The Justice and Security Green Paper
Oral Evidence HC 1777–i–v

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Dinah Rose QC and Tom Hickman

Oral Evidence, 24 January 2012, Q 1–44

EVIDENCE SESSION NO. 1. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Baroness Berridge
Lord Bowness
Rehman Chishti
Mike Crockart
Lord Dubs
Lord Morris of Handsworth
Mr Richard Shepherd

Examination of Witnesses

Dinah Rose QC and **Tom Hickman**, Barristers, Blackstone Chambers

Q1 Chair: Good afternoon and welcome to this session of the Joint Committee on Human Rights in relation to the Justice and Security Green Paper. Could I ask you both to introduce yourselves for the record?
Dinah Rose QC: My name is Dinah Rose QC and I am a barrister practising in human rights and public law at Blackstone Chambers.
Tom Hickman: I am Tom Hickman and I am also a barrister practising in public law and human rights at Blackstone Chambers.

Q2 Chair: Ms Rose, could I begin by referring to your recent Atkin Memorial Lecture? You said in that lecture it is clear from the Supreme Court's judgments in Al Rawi and Tariq that the common law gives greater protection to the right to know the case against you than does Article 6 of the European Convention on Human Rights. Could you explain why that is?
Dinah Rose QC: I believe the reason is because in England we have always had an adversarial justice system. The essence of an adversarial trial is that each party presents their case, puts forward their evidence and challenges the evidence put forward by the other party, and the judge then sits as the arbiter to make the decision between the two. That is the essence of the adversarial system. Of course, in many European jurisdictions they have a civil law system that may include a greater or lesser inquisitorial element, where the judge carries a greater investigatory role. I think that makes a basic difference to the way that natural justice operates.
Article 6 of course sets the minimum standard that must be adhered to by all states of the Council of Europe. Our own common law tradition sets the standard that is appropriate for our own legal system. The problem is I do not think you can have an effective adversarial trial unless you know the whole of the case that is being mounted against you. Unless you know what the defence is and what evidence is being put forward to support the defence, you are in no position to work out what evidence you need to present or how to challenge the evidence of the other side. The system simply does not work without full disclosure. Indeed, I think that is the reason why Lord Kerr, in the Al Rawi case, said that a case in

which there was not full disclosure lacked the mark of judicial proceedings; it could not be described as a judicial process within our own legal system.

Q3 Rehman Chishti: Chairman, may I first of all declare that I am also a barrister and door tenant at 18 Red Lion Court? I have a question for Ms Rose linked to Article 6, which you just referred to. Your argument is founded on common law, but under our constitutional arrangements Parliament has the acknowledged power to override the common law if it so wishes. Article 6 of ECHR, on the other hand, binds Parliament so long as the UK remains part of ECHR. On this specific point of ECHR and Article 6, what constraints does Article 6 place on Parliament in your view?
Dinah Rose QC: I believe that Article 6 does place constraints. Their scope is not clear under the current case law. The two most pertinent cases are, firstly, the case of A and others v United Kingdom, which, in relation to detention of terrorist subjects, held that you should at least have the gist of the allegation disclosed so that you can give full instructions to the special advocate. Then there is the case of Kennedy v the United Kingdom, which dealt with the procedures in the investigatory powers tribunal and which appeared to adopt a much looser standard under Article 6. That is the case that the Government successfully relied on in Tariq.
My own view is that, if this legislation were to be introduced, Strasbourg would look at the whole picture again in the context of our common law system. I think what is proposed under this Green Paper would violate Article 6 in a number of ways: first, the principle of natural justice; secondly, the principle that no one should be a judge in their own court, because under the proposal it is suggested that the Minister would decide if there was to be a closed material procedure subject only to a judicial review scrutiny. The idea that a party to the action decides what procedure is to be followed seems to me to be anathema under Article 6. Thirdly, and linked to that, it breaches the principle of equality of arms, which is also a requirement under Article 6. I do not believe that this proposal would survive an Article 6 challenge.

