chair, to Michael Todd QC, Chairman of the Bar	p 44
5	Letter to the Chair, from Nicholas Lavender QC, Vice Chairman Elect of the Bar Council England and Wales, Chairman of the Professional Practice Committee	p 45
6	Letter to the Chair, from Angus McCullough QC and Martin Chamberlain	p 46
7	Letter to the Chair, from Ewen Macleod, Head of Professional Practice, Bar Council	p 49
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List of written evidence published on the Internet

1	British Irish Rights Watch
2	Special Advocates
3	Independent Police Complaints Commission
4	Dr Lawrence McNamara
5	Leigh, Day & Co
6	Immigration Law Practitioners Association
7	Professor Clive Walker
8	Professor Adrian Zuckerman

Written evidence

1. Letter from the Chair, to Rt Hon Theresa May MP, Home Secretary, 3 July 2012

The Joint Committee on Human Rights is currently scrutinising the Justice and Security Bill for compatibility with the UK's human rights obligations. One of the issues it is considering is whether the Government has demonstrated by reference to evidence that the fairness concern on which the Government relies to justify extending the availability of closed material procedures (ICMPs) in civil proceedings in Part 2 of the Bill is in fact a real and practical problem. As you know, in its Report on the Justice and Security Green Paper, the Committee was not satisfied that such evidence had been produced by the Government.¹ However, the Committee is anxious to ensure that every reasonable opportunity is afforded to the Government to make out its case for the provisions in Part 2 and I am therefore writing to invite you to take such an opportunity, in the light of the evidence recently given to the Committee by some special advocates.

The Government's Response to the Committee's Report says that since the Guantanamo claims were settled in November 2010 six further civil damages claims against the Government have been launched where sensitive material will be centrally relevant." The Independent Reviewer has been shown the material in three of those six claims, and on the basis of his consideration of those three cases he concluded that "under the current law there are liable to be cases that are settled (or the subject of a *Carnduff v Rock* [strike-out] application) which, had a CMP been available, would have been fought to a conclusion."

In a Note commenting on the Independent Reviewer's Supplementary Memorandum, however, some special advocates expressed their concern at the independent Reviewer's conclusion. They pointed out that the Independent Reviewer had not had the benefit of a countervailing independent but experienced party, such as a special advocate, whose practical experience of handling sensitive material in civil claims might have pointed to a different conclusion, that a way could be found to hear those claims acceptably fairly, and without unacceptable disclosure of sensitive material, without having to resort to a CMP. They considered that it was possible that their practical experience of operating procedures to deal with sensitive material would lead to a different view of those three cases. They pointed out that "there is as yet no example of a civil claim involving national security that has proved untriable using PII and flexible and imaginative use of ancillary procedures".

The evidential basis of the Government's case for the far-reaching changes to open justice in Part 2 of the Bill rests on three current cases in which the Independent Reviewer has been shown the material but no special advocate has yet had the opportunity to consider whether a way could be found for the claims to be heard acceptably fairly without unacceptable disclosure of sensitive material, and without having to resort to a CMP.

1 JCHR Report on the Justice and Security Green Paper, paras 56–80, esp. Paras 72 and 80.

The Committee suggests that some experienced special advocates be invited by you to view the material seen by the Independent Reviewer to see if the special advocates agree that they are cases which can only fairly be determined with a CMP. When we asked two of the special advocates in oral evidence last week if they would be prepared to do so if they were invited by the Government, they said that they would and that they thought a number of their colleagues would also be willing to do so. A copy of the relevant part of their answers is enclosed with this letter.

The Committee hopes you will extend such an invitation to some special advocates, as it considers that this would provide the best evidence that could be made available to Parliament as to whether there really exists a practical need for the provisions in Part 2.

In view of the progress that the Bill is making in the House of Lords, it would be helpful to receive your reply by 17 July 2012.

I look forward to hearing from you.

3 July 2012

2. Letter to the Chair, from Rt Hon Theresa May MP, Home Secretary, 17 July 2012

Thank you for your letter dated 3 July regarding Special Advocates and the evidence base for the Justice and Security Bill proposals.

The three civil damages cases in which material was shown to David Anderson QC were three of the 27 cases considered current at publication of the Green Paper, not the six new cases launched since the Bill's publication as you suggest in your letter. In order to go into sufficient detail in the time available on all the case types, it was considered more beneficial to allow David Anderson QC to consider these three cases in greater detail as opposed to a less detailed look at all the cases.

The problem of being able to demonstrate the difficulties in these cases publicly is clear. As David Anderson QC pointed out, the problem cases are currently the subject of litigation and “almost by definition, cannot be the subject of specific public comment”.

David Anderson QC's briefing was by no means undertaken lightly and involved making a limited waiver of privilege in order to open up information including merits advice. The briefing session was not intended to be an adversarial process but an honest account by a lawyer with experience of the difficulties involved in litigating those cases for Government without the benefit of a closed process. As you would expect, David Anderson QC had the opportunity to probe information provided in the briefing, rather than take it at face value.

The Special Advocates, who represent active litigants in such cases, take on the role of challenging the Government's position in high profile cases in Terrorism Prevention and

Investigation Measures (TPIMs) and Special Immigration Appeals Commission (SIAC) cases, for example, and have well-known views about the system. It is noteworthy that many of the Special Advocates' arguments have not been accepted by the courts. David Anderson QC is familiar with the Special Advocates' arguments. He is in a unique position—his role is fully independent and has given him the greatest exposure to terrorism legislation and the operation of Closed Material Procedures (CMPs) in a practical context. Moreover, as a highly experienced lawyer himself, he is well able to cast a critical eye over the material shown to him. Because of the seriousness of the cases and the complex issues at stake I, together with colleagues in other departments, have considered your request in detail to see what possible way could be found to allow Special Advocates to view the specific material shown to David Anderson QC, something I would like to be able to do if, as you suggest, it would reassure you about the need for the CMP provisions in the Bill.

Unfortunately, I do not feel it would be appropriate to extend the waiver of privilege to Special Advocates, who regularly act against Government in these sorts of cases. The merits advice which was shown to David Anderson QC would reveal confidential decisions on the Government's litigation strategy in cases. It would simply not be possible for counsel to provide the same frank briefing, or to share the same information with Special Advocates, which would dilute any potential benefits. The benefits are in any event unclear given that Special Advocates already have a good idea of the type of sensitive material that can necessitate a closed process from their work in other contexts where closed proceedings are already available.