Q4 Baroness Berridge: Could I just ask you a supplementary in relation to the first question before I go on to my question? You said that Article 6 is the baseline and that we have this adversarial procedure beyond that. Can you give me some specifics of what is beyond Article 6? Is it just the fuller disclosure that an adversarial system requires or are there other elements that mean the common law right is broader than the Article 6 right?
Dinah Rose QC: There may be other respects in which the common law is broader not just than Article 6 but than other convention rights as well. But the example relevant for our case is if you compare the decision of the Supreme Court in Al Rawi with the decision of the European Court of Human Rights in A and others v United Kingdom. In that case the standard that was being set under Article 6 was for disclosure at least of a sufficient gist to enable instructions to be given, but the standard that the Supreme Court sets in Al Rawi is a standard of complete disclosure in order for there to be a civil trial.

Q5 Baroness Berridge: I have a question now to Mr Hickman. The Bingham Centre has considered whether there is a problem that is required to be addressed and has concluded that there is not. Can you explain in more detail why you reached that conclusion, because clearly the Government thinks there is a problem that swiftly needs addressing?
Tom Hickman: Our position is not quite as simple as that, but I agree that that is the bottom line. It depends on what the arguments being put forward are. The first argument

that the Government put forward in the Al Rawi case was effectively a pragmatic argument; they said that it is very onerous to go through a public interest immunity, or PII, process and that in cases raising significant public interest issues/national security issues, it would be appropriate to bypass that. In our view PII is a constitutional fundamental, and you simply cannot rely on expediency as a reason for going around PII, so that is not a reason for changing the system.

The argument at the forefront of much of the Green Paper is that there are perceived risks to national security in the current arrangements, either because it is said that there may be some disclosure of sensitive material by the courts or because the disclosure of sensitive international relations material may lead to a constriction in security-sharing arrangements. We also say that this case has not been made out at all. In fact, there is no case that we are aware of, as we have said, in which the courts have ever required disclosure of national security information that is operationally sensitive. We have explained why the suggestion that there would be a constriction in intelligence sharing is not sufficiently persuasive to justify the sorts of proposals that have been brought forward.

Indeed, the very justification for the closed material procedure that the Government wants to introduce is supposedly because so much material would not be disclosed by the courts. There is an inconsistency in the Government's position, because they say the courts are not going to disclose a lot of this material. Let us say this file here is full of security sensitive information. The Government's case is that the courts are never going to disclose this information and, therefore, the case will not be able to proceed, and they want to put it before the court in a secret hearing. That is inconsistent with their suggestion that there is a national security risk in the current arrangements. In our view, therefore, that argument does not give rise to any need for change.

They also have an argument that it is unfair on the defendant—that the Government cannot defend themselves if all this material in this file cannot be put before the court. That argument does not assist them either because, in their view, in such a case the case would not go ahead; the Government would not be prejudiced in such a case, because the case would not go ahead. The sole remaining issue is what happens if a claimant wants to bring a case but their case is struck out because the case cannot go ahead as evidence that they need is covered by PII. A number of the judges in the Al Rawi case said that that could potentially be justification for closed material procedure, and we have examined that in our paper.

But that is not the proposal the Government is making; the Government's proposal amounts to effectively a wholesale abolition of PII, and the replacement of it with closed procedures in an unspecified and very broad number of cases. We have said very clearly that the Bingham Centre does not think that any case has been made out to justify that kind of fundamental reform.

Q6 Baroness Berridge: Your memorandum helpfully explains that the Binyam Mohamed case did not go through the PII procedure. Can you illuminate for us why they did not go through that procedure in that case and then draw us a conclusion?

Dinah Rose QC: There was a PII process in Binyam Mohamed.

Baroness Berridge: Sorry, I thought it said that there was "no full-blown PII process in that case".

Dinah Rose QC: I think you are referring to the Al Rawi case.

Baroness Berridge: Sorry, Al Rawi.

Dinah Rose QC: In Binyam Mohamed there was a PII. What happened in the Al Rawi litigation was that there was some disclosure. There was then a mediation and the cases were settled. The case never got to trial and there was no full-blown disclosure exercise and, therefore, no full testing of PII. My view is that one of the weaknesses of the Green

Paper is that it dismisses PII without appearing, with respect, to have a very clear understanding of the power and flexibility of the PII principle, and without putting forward any evidence of why it is inadequate.

Q7 Baroness Berridge: Was not your point that it was not put to the test as a procedure in that case, so we do not know whether we have reached the end of the line as to what PII can do for us in these situations?
Dinah Rose QC: That is correct. Indeed, they do not point to any case suggesting there is a serious problem that needs to be addressed by legislation because PII is inadequate to address it.
Tom Hickman: Can I add a supplementary answer to that? While the case was proceeding up to the Supreme Court in Al Rawi, the main proceedings carried on until they eventually settled. While they were carrying on, some PII was done and there was disclosure, for example, of some of the internal SIS instructions going back to 2004. That was actually disclosed and is publicly available now on the internet, having been disclosed publicly in that case. That was done by a PII process, so what we said in that case was, "Let's just have a look at some of this very important documentation and, to start with, just do PII on that information." That was done successfully. We never got on to the next tranche of information and the next tranche, because the case settled.

Q8 Lord Morris of Handsworth: My question is to both of you, but I suspect that Ms Rose might have already given it her answer. I will put the question to you anyway. Do you agree with the Government's claim in its Green Paper that the extension of closed material procedures will enhance procedural fairness?
Dinah Rose QC: I strongly disagree with that.
Lord Morris of Handsworth: I thought you would.
Dinah Rose QC: It is based on a fallacy identified by Lord Kerr in what is now a very well-known passage—paragraph 93 of the judgment in Al Rawi. He makes the point that the argument run by the Government, which was run in Al Rawi as well, is that it is fairer for the judge to have more material. Therefore, a process that enables the judge to see all the evidence is fairer than a process that limits the evidence that goes before the judge because some evidence has been declared inadmissible following the PII process. The fallacy in that argument is that the judge may see the evidence and the Government may see the evidence, but the claimant and the claimant's lawyers cannot see the evidence. That is fundamentally unfair and, as Lord Kerr said, evidence that is not tested may positively mislead.
Let me give you a specific example, which I have put forward a number of times and to which I have never had a convincing answer. The example is this: if you have a case in which the claimant gives oral evidence about what he says happened to him, and in the closed material there is a document inconsistent with the evidence he has given, he cannot be cross-examined on the basis of that material because it is secret from him. So the judge has unchallenged oral testimony from the claimant and then has a document that on its face is inconsistent with that testimony, but the claimant has had no opportunity to explain it and it has not been put to him.
In that situation, how is the judge fairly to determine which evidence he accepts—to decide whether he accepts the evidence of the claimant or what is in the document? He simply does not have the tools to enable him to do that. That brings me back to where I started, which is that in an adversarial process this procedure does not work. It is a fundamental misunderstanding of what an adversarial trial is.

Tom Hickman: My answer to that question would be quite simply that it obviously does not and cannot enhance procedural fairness, because you are denying one party to the case evidence being used in their case. It cannot, in any view, enhance procedural fairness. There were some suggestions in the Green Paper that the special advocate system has been shown to protect procedural fairness. That is clearly wrong. Any use of closed procedures is inevitably a grave departure from procedural fairness.

Q9 Baroness Berridge: Can I just clarify first of all what you were previously saying? Are you saying that in your view justice, which is obviously what we are trying to ultimately get to, is better served in an adversarial situation by potentially a more limited disclosure of everything being tested than by having greater disclosure but some of it being untested by the means of trial? Have I understood?