Additionally, allowing Special Advocates to view the material risks tainting them for future work, the extent of which they cannot be aware of before seeing the material.

I understand your concerns regarding the evidence base for Closed Material Procedures. You will be interested to know that a waiver was also made for the ISC to be briefed, at their request, by Government counsel and with the same detail on the cases that David Anderson QC was shown.

David Anderson QC had already suggested that there are cases sufficiently saturated in secret material to require the use of a CMP in other contexts (SIAC or TPIMs for example) and that it is logical to suppose that there may be civil cases of which the same can be said. He also suggested that it is the courts' views in real cases which provide the actual evidence for the use of CMPs, as opposed to either his view or the Special Advocates'.

Obviously the debate benefits from the views of Special Advocates who put across their views as regards CMPs and play an important role in such cases. However, only the judiciary are completely independent of the parties, acting in the interests of justice in each particular case. In the recent case of *AHK v Home Office* [2012] EWHC 1117, the court highlighted the injustice that could be caused to a claimant in a naturalisation case if a CMP was not available, and called upon Parliament to provide a statutory solution. The courts have also supported the effective operation of CMPs in other cases. For example, Lord Woolf (in *M v SSHD*) indicated that, “while the procedures which SIAC have to

adopt are not ideal, it is possible by using SAs (Special Advocates) to ensure that those detained can achieve justice”.

I regret not being able to fulfil your request in this regard by extending such an invitation to Special Advocates, but I hope that you understand the complexity of the considerations that I have had to take into account, given the context of current and ongoing litigation and the degree of sensitive information involved.

We continue to examine this issue. If you have any other suggestions for how Special Advocates could voice their concerns or how independent voices not party to litigation could be reassured about difficulties in a small number of cases and the need for a CMP to ensure a fair determination of them, I would be very happy to hear them.

17 July 2012

3. Letter from the Chair, to Special Advocate Support Office (Closed), 12 September 2012

The Committee would like to give the Special Advocates an opportunity to comment on the attached letter dated 17 July 2012 from the Home Secretary, in which she declined the Committee’s request that some Special Advocates be invited to view the specific material shown to the Independent Reviewer of Terrorism Legislation, David Anderson QC.

The Committee would also be interested in the views of the Special Advocates on any relevant issues that have arisen so far in the parliamentary debates on the Justice and Security Bill.

The Committee is hoping to Report on the Bill before Report stage in the House of Lords and it would therefore be helpful to receive your reply by 3 October 2012. I would also be grateful if you could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

I am copying this letter to Martin Chamberlain and Angus McCullough QC in view of their role in co-ordinating previous submissions by the Special Advocates to the Joint Committee on Human Rights.

12 September 2012

4. Letter from the Chair, to Michael Todd QC, Chairman of the Bar, 12 September 2012

The Joint Committee on Human Rights is scrutinising the Justice and Security Bill for compatibility with human rights.

One of the issues which has arisen in the course of its scrutiny is whether the extension of closed material procedures to all civil proceedings has implications for the ability of barristers, both open counsel and special advocates, to comply with their professional obligations.

The Committee would be interested to hear the view of the barristers' professional body about the implications of the Bill for the ability of barristers to comply with the Code of Conduct.

The Committee is hoping to report on the Bill before Report stage in the House of Lords and it would therefore be helpful to receive your reply by 3 October 2012. I would also be grateful if you could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

12 September 2012

5. Letter to the Chair, from Nicholas Lavender QC, Vice Chairman Elect of the Bar Council England and Wales, Chairman of the Professional Practice Committee, 1 October 2012

Thank you for your letter of 12 September 2012, in which you referred to the potential extension of closed material procedures to all civil proceedings and asked for the views of the Bar Council about the implications of the Justice and Security Bill for the ability of barristers, both open counsel and special advocates, to comply with the Bar's Code of Conduct. The Bar Council has not been asked to express a view on the desirability or otherwise of any extension of closed material procedures to all civil proceedings and the views expressed below are accordingly confined to the narrow issue raised in your letter.

You should be aware that the Bar Council has delegated its regulatory functions to the Bar Standards Board, which is responsible for the content and enforcement of the Code, so you may also wish to contact them. However, the Bar Council, through its Professional Practice Committee, continues to provide advice on effect of the Code. I have consulted the Professional Practice Committee, and their view is outlined below.

The Code does not prevent barristers from acting as open counsel or as special advocates in cases where closed material procedures are adopted. Many barristers already do this, for example, in cases before the Special Immigration Appeals Commission.

Barristers acting as open counsel are obliged by paragraph 303(a) of the Code to promote and protect fearlessly and by all proper and lawful means the lay client's best interests. The closed material procedure obviously makes it more difficult to carry out this duty, since the barrister will not be aware of the closed material relied upon by the other party. Nevertheless, the barrister must promote and protect the lay client's best interests insofar as they are able.

Barristers acting as Special Advocates (SAs) are appointed by the Attorney General (in the words of clause 8(1) of the Bill) "to represent the interests of" a party. That party is not the SA's client, and I note that clause 8(4) of the Bill provides that SAs are not responsible to the party whose interests they are appointed to represent, and that clause 11(1) provides that they are not that party's legal representative. Nevertheless, it is our understanding that barristers are appointed as SAs on the basis that, subject to the constraints imposed by the closed material procedure, it is their duty to promote and protect fearlessly, and by all proper and lawful means, that party's best interests. Again, those constraints, including in particular the inability to communicate with or take instructions from the party, obviously make it more difficult to promote and protect the party's interests, but the barrister remains under a duty to do so, insofar as they are able.

Whether acting as open counsel or as Special Advocates, barristers remain subject to the Code, including, for example, the duty to exercise their own personal judgment in all of their professional activities (paragraph 306) and the duty to withdraw from a case in specified circumstances, including if their instructions seek to limit their ordinary authority or discretion in the conduct of the proceedings (paragraph 603(c)) or if the matter is one in which they have reason to believe that it will be difficult for them to maintain professional independence or the administration of justice might be or appear to be prejudiced (paragraph 603(d)).