Dinah Rose QC: Yes. In the paper that I circulated this morning I have sought to summarise the points. I think PII is really important here, and the Green Paper shows a basic misunderstanding of PII. First, I do not think it appreciates the flexibility of the powers that a judge has in a PII process. It is not simply a decision by the judge: either this sensitive material will be publicly disclosed or it will be inadmissible. That is a false picture of PII. The judge has a range of tools available to him or her when considering a claim for PII. What will happen is that the Minister will sign a certificate that says that particular evidence, if it is publicly disclosed, will be harmful to national security. The judge's task is then to balance the harm to national security against the needs of the administration of justice.

In order to do that, the judge can do a variety of things: he can have the hearing in secret; he can put in place measures to protect the identity of a witness who is giving evidence; he can order that there should be disclosure of the gist of the information but not the actual document itself; he can order that a document should be redacted so part of it is disclosed; he can even order that there should be put in place a confidentiality ring so that there should only be restricted disclosure, perhaps to the claimant's lawyers. You can imagine a situation where, for example, there might be evidence given by a witness on behalf of the defendant that is outside the knowledge of the claimant, and where the barrister would want to cross-examine that witness and is able to do so if they have access to the secret material.

It is not a simple question of either having the material in or having it out. There is a whole range of tools, and that is why I think the analysis in the Green Paper is simply inadequate.

Q10 Baroness Berridge: To put it colloquially, I think the Government is saying, "In this case we took a hit. We could not release this information and we had to settle." In your view of the overall principles of justice—because the scales are going to end up somewhere in this balance—are you saying that: (a) you are not convinced that there are these situations; but (b) assuming the Government are right that they took a hit on this one and had to settle, in the overall scheme of things justice is better served by not introducing this procedure and having the minute number of cases where the Government take the hit and decide they are going to protect their operational security services over and above paying out this money?

Dinah Rose QC: Remember, the only situation in which the Government would take a hit in that way is one in which the judge decides that material is disclosable and the Government says, "We cannot accept that judgment, so we will settle rather than disclose it." That is something that happens to defendants every day in our courts; it is not special to PII. There are very many cases in which defendants are ordered to disclose documents and are so appalled by what those documents may reveal about their internal practices that they settle the case. That is one of the pressures of civil litigation; that is what happens.

The Government found themselves in a very embarrassing situation, where there was a risk that documents showing misconduct on the part of the intelligence agencies would be

disclosed, so they settled the cases. In my view, it is unacceptable that their reaction to that is not to say, "The intelligence services should be held more accountable and held to higher standards," but instead to say, "We are going to change the rules of the game so that in future we can have a situation where we can fight these cases in secret without the claimant being able to pursue a claim against us." That seems to me to be a very strange response.

Q11 Baroness Berridge: Just to move on to the question we were going to ask you—I think you have covered it—do you think PII is inadequate to deal with the disclosure of sensitive information?

Tom Hickman: This is the point that Dinah was talking about when she was talking about all the different options that are open to a court. I do not know if any of you have our paper in front of you, but we deal with this in paragraphs 23 and 24. There is a very important statement in the leading judgment of Wiley—Lord Woolf's judgment. I have set it out in the paper and, basically, what he is saying is you go through the exercise of issuing a certificate; then you give that to the judge; representations are made on it by both parties; the judge looks at the material and he weighs the public interest in maintaining the secrecy of that information against the public interest in the administration of justice in disclosing it. He carries out a balancing exercise.

That is not the end of the process, and this is an often-overlooked aspect of the PII exercise. There is a further element to the process, which is described in this passage in Lord Woolf's judgment. What he then says is, "You have the category of information"—let us say it is half of the documents in this folder here—"that I recognise is sensitive, but I think that some of this information can be given to the lawyers of the claimant, for example, who have entered into undertakings that they will not disclose it any further. We can also restrict the circumstances in which these documents are going to be inspected or we can gist the documents—we can take the material bits from them, put that in a separate document and give that to the claimant or to their lawyers." There is a whole range of possibilities that can be employed at that final stage of the PII process.

That has never actually happened in any case yet because we have not had a situation where we have got through the PII process. We did in Al Rawi in respect of some limited documents, but they were disclosed with some redactions. We have never actually tested this mechanism and, for example, confidentiality rings—which we mention in paragraph 24 of our paper and which Dinah has mentioned—are used extensively in other areas of law. They are not addressed at all in the Green Paper, and the Government has not explained why these sorts of processes cannot be employed. It is time-consuming and it is of course difficult, but this is the administration of justice and potentially extremely serious allegations that need to be tested. So what we have said is that we find it very difficult to conceive of circumstances where, having done all of that, you are left with the prospect of having to strike a claim out because so much of the material remains undisclosable.

Q12 Baroness Berridge: In the balancing tests that you outline, obviously the level of sensitivity of the information is one factor, but am I right in assuming that how relevant the information is to the core of the allegations is a huge factor in the judge's mind as to whether or not they can just be—

Tom Hickman: That is right.

Baroness Berridge: So it is not just a case on disclosure as to whether it is relevant; within relevant, you get a consideration of how relevant the information is that you have seen.

Tom Hickman: That is right. It is both relevance and also how damaging it would be to the national interest. You have to weigh both.
Dinah Rose QC: You would also be looking at the nature of the issue in the proceedings. For example, in Binyam Mohamed, when that case started Binyam Mohamed was in detention in Guantanamo Bay facing a potential capital charge. By the time the issue of PII came to the fore, he had already been returned to the UK. One of the things that the divisional court said in that case is that they would have taken a different approach to the balancing of PII had he still been facing a capital charge because, obviously, the importance of disclosure is much greater in that case.
Tom Hickman: Can I also add a footnote, if you do not mind? When you compare a system that applies PII like we do in the civil justice system with what happens in control order cases or SIAC cases, there is a vast difference. In SIAC and control order cases, you basically do not get told anything. It is blanket secrecy; all the documents that you get given in a control order case, in so far as they refer to anything about the intelligence services, are completely blacked out, because anything that could cause any potential harm to the national interest or public interest, no matter how remote and no matter how important that material, is blanket redacted.
Dinah Rose QC: No balance.
Tom Hickman: There is no balancing of interests, and I think that is what the Government want to do here. They want to have this complete blanket of secrecy that would effectively close off the whole part of the civil trial. There would be no disclosure of anything; it would be blanket secrecy. That is why the fact that they are seeking to replace PII completely is so important.
Chair: Ms Rose, I do apologise. We should have thanked you for the memorandum you provided us with this morning. We place on record our thanks for that. That will be reported to both Houses, hopefully today, and it will be on our website tomorrow so the public can see it.

Q13 Lord Dubs: Are there any exceptional circumstances in which the availability of closed material procedures in civil proceedings could be an enhancing of human rights?
Dinah Rose QC: There is already an obvious example of a situation in which a closed proceeding can indeed enhance human rights. That is when you have what would otherwise be an ex parte process and you can use a special advocate to enhance the fairness of that process. The most obvious example of that is a situation in which an application has been made for PII. The normal procedure is that a certificate is signed by the Minister saying, "Disclosure of this particular evidence would harm national security," and the judge may then say, "Well, I would like to inspect the documents in order to be able to conduct the balancing exercise." Traditionally, that process was of course done in the absence of the claimant and the claimant's lawyers, because a claim for PII had been made, so only the judge and the defendant's lawyers would be present. But it is now well established that you can appoint a special advocate to represent the interests of the claimant in that process and to argue in that process that more material should be disclosed. That is a good example of how a special advocate can enhance fairness.
Essentially, in my view the right principle is this: a special advocate is a legitimate tool to enhance procedural fairness and to provide representation where otherwise there would be none. A special advocate is not a legitimate tool to reduce procedural fairness and to prevent a claimant from access to information. That is why the original concept behind SIAC was acceptable. Before SIAC—and, of course, this is what was examined in the Johal case—there was a wholly secret procedure where the decision was taken to deport somebody on national security grounds, and the original idea of the special advocate was to enhance procedural protection for the claimant. We now have a perversion of that concept, where

the special advocate is being used to reduce procedural protections, and that is unacceptable.