Obviously, conduct issues may arise on the facts of any particular case, and cases involving the closed material procedure are no exception. You may be aware, for example, of a well-publicised case in which the Special Advocates considered it to be their duty to withdraw from the case.

If you have any particular concerns about conduct issues which might arise in cases concerning closed material procedures, I would be happy to consider them further, via written correspondence or a meeting in Westminster.

1 October 2012

6. Letter to the Chair, from Angus McCullough QC and Martin Chamberlain, 2 October 2012

We write in response to your letter of 12 September 2012. You invited us to comment on the Home Secretary's letter to you of 17 July 2012 and on any relevant issues that have arisen in the context of the Parliamentary debates on the Justice Security Bill.

The Home Secretary's letter of 17 July 2012

As we made clear in evidence before the Committee, the question whether to show privileged and sensitive material to persons outside the Government's legal team is ultimately one for the Home Secretary. That said, we have five comments on the reasons given in the Home Secretary's letter of 17 July 2012 for rejecting the Committee's

suggestion that she show to some experienced special advocates the material shown to David Anderson QC.

First, in our Note of 23 March 2012 to the Committee, we expressed ourselves unconvinced by the conclusions David Anderson drew in relation to the three cases shown to him. That was not because of any lack of respect for his experience or judgment. It was, as we said, because he had reached his conclusions following “an (untested) introduction to the case by just one side to the contested proceedings”. We went on to say that “our combined practical experience of handling sensitive material in civil cases (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” (see at §7).

Secondly, whilst the Home Secretary is correct to say that special advocates “take on the role of challenging the Government’s position in high profile cases” and “represent active litigants in such cases”, it would be wrong to infer from this that the views expressed by the special advocates in relation to the Green Paper and the Bill are somehow partisan. The special advocates are drawn from a variety of legal backgrounds. Many of us appear regularly both for and against the Government in civil cases and for both prosecution and defence in criminal cases. The comments we have made on the Green Paper and the Bill represent our own independent views as members of the public with particular experience of the issues raised. They are not in any sense advocacy on the part of the individuals in whose interests we are instructed, from time to time, to act.

Thirdly, whilst it is certainly true that arguments advanced by special advocates in cases before the courts are sometimes rejected, we do not agree that this should be regarded as “noteworthy”. Special advocates, like all other advocates, make submissions in individual cases in the interests of their individual clients. Sometimes those submissions are accepted by the courts; sometimes not. The views of the special advocates on the Green Paper and the Bill are, as we have said, quite distinct from the submissions made by individual special advocates in individual cases. These views have not, to our knowledge, been the subject of comment by the courts.

Fourthly, we accept that it is in principle possible that any special advocates made privy to confidential details of the Government’s litigation strategy may be “tainted” for future work as a special advocate. That is because, having heard confidential details of the litigation strategy of one party in one case, it might (depending on the circumstances) be professionally improper for the same advocates to accept instructions against the same party in another related case. It would follow that any special advocate who agreed to see the material shown to David Anderson would run the risk of being obliged to refuse future instructions as a special advocate in certain related cases. Whether to accept this risk would be a matter for individual special advocates. We do not understand why it should be regarded as a reason justifying a refusal on the part of the Home Secretary to disclose the material to special advocates who are prepared to accept this risk.

Fifthly, and finally, in the second paragraph of her letter, the Home Secretary notes that the cases shown to David Anderson were “three of the 27 cases considered current at publication of the Green Paper, not the six new cases launched since the Bill’s publication”. As we understand it, the Green Paper identified 27 cases in which “sensitive information” was “central” to the case (see Appendix J, §11). It is relevant to note that “sensitive information” in the Green Paper was defined very broadly and, in particular, covered information which did not raise national security concerns. Furthermore, it is not clear how many of those 27 cases were civil claims for damages: from the context it is apparent that many were from different categories, such as naturalisation and exclusion cases which the JCHR has recommended be brought within the jurisdiction of SIAC. The Home Secretary selected 3 cases which were civil damages claims to show to David Anderson, but it remains unclear how many civil damages claims are said to necessitate the measures provided in the Bill. The “six new cases” referred to in the Home Secretary’s letter would seem to be those identified in the Government’s response to the JCHR’s report on the Green Paper, which response was published on 29 May 2012. What was said in that document was: “[...] the Guantanamo claims were settled in November 2010 and since then six further civil damages claims against the Government have been launched where sensitive material will be centrally relevant”. The suggestion in the Home Secretary’s letter that the “new cases” post-date the Bill’s publication would appear to be mistaken: they date back to November 2010, about a year before the Bill’s publication in October 2011. Some or all of them would presumably have been among the (unspecified) number of civil damages claims included in the 27 cases referred to in the Green Paper itself and, at least potentially, may have been shown to David Anderson. When introducing the Second Reading of the Bill to the House of Lords on 19 June 2012, Lord Wallace, the Advocate General for Scotland indicated that there were then 29 live cases “where sensitive information was central to the case” of which 15 were said to be civil damages claims. Quite how these 15 live cases relate to the six civil damages claims referred to in the Government’s response published three weeks earlier, or the “six new claims” referred to in the Home Secretary’s letter referred to by in the Home Secretary’s letter one month later, is hard to understand. At all events, there remains a real lack of clarity, both in the Home Secretary’s letter and from information provided by the Government to date, as to the size of the problem arising specifically from civil damages claims which it is said necessitates the proposals in the Bill.

Relevant issues arising in the House of Lords debates on the Bill

The debates on the Bill in the House of Lords have covered a large number of points, and included a wide range of views. Nothing we have heard or read from those debates would lead us to seek to alter the evidence that we gave have given to the Joint Committee.

2 October 2012

7. Letter to the Chair, from Ewen Macleod, Head of Professional Practice, Bar Council, 3 October 2012

The Joint Committee on Human Rights has asked the Bar Council to comment on the implications of the Justice and Security Bill for the ability of barristers to comply with the Bar's Code of Conduct. The Bar Council is the statutory regulator of barristers in England and Wales and it discharges its regulatory functions through the independent Bar Standards Board (BSB), which oversees the Code of Conduct. The BSB has considered the terms of the Bill and wishes to make the following comments by way of response.