Tom Hickman: I would accept that there are no circumstances that I can think of in which it could be said to be human rights enhancing, save in those respects that Dinah has mentioned. We have referred in our paper to some circumstances in which Lord Mance, Lord Hope and Lord Clarke in Al Rawi said that there could potentially be some justification for a closed procedure, which is where a claimant brings a case against the security services in particular—it is difficult to imagine any other defendant—in which those claims would be struck out. Of course, in America you have a system of state secrets called the state secrets doctrine, and all the claims against the CIA that have been brought have been struck out on the grounds of state secret privilege. It would be unfortunate if we ended up in a situation such as that in this country.

We have looked at that suggestion in our paper, and we accept that there could potentially be justification for a closed process if the only option was that claims of that nature would be struck out and would fail. I think that is probably an example of what Dinah has said, which is that it is enhancing because it is a situation where otherwise there would be no justice at all. Given what I have said about Wiley and the fact that there is all this possibility for other arrangements in the PII process to be made, such as confidentiality rings, we find it difficult to accept that that would not adequately deal with those circumstances. Certainly, there is no case yet that justifies the Government's suggestion that closed material procedure is necessary in those circumstances.

Q14 Lord Dubs: In the answers to earlier questions, I think you indicated why the proposal in the Green Paper is different from the existing law on PII. Is there anything else you want to add to that?

Tom Hickman: There are certain key features of PII that, in the light of the question, it might be helpful to spell out. All of these would be done away with if the Green Paper were to become law. The first key feature is there has to be a ministerial certificate. That is a very important discipline and it is a very important protection. There have been examples of where the courts have come down very hard when those certificates have not been properly drawn up. One can think of the Scott inquiry and the Al-Sweady litigation. They provide a very important discipline and check. The second key feature is that you cannot use PII for class claims. You cannot just say this falls into a whole category of information and, therefore, there is PII.

The third key feature is that there is a balancing of interests: you balance the administration of justice against the need for secrecy, and so the administration of justice has a say, and we have already discussed that. The fourth key feature, as we have discussed in Wiley, is that at the end of the process, once you have decided that material cannot be properly disclosed, you try to find other ways to introduce it into the case in a manner that is acceptable. Finally, a key feature of PII is that, if having done all that, there remains some information that cannot be introduced into the trial, it is excluded altogether from the trial. They are the five key features of PII, and the Government in these proposals, apparently in order to meet only the last point, would do away with all five of them. That cannot be justified.

Dinah Rose QC: The only one I would add to that is that in PII it is the judge who makes the decision and not the Minister.

Tom Hickman: That is a very important point and we have addressed that in our paper at the Bingham Centre. We think the suggestion that it should be the Secretary of State who triggers this process is simply unjustified.

Q15 Lord Morris of Handsworth: Can you clear up something in my mind? I understood you to say that PII cannot be used to establish a class action situation. Can it, therefore, be used to pursue a situation where precedence has been established or indeed to set precedent?
Tom Hickman: Sorry, I am not entirely sure I heard the question. Would you mind just repeating it?
Lord Morris of Handsworth: What I have said is that I recognise that the PII cannot be used or should not be used to establish class actions going forward. Fundamentally, my question is: can it be advanced where precedence has already been established and you are making like-for-like comparison of the facts?
Tom Hickman: I see what you mean. There are obviously precedents that say, for example, Cabinet minutes are treated as very sensitive, and there are obviously precedents that refer to national security information. There are cases that have addressed different types of information. Therefore, when you are having an argument in court about PII and those are the cases to which the judge's attention is directed, the judge reads those cases and says, "Obviously, this case concerns Cabinet minutes—very sensitive. It would take some very weighty reasons of the administration of justice for there to be disclosure of them." The previous cases are not binding on him because the circumstances will always be different, but obviously the judge takes that very much to heart and it guides the decision.
Lord Morris of Handsworth: Does that work both ways?
Tom Hickman: Yes. It can work in favour of either party; it just depends.

Q16 Baroness Berridge: Can I just draw you back, Ms Rose, to your comments about ex parte proceedings and how they have been enhanced by the role of the special advocate? You started with the core principle that, in an adversarial procedure, this is what is necessary for full disclosure. How do you apply that principle that you have very eloquently stated to ex parte proceedings? Are not ex parte, as a class of proceedings, contrary to what you first outlined?
Dinah Rose QC: Ex parte proceedings are not the trial of an action; they will normally be an ancillary process that takes place during the proceedings. An obvious example will be a situation where there is an application for disclosure that is being met with a claim for PII. You are not trying the action; it is an ancillary issue that has arisen in the course of the proceedings that may be dealt with on an ex parte basis.

Q17 Baroness Berridge: Was it ex parte that all the super injunctions then happened under?
Dinah Rose QC: They would have originally been ex parte. I do not know the detail of the super injunctions, but there are of course many injunctions originally applied for on an ex parte basis, but what then happens is that there has to be a return date where the other side is allowed to come along and make their points. One of the interesting features of the case law on ex parte injunctions is that you are not allowed to rely, in support of an application for an ex parte injunction, on evidence that you are not prepared to disclose to the other side for the return date, which is quite an interesting point when you contrast it with what the Government is seeking to do here.

Q18 Rehman Chishti: I have a question to Ms Rose. I think we have touched on it, but just for clarification can you explain how what is proposed in the Green Paper is different from what was argued by the Government in the Al Rawi litigation?
Dinah Rose QC: It is actually quite similar to what was argued for the Government in Al Rawi; you can read this Green Paper as their revenge for losing Al Rawi. Certainly, some

familiar arguments rear their heads here, including the argument that it is somehow fairer to have a closed process than a PII process. That is certainly an argument that was made in Al Rawi. The idea that the Minister would make the decision, and that it would only be reviewable on judicial review principles by the judge, is something that is new and was not proposed in Al Rawi, and it is very radical.

Rehman Chishti: It is basically saying that the Secretary of State will decide if it should be a closed material procedure or not.

Dinah Rose QC: The defendant to the action will decide to invoke a procedure favourable to him.

Rehman Chishti: Rather than the court.

Dinah Rose QC: Yes. It is unprecedented.

Rehman Chishti: I think us lawyers would probably have some agreement on that.

Dinah Rose QC: I think you would, yes.

Tom Hickman: It is very important that the argument that was put forward in Al Rawi was rejected unanimously by the Supreme Court, and that does not come out in the Green Paper.

Baroness Berridge: Strange, that.

Q19 Mr Shepherd: This is for clarification in my mind, because when we come to PIIs I go back to the Scott inquiry and the circumstances around that. First of all, the Attorney General insisted with the Secretary of State it was his duty to sign such an attestation: "I, Michael Heseltine, attest and affirm…" and it took 10 or 12 hours, or something, to convince Heseltine that he did, so I respect that element of it. Then came the question as to whether the judge is actually required to read the material in that because of the origins in Crown immunity—this was an absolute act of state that took it out. Of course, we then had a very big political battle over this, and you are now coming to tell me that the PII is actually a more secure way now than any alternative.

I believe in open courts as a general principle, but I recognise here that we are talking about the very security and safety of the state, we hope, although the Scott arms inquiry indicated that it was not about the security of the state but rather the security of ministerial decisions. You feel secure that the PII system is fairer than what was before in PII cases, where the judges did read, or, rather, they accepted the declaration, that in fact the Minister is not instructed to do that because it is a personal act of station by a Minister of the Crown. All of these are elements that in theory guaranteed the security of the old process. Do you think the PII is a secure process now? It used to be called Crown immunity, of course.