Barristers fulfilling the role of open counsel and special advocates will retain their duty to act in compliance with their professional obligations in the Code of Conduct. Barristers have a primary duty, under paragraph 303(a) of the Code, to promote and protect fearlessly and by all proper and lawful means the lay client's best interests and to do so without regard to their own interests or to any consequences to themselves or to any other person. However, this duty is subject to an overriding duty to the Court, under paragraph 302, to act with independence in the interests of justice and to assist the Court in the administration of justice.

In discharging their duty to act in the interests of justice, barristers will need to act in accordance with the law. If the Justice and Security Bill becomes law, barristers will be under an obligation to observe its provisions and to assist the court in doing so. In this respect, the obligations in the Code of Conduct will therefore remain unchanged.

Barristers acting as open counsel or as special advocates will also need to observe their duty to remain individually and personally responsible for their conduct and professional work and to exercise personal judgement in all professional activities (paragraph 306). Barristers are also under a duty not to accept instructions, or to return instructions, where those instructions seek to limit the ordinary authority or discretion of a barrister in the conduct of proceedings in Court (paragraph 603(c)), or where they have reason to believe that it will be difficult to maintain professional independence or where the administration of justice might be or appear to be prejudiced (paragraph 603(d)).

These comments are restricted to answering the Joint Committee's question about the implications of the Bill for the Code of Conduct and the BSB does not wish to comment on the policy implications, desirability or otherwise of the Bill's proposals. We understand that the Bar Council has responded to you separately and may provide some more detailed comments.

3 October 2012

8. Letter from the Chair, to Lord Wallace of Tankerness, 23 October 2012

I am writing to you in the light of the recent evidence given by the Independent Review of Terrorism Legislation, David Anderson QC, to ask for clarification of the number and nature of pending civil damages claims against the Government to which national security material is centrally relevant. A copy of the relevant part of the transcript is attached [*not printed*].

I would be grateful if you could answer the following questions:

Q1. How many civil damages claims are currently pending against the Government in which sensitive national security information is centrally relevant:

Q2. To the extent possible, please give a breakdown of these cases showing the date on which proceedings were commenced and a summary of the nature of the claim.

Q3. In how many of these cases is it the Government's view that the issues in the case cannot fairly be determined without a Closed Material Procedure?

The Committee intends to report on the Bill before report stage in the House of Lords and I would therefore be grateful for a reply by Wednesday 31 October.

23 October 2012

9. Statement by Sir Daniel Bethlehem QC, 15 October 2012

1. By correspondence of 3 August 2012 from the legal adviser to the Joint Committee on Human Rights, the Committee invited me to submit written evidence to assist in its scrutiny of the Justice and Security Bill. Specifically, the Committee invited evidence on "the historical context of the Bill's provisions concerning the courts' Norwich Pharmacal jurisdiction", noting that, while it "accepted 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", it "found it difficult to assess Government assertions about the impact of particular court cases on the flow of intelligence". The Committee indicated that it would therefore "find it particularly helpful to hear from [me] specifically on [my] experience of the impact of the Binyam Mohamed litigation, and other relevant cases, on the UK's intelligence partners, including but not confined to the US".

2. Insofar as I am in a position to do so, I address below various issues that I hope may assist the Committee in its further consideration of the Bill. Given my position as principal Legal Adviser of the UK Foreign & Commonwealth Office from May 2006 to May 2011, there are a number of issues on which it would not be appropriate for me to comment, including:

- (a) any issue covered by legal professional privilege;
- (b) any issue of detail relevant to ongoing or foreseeable litigation engaging the matters in question; and
- (c) any classified information.

3. In addition, in correspondence with the legal adviser to the Committee, I indicated that I could not properly comment on the detail or balance of the Bill for the reason that policy consideration leading to the Bill began while I was FCO Legal Adviser, including in respect of elements on which I advised. It would not therefore be appropriate for me to comment on a matter on which I had some prior professional involvement in circumstances in which I am now giving personal evidence in a private capacity.

4. I emphasise the point just made about this statement being personal evidence in a private capacity. It reflects my views, not necessarily those of HMG or any other person. Further, I have not had access to any government or other non-public papers for purposes of the preparation of this statement. My comments below, for example on the Binyam Mohamed case, are therefore based either on the public record or on my recollection.

5. Before turning to issues of substance, four preliminary observations to frame the remarks that follow may be helpful. *First*, as noted, I was the principal Legal Adviser of the FCO from May 2006 to May 2011. I was appointed to this post from the private sector, being previously a barrister in private practice in the field of international law at the London Bar and Director of the Lauterpacht Centre for International Law at the University of Cambridge. I returned to practice at the Bar following the end of my FCO tenure. This background is germane to one aspect of my evidence, addressed below.

6. *Second*, the FCO Legal Adviser's post is not concerned with day-to-day intelligence matters and the breadth of the responsibilities of the office is such that the Legal Adviser only seldom leads on any issue. This notwithstanding, the Foreign Secretary's statutory and political responsibility for the Secret Intelligence Service and GCHQ, and the close engagement of the FCO with aspects of the work of these agencies, means that the FCO Legal Adviser is often closely involved in such matters. This was the position in my case, notably, for present purposes, in respect of two aspects that are relevant to this evidence. The first concerned FCO-related litigation touching upon intelligence matters. The second concerned matters of engagement with the United States that involved an inter-departmental/agency dimension.

7. *Third*, it bears emphasis that achieving a proper balance between justice and security is vitally important. Justice under law is the hallmark of a democracy. Security is the fundamental obligation of government. All concerned in government with the Justice and Security Green Paper and the Bill with whom I had dealings were acutely aware of the importance of achieving the right balance, and none would wish to see open justice gratuitously compromised.

8. The challenges identified in the Green Paper might have been addressed in number of different ways. The Bill might have proposed placing Public Interest Immunity (PII) on a statutory footing, as it might also have done in respect of the “control principle”. A specialist tribunal, along the lines of the Special Immigration Appeals Commission (SIAC), might have been proposed. It might have been proposed that certain types of civil damages claims should be precluded, with avenues found to address the issues to which this would have given rise under Article 6 of the European Convention on Human Rights ranging potentially from an inquisitorial mechanism to examine such complaints to the without prejudice payment of compensation to a derogation from Article 6. The Bill might have sought to revise and improve the workings of the Special Advocate system by, for example, allowing greater (even if still managed) access by a Special Advocate to the person in whose interests he or she is acting. Other approaches still might also have been available.

9. While there are different views on what the best approach might have been, there are no easy options. Each one of the alternatives just canvassed would have brought its own complexities and complications. PII, for example, could not simply be put on a statutory footing without more. For reasons addressed below, the current PII framework is not adequate, in my view, to the task of achieving a proper balance between justice and security. Significant revisions to the mechanism would have been required. Similar considerations are relevant to other options.

10. This is simply to say that where and how to achieve an appropriate balance between justice and security is now properly a matter for Parliament. The Courts and the Executive have not so far, in the context of litigation, been able to do so. In addressing these matters, Parliament should not proceed on the assumption that either an approach of least resistance or of maximum security was adopted, or indeed that other potential avenues were not carefully considered.

11. Fourth, it is useful to identify the key national security issues that the Bill aims to address. In my view, describing them in broad brush terms, there are three:

(a) the disclosure of foreign intelligence information in consequence of a decision of a UK court;

(b) the challenges associated with civil proceedings involving review for disclosure of a very considerable numbers of documents; and

(c) the absence of a mechanism to allow a court to hear civil claims, in whole or in part, in closed session in circumstances in which this is judged to be necessary in the interests of justice, national security and an efficient procedure for dealing with classified information. Although these issues have arisen in various forms in a number of cases over recent years, the two sets of proceedings that most exemplify these difficulties are the Binyam Mohamed case and the Civil Damages proceedings, eventually settled, to which reference is made in the Green Paper. In highlighting these issues, I emphasise that, although they may come together in a single case, they are discrete problems. The closed

material procedures (CMP) and Norwich Pharmacal provisions of the Bill address these elements in different ways.

General observations

12. Turning to issues of substance, a number of general observations are warranted.

Understanding and explaining intelligence issues

13. My appointment from the private sector is material to an appreciation that has a bearing on my evidence. Although, in my pre-FCO practice as a barrister, I periodically had to deal with classified, including intelligence, information, this was not a routine part of my work. My appreciation of intelligence and related matters before taking up the FCO post was thus derived largely from ad hoc experience in the context of particular litigation or advisory issues.

14. On taking up the FCO Legal Adviser's post, it became clear to me that my understanding of intelligence and related matters from this ad hoc experience was not a sufficient or adequate basis for my appreciation of such matters in the round, including as regards challenges of collection, sensitivities around protection, issues of reliability and proper use, constraints around the sharing of information, operational caveats and assurances central to international cooperation in this area, and other similar matters. My understanding of these issues (such that it now is) only developed over time, informed by an on-going exposure to such matters over a period of years.

15. This is not a surprising observation. I highlight it for present purposes, however, as it has led me to a sharpened appreciation of the often quite acute challenges and difficulties of addressing intelligence matters in the context of litigation. Litigation is inevitably ad hoc in character. It almost invariably takes place before a court that will, if at all, have only a narrow and passing appreciation of such issues. The court will (properly) be guided by principles of open justice. Its focus will be on the circumstances of the particular case in issue.

16. This is in notable contrast to the imperatives of intelligence work and the responsibilities of the Executive in respect of such matters. Even if these have an operational dimension, they are rooted in a strategic policy of government— in the case of the United Kingdom, going back more than a century, transcending political affiliations. It is the preserve of experts as well as others, such as successive Foreign and Home Secretaries, who have quickly to become knowledgeable in this area. Confidentiality is at its core. Decision-making, even if it is issue specific, must have close regard to the wider context and longer-term implications.

17. These elements are also not easily and adequately conveyed to a court in the context of a particular case, both for reasons of transparency and disclosure in open court and because of the (understandable) lack of familiarity, as a general proposition, of the bench with such matters. These challenges are deepened in circumstances in which the case in

question is politically charged and is the subject of parallel media comment. They are compounded in circumstances, as is sometimes the case on appeal, in which the court determines that it will hear the matter without the benefit of closed submissions or argument with the intention of ensuring that it is public justice that is done.

A specialist court or bench

18. The preceding raises the question of whether cases involving such matters ought not to be heard by a specialist court or bench. This issue is often, sometimes wilfully, mischaracterised by the implication that such a court would be a “national security court”, with all the connotations of the suspension of civil liberties that this carries with it. I imagine that it is largely for this reason that such an approach was not proposed in the Green Paper and the Bill. The politics of taking this forward in the present climate was probably judged to be simply too difficult. It should, however, occasion a more serious and reflective enquiry for a number of reasons, also because elements of such an approach would be within the control of the courts. First, the UK has a good deal of positive experience of specialist courts or benches, ranging from the Family Division of the High Court, to specialist tribunals dealing with immigration, employment, etc, to specialist tribunals dealing with certain matters engaging issues of national security, such as the Special Immigration Appeals Commission (SIAC), to the assignment of judges with specialist, subject-matter knowledge to hear certain types of cases (for example, in the field of libel), and more. There is no reason to suppose that the experience would be any less favourable with a specialist court or bench that would be seised of cases involving intelligence and related matters. Second, the specialised nature and sensitivity of intelligence and related matters is such that it is probably ripe for a court or bench with special expertise. Third, a specialist bench may well be better able to hold government to account, including on issues of disclosure, precisely because the judges would themselves have a better appreciation of the equities involved, the practical issues associated with, for example, disclosure, and, in the case of doubt, where the line ought to be drawn.

The challenges of disclosure

19. Although the challenges of disclosure facing government in civil cases in this field were addressed in the Green Paper, their full import might not be quite so well appreciated. The duelling imperatives are, on the one hand, the requirement to ensure that information the secrecy of which ought properly to be maintained in the national interest is in fact kept confidential, and, on the other hand, the requirement of open justice and the disclosure rights of an applicant. In between, however, are a number of highly challenging variables that often, and certainly in civil damages claims of the kind addressed in the Green Paper, are simply overwhelming of the justice process.

20. In any given case, these variables may include the following:

(a) a very considerable volume of documentation, sometimes running into the hundreds of thousands of pages, or indeed more, each page of which, under the current legal framework, has to be examined individually;

(b) an understandable lack of sufficient, and sufficiently expert and security cleared, personnel to undertake this examination of documentation in anything like the kind of time that may be required by the procedure of the case;

(c) the pressures of litigation timetables which, while perhaps understandable from a case management perspective, often seem to have an insufficient appreciation of the constraints on government in respect of the disclosure review process;

(d) an understandable and proper degree of caution that operates in such disclosure review exercises given the litigation pressures, the volume of material to be reviewed, the sometimes fine questions of judgement that are required in respect of particular issues of disclosure, the requirement, on occasion, to engage with liaison partners to address relevant issues, etc;

(e) issues associated with the systems in which intelligence information is stored—whether paper or electronic—their accessibility and searchability, and the ease and form of retrievability of potentially relevant information;

(f) the very considerable importance—given the reputational risks and possibilities of damages awards (as in the Al Sweady case)—that attaches to being able to establish whether any particular item of information the confidentiality of which may need to be asserted has in fact already been disclosed elsewhere, for example, as a result of a freedom of information disclosure or an unauthorised leak in another jurisdiction. If so, there is then a need to establish whether any such disclosure was authorised and accurate and does indeed cover the material thrown up in the disclosure review. Depending on the answer to these questions, it may be important to consider whether the other disclosure requires an NCND (neither confirm nor deny)² response and whether the confidentiality of the information can still be protected in the context of the case in issue;

(g) questions associated with the provenance of particular items of information that may engage wider concerns of disclosability, notably, whether the information in question originates from a foreign intelligence partner and is covered by the “control principle”; and

(h) the potential implications for other national security work of having to reassign personnel and reallocate resources to undertake a review of documentation for purposes of disclosure.

21. Many of these issues arose in the Binyam Mohamed case; others in the Civil Damages cases referred to in the Green Paper. In the Binyam Mohamed case, the disclosure difficulties that arose at one point in the course of the proceedings were the subject of correspondence from me, in both my name and that of the then Home Office Legal Adviser, to the Treasury Solicitor requesting that guidelines be drawn up for the handling of disclosure review matters. I attach copy of the letter in question as it highlights some of the challenges that arose in the circumstances then in issue. In response to this request, as

well as disclosure difficulties that arose in the Al Sweady case, a review was undertaken and guidelines were drawn up.³ While the Guidance brought greater clarity to the disclosure process, the challenges associated with such issues remain. The Green Paper and Bill are a recognition that, notwithstanding the best efforts of government, including in the interests of open justice, disclosure challenges are sometimes overwhelming and it is simply not possible to proceed on the basis that normal civil justice procedures are adequate or appropriate.

Public Interest Immunity

22. I noted in paragraph 20(a) above that, under the current legal framework, each page of each document, indeed each paragraph and sentence, that may be relevant and therefore need to be disclosed has to be reviewed individually. The legal framework in question is that of Public Interest Immunity, which is a common law creation that operates through PII certificates issued by a Secretary of State, Minister or potentially, although rarely, a senior official. Such certificates essentially require two evaluations to be made by, in the case of the 5 such certificates issued in the Binyam Mohamed case, the Home Secretary (2 certificates) and the Foreign Secretary (3 certificates). The first evaluation is an assessment of the likelihood of real damage to the public interest (in the form of the national security and/or international relations interests) of the United Kingdom. The second evaluation, which only arises in circumstances in which the first evaluation is that there is indeed a likelihood of real damage,⁴ is what is often referred to as the “Wiley balance”, ie whether, in the view of the Secretary of State, the likelihood of real damage to the public interest from disclosure outweighs the public interest in open justice. As a matter of established form, this assessment always concludes with a statement by the Secretary of State that this balance is ultimately a matter for determination by the court, even though the received wisdom is that a court will give a good deal of deference to the views of the Secretary of State and is highly unlikely to reach a conclusion different from that of the Secretary of State.

23. Tangentially, a highly problematical aspect of the Binyam Mohamed case that is often overlooked, and indeed of which many seem simply to be unaware, is that the Divisional Court ultimately rejected the Foreign Secretary’s third PII certificate. In that certificate, the Foreign Secretary assessed that disclosure of the seven paragraphs in issue would give rise to a likelihood of real damage to the national security and international relations interests of the United Kingdom. On the Wiley balance, the Foreign Secretary reached the view that the risk of damage to the public interest outweighed the public interest in open justice, particularly in circumstances in which Binyam Mohamed had been released and returned to the United Kingdom. The assessment of a likelihood of real damage was addressed in detail in the open PII certificate and supported by compelling evidence in the sensitive schedule that was submitted in closed form with the certificate.

3 See both http://www.tsol.gov.uk/Publications/Scheme_Publications/Letter_to_Attorney_General.pdf and http://www.tsol.gov.uk/Publications/Scheme_Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf

4 The formula employed varies, sometimes being described as disclosure that would “cause serious harm or real damage to the public interest”.

24. The fallout of the Binyam Mohamed case was only in part a consequence of the decision of the Divisional Court, ultimately upheld by the Court of Appeal, requiring disclosure of the seven paragraphs in question in violation of the “control principle”. More serious, in my view, was the decision of the Divisional Court to reject the PII certificate and substitute its own view of the balance of the public interest. The consequence of this was to throw into doubt the stability and reliability of the PII mechanism as a means of safeguarding the national interest. The legislation that is now proposed reflects this systemic concern. The issue at the core of the matter is thus not the breadth or narrowness or risk of repetition of the Binyam Mohamed judgment. It is not whether the information in issue in that case had been disclosed in the Opinion of Judge Kessler in the DC District Court in the Farhi case.⁵ It is not whether the UK courts—in recent cases such as *Omar v. SOSFCA*⁶ or that of the First-Tier Tribunal’s decision in the appeal against the decision of the Information Commissioner by The All Party Parliamentary Group on *Extraordinary Rendition*⁷—upheld the government’s position on national security. All of these are relevant, but on the margins. The core issue associated with the Binyam Mohamed judgment is that it caused considerable doubt to creep into the heart of the PII process. The fact of the matter is that intelligence and similar relationships that hinge fundamentally on trust and reliability require greater certainty than the courts are now able to provide.

25. Returning to the broader issue of PII, a revised PII framework, including, but not limited to, placing PII on a statutory footing, might have been one way in which the challenges could have been addressed. In the light of the Supreme Court’s judgment in the *Al Rawi* case,⁸ however, there would still have been a need to legislate to allow for closed material procedures (CMP). This apart, there are also a number of other features of the current PII framework that lead me to the conclusion that the current PII framework is not of itself adequate to the task of achieving a proper balance between justice and security.

26. A central feature of the current PII framework is that it differentiates between the content of a document, ie, the information contained therein, and the class of a document, ie, its classification, provenance or other generic form of distinction. PII may be claimed, as appropriate, for part or all of the content of a document but it cannot be claimed for a document itself simply on the ground that it is a document of a particular form, eg. Classified as SECRET.

27. This class–contents distinction, a creation of the common law, stands at the heart of PII. It is appropriate, and works well, when what is in issue in legal proceedings is a small quantity of HMG-sourced information that ought properly to be put in the balance between open justice and national security. It poses significant challenges, however, when what is in issue for disclosure purposes is a very large volume of documentary material

5 Civil Action No.05-1347, 19 November 2009.

6 [2012] EWHC 1737 (Admin).

7 Case No.EA/2011/0049-0051.

8 [2011] UKSC 34.

some or all of which contains information that is foreign-sourced. In such circumstances, the class–contents distinction requires that every line of every potentially relevant document is reviewed (a) for relevance, (b) for direct HMG national security sensitivities going to disclosability, (c) to establish whether the information in issue is foreign-sourced and subject to the control principle, (d) to establish whether the information in question might have already been disclosed in some other manner and forum, and (e) to identify what redactions are required and appropriate. In proceedings involving hundreds-of-thousands of documents, or more, this is simply not manageable—in the interests of justice, in the interests of national security, in the interests of a sensible engagement with the UK’s intelligence partners, and in the interests of an efficient court process. The current PII framework is, for this reason alone, inadequate to the task of achieving a proper balance between open justice and national security in the types of cases with which the Bill is concerned.

28. Beyond this, and, as already addressed, very much part of the fallout of the Binyam Mohamed case, is the uncertainty that now attaches to the exercise of judicial discretion to substitute the views of the judge for the views of the Secretary of State when it comes to assessing the balance between the public interest in national security and the public interest in open justice. While there was evident public appetite to learn of the information the public disclosure of which was resisted in the Binyam Mohamed case, and public appetite perhaps translates into public interest, it is difficult to conceive of a stronger claim to PII. The applicant in whose name the case was brought, and in respect of whose indictment before a US military commission the information was sought, had been released without charge and returned to liberty in the UK. Successive US Governments had expressed their unequivocal concern about and opposition to the possible disclosure of US intelligence information. The UK Foreign Secretary, in both an open PII certificate and a classified sensitive schedule, had assessed there to be a likelihood of real damage to the UK public interest from disclosure. While the information in question might not have been such that the disclosures would have put in jeopardy life and limb, it went to a principle of trust that stands at the heart of intelligence relationships. The public interest in open justice is always strong. This was a case, however, in which there was also a strong competing public interest. The substitution by the court of its view of the balance of the public interest for that of the Foreign Secretary has understandably given rise to a good deal of disquiet in the intelligence and diplomatic communities.

29. Against the background of these general observations, I turn briefly to address some specific issues relevant to Norwich Pharmacal jurisdiction and the practical fallout of the Binyam Mohamed case.

Norwich Pharmacal jurisdiction

30. Norwich Pharmacal jurisdiction was a creation of the common law to address the inability of a private law claimant, in proceedings against a private law respondent, to secure information from the respondent in circumstances in which relevant information was also held by a third party who could be shown to have been “mixed up” in the alleged wrongdoing of the principal respondent. The court allowed proceedings to go ahead, and relief to be granted in the form of disclosure, against the third party.

31. The novelty of the Binyam Mohamed case was to extend this mechanism into the public law arena in circumstances in which the principal respondent was a foreign state and the information in question was foreign-sourced intelligence information. Following Mr Mohamed's release and return to the UK, the case took on a freedom of information character, to secure the public disclosure of certain information held by HMG rather than only disclosure to Mr Mohamed for use in legal proceedings in the United States, subject to appropriate handling and non-disclosure safeguards. And this in circumstances in which the information in question would not have been subject to disclosure under the Freedom of Information Act. Subsequent cases took more of the form of a fishing expedition in which the applicant had no knowledge of whether HMG held any relevant information but, relying on the government's "duty of candour" disclosure obligation, nonetheless sought disclosure, with significant attendant burdens on HMG.

32. The fungibility of information and the notion of presumed knowledge across government pose a challenge in this area. By this I mean, first, that information that is held by one department or agency of government is presumed to be held by the government as a whole, and, second, that information once received is presumed to put the government on notice. I make no wider point about these elements, which are probably right and sensible in the ordinary course of events. In the context of Norwich Pharmacal proceedings in the national security sphere, however, they have formed the implicit foundation of the contention that HMG has been mixed up in the alleged wrongdoing of another in large measure because it is in receipt of information that is said to evidence the alleged wrongdoing or to be otherwise relevant to the case.

33. As a legal matter, Norwich Pharmacal jurisdiction in this area has proven to be challenging. In some cases, no proceedings had been commenced against a putative principal respondent but only the suggestion that, contingent on disclosure from HMG, proceedings may be initiated. The allegation that HMG was somehow mixed up in the wrongdoing of another, an essential element of the claim, has been easily made. It is less easily addressed, however, when to do so would require detailed argument on issues often contingent on the very information the confidentiality of which it was sought to maintain.

34. As a practical matter, the extension of Norwich Pharmacal jurisdiction into the public law arena, in respect of allegations engaging the interest of foreign states that ought properly to be the preserve of the courts of those states, and in circumstances in which the information that is sought is sensitive foreign-sourced intelligence information, is highly problematical. It undermines the trust and confidence that is at the heart of intelligence relationships.

The Binyam Mohamed case

35. I have already addressed aspects of the Binyam Mohamed case in some detail. I set out below some of the practical consequences of the case that I observed in the intelligence and diplomatic spheres. As a preliminary matter, it is useful to underline quite how unprecedented the case was, both as regards the currency and sensitivity of the national security issues engaged and the case procedure.

36. Following the initiation of proceedings on 6 May 2008 to the concluding judgment of the Court of Appeal on 26 February 2010, a total of 9 judgments were handed down, 7 by the Divisional Court (6 open and 1 closed) and 2 by the Court of Appeal. In practical terms, the momentum of the litigation saw 9 judgments handed down in 18 months. All told, 5 PII certificates were submitted. The case ran in parallel with focused diplomatic efforts by HMG to secure the release from Guantanamo Bay of Mr Mohamed and other lawful British residents that had been launched by the then Foreign Secretary, David Miliband, in correspondence to US Secretary of State Condoleezza Rice, in August 2007. The case straddled the US Presidential election of November 2008 and the assumption of office of the Obama Administration in January 2009, giving rise to significant legal and diplomatic challenges, at the tail end of the Bush Administration and the start of the Obama Administration, for both the UK and US Governments. Much of the case, and certainly its most problematical parts, played out after the information that Mr Mohamed had sought through the legal process had already been made available to his US security cleared counsel, around the time of the 3rd Judgment of the Divisional Court in October 2008, and Mr Mohamed had been released from Guantanamo Bay on 23 February 2009 and returned to the United Kingdom.

37. The outcome of the case, following the 6th open judgment of the Divisional Court, upheld by the Court of Appeal, was to require the public disclosure of seven paragraphs of an earlier judgment of the Divisional Court in which the court had summarised sensitive foreign-sourced intelligence information. The judgments rejected the 3rd PII certificate of the Foreign Secretary that had concluded that there was a likelihood of real damage to the national security and international relations interests of the United Kingdom and that this risk of damage outweighed the public interest in open justice in the circumstances of the case. The Foreign Secretary's evaluation weighed and referred to unambiguous concerns expressed by the US Government over the possible public disclosure of the information in question and the potentially wider consequences of such a development for the intelligence relationship.

38. Turning to the practical consequences of the case, there are 4 areas that I would highlight, from my own experience, in which the consequences of the case had wider and materially damaging effects. I do so only in summary terms for the reason that further elaboration or illustration would require the disclosure of details that are still regarded as sensitive. The 4 areas of impact are as follows.

(a) Heightened sensitivity in the intelligence sphere—the case sent a signal to the UK's intelligence partners that, for reasons of potential litigation disclosure risks and the approach of the UK courts, HMG was not in a position to guarantee the confidentiality of foreign intelligence information shared with the UK on the basis of the “control principle”. While HMG put considerable effort into engaging with senior officials in the foreign intelligence community to assess and address the disclosure risks flowing from the case, whatever limited reassurance such engagement may have been able to achieve at a strategic level, it could not adequately address concerns arising at an operational level.

I would add that, with the Green Paper and Bill, there is an appreciation amongst the UK's intelligence partners that HMG is seeking to address the difficulties to which the Binyam

Mohamed case gave rise. I am not in a position to comment on the level of comfort that the Bill, if enacted, would give to such partners although I anticipate that it would address the principal concerns. What I do not doubt, however, is that a failure by HMG to be able to provide necessary reassurance on these matters to the UK's intelligence partners would inevitably lead to a re-evaluation on their part of long-standing intelligence-sharing arrangements.

(b) Repercussions beyond the intelligence arena—the case had consequences in other areas involving the exchange of sensitive information with foreign governments. The fact of the case, even if not its fine details and likely precedential effects, became quickly and widely known amongst foreign policy officials and lawyers in other states with the consequence that caution began to creep into the sharing of sensitive information with HMG in other areas where there was a perceived litigation disclosure risk.

(c) Complicating diplomatic engagements more widely—the case had consequences in the broader arena of diplomatic engagements involving the discussion of sensitive issues. In my direct experience, for example, in discussions on matters of some sensitivity with foreign partners that were perceived to have a litigation risk in the UK, I was on occasion faced with a preliminary enquiry on whether I/the HMG delegation could guarantee the confidentiality of the information that our foreign interlocutors thought it necessary to impart to us for purposes of a fully informed dialogue. I could not do so. The consequence was to considerably complicate and elongate the discussions in question.

(d) The risk of a self-denying ordinance in the conduct of HMG officials—given the perceived litigation disclosure risks, a degree of caution began to creep into the conduct of HMG officials when it came to eliciting information from foreign counterparts the confidentiality of which they may not have been able to maintain. It certainly coloured my approach, for example, in circumstances in which a matter on which I was engaged carried a real litigation risk. While I do not want to overstate this issue and leave the impression that Binyam Mohamed disclosure concerns intruded into all or even most diplomatic dialogue, the uncertainty created by the case had a wider impact on the candour and ease of sensitive diplomatic exchanges more generally.

Postscript

39. At the moment of finalising this statement, I was provided with a copy of HMG's response to the House of Lords Select Committee on the Constitution, laid before Parliament today (15 October 2012), addressing the issue of Norwich Pharmacal jurisdiction. I have not taken that response into account for purposes of my statement and have not altered the statement in any way to reflect it. As will be apparent, however, I agree in large measure with what it says.

15 October 2012

10. Letter to the Lords Clerk of the Committee, from Caroline Mersey, Deputy Director, Justice and Security Bill Team, Cabinet Office, 2 November 2012

Thank you for the Joint Committee's recent letter seeking information about the number and nature of pending civil damages claims against the Government to which the provisions in the Justice and Security Bill may be relevant. The Advocate General has asked me to write to you and provide an update on the progress of responding to your request.

I sincerely apologise that the Government has not responded in time to meet your 31 October deadline I hope this delay will not cause significant disruption to your important work scrutinising the Bill.

It may be helpful if I provide an explanation of why the Government has not been able to supply this information within the deadline. The Cabinet Office does not hold a central database of the case details. Instead the information is held in each Government department. Consultation is required with a significant number of individuals and Departments across Government and it has proven difficult to complete this to a sufficient degree of reliability within this timeframe. It is important to us that any figures provided are the most current and accurate as we would not want to inadvertently provide you with incorrect information.

As you are aware, these cases are sensitive and very complex. As is the case with litigation, the status of cases varies with the passage of time and provides a continually shifting picture, for example as some cases are stayed behind other proceedings. We also have to consider all the impacts of any information given publically about these very sensitive cases.

I understand it is important that you receive this information for your report on the Bill. I am sorry I am unable to provide a specific date when this information will be ready, however, I hope to supply the information to Lord Wallace next week, who will then reply to the Chair.

2 November 2012

List of Reports from the Committee during the current Parliament

Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370

Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion	HL Paper 192/HC 1483

	(second Report)	
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777