Dinah Rose QC: Of course. There were very significant developments during the 20th century, as you rightly say. Originally, the position was that, if a claim for Crown immunity was made, that was the end of the matter, and the material was excluded. Then the crucial step forward was made that there remained a balancing act to be taken by the judge, and the Crown could not simply oust evidence by making that claim. Post Scott—and Scott of course is a very important watershed, particularly because a statement was made in Parliament after the Scott inquiry about the approach that would be taken in future—it was acknowledged that there would not be class claims taken, and that the effect of the certificate is that the Minister is expressing the opinion that disclosure of the material would be harmful to national security. That is only the beginning of the inquiry, not the end of the inquiry, because it then becomes the duty of the judge to balance that claim and the extent of the harm identified against the need for the material to be disclosed. That is the crucial

element of PII—that the judge is in charge of that exercise of balancing the conflicting interests.
It is right to say that there have been many cases where PII has been wrongly claimed. A very recent example was the Al-Sweady case, where claims for PII were made by the Ministry of Defence over material which then transpired to be already in the public domain. The judgment in that case is a swingeing criticism of the Minister and the witness who was called by the MoD in that case. The fact that £1 million in indemnity costs were awarded against the MoD is an indication of how seriously courts take abuse of the PII process.

Q20 Mr Shepherd: The last point on this was that I remember from the Scott inquiry—I actually attended the evidence session—that the Attorney General assured Sir Richard Scott that he had not read the material and did not think it was appropriate to do so. If you remember, the Solicitor General said he had read the reasoning behind the application for it. It was this confusion, clearly, at the highest level of government—
Dinah Rose QC: There was certainly an issue there. Of course, Governments always struggle with the question of the difference between material that is damaging and material that is embarrassing. One of the real vices about this proposal is that all the power ends up in the hands of the Minister, who is a defendant to the action and may not take that much persuading that material showing his department, or people for whom he is responsible, involved in misconduct is damaging to national security.
Indeed, in the Binyam Mohamed case we had a number of instances in which PII claims were made, in particular over various paragraphs of one of the judgments, which then transpired to be paragraphs that contained material that was already in the public domain. One encounters this not infrequently. Another example is a control order case that I was acting in, where, on the day of the hearing, some material was produced by the Government that was heavily redacted; we objected to the redactions, and we were all sent away while they argued about them. We were called back in and the judge had written on in handwriting what had been redacted. What had been redacted was material that had no national security implications at all, but what it did show was that the Home Office had misdirected itself in law when imposing the control order. Somebody in the Home Office had thought it appropriate to redact that on national security grounds. That is the vice, and once you take the oversight of the judge out of the process, you will have no control over that.

Q21 Lord Dubs: I think you have actually just answered this question, but I am going to put it in case there is any more to the answer. The question is this: the significance under the Green Paper's proposals is that the decision of whether to use the closed material procedure should be made by the Secretary of State and not the court. I think you have answered that. Is there anything else you want to add to that?
Dinah Rose QC: No, except that you will already have gathered that I regard it as one of the most serious defects in the Green Paper.
Lord Dubs: Just about, yes.

Q22 Baroness Berridge: Would you say that it is a breach of separation of powers?
Dinah Rose QC: I do not think I would put it that way. I would say it is certainly a breach of the principles, first of all, that no one is a judge in their own cause and, secondly, that there should be equality of arms. Those are both basic principles of natural justice.
Tom Hickman: The justification that the Government puts forward for having a closed material procedure is supposedly fairness to itself and to the other side in being able to adduce information before the court. The judge is the arbiter of fairness, and even on the Government's own case, it should properly fall to the judge to make that decision.

Q23 Lord Morris of Handsworth: My question is to Mr Hickman. If provision is to be made for closed material procedures in civil proceedings in exceptional cases, as the Bingham Centre suggests, how do you suggest their use could be confined to wholly exceptional circumstances?

Tom Hickman: We certainly do not propose that there should be a closed material procedure in exceptional cases. That is not at all what we have said. What we have said is we examined the circumstances that were contemplated by several members of the Supreme Court in Al Rawi, who say there may be circumstances where they would have to strike claims out against the intelligence services because so much material is covered by PII. They have said that only in those circumstances the claimant should be given an option: "You can either go away and your claim will fail, or we could have some sort of procedure whereby we will see the material but you will not."

I have to say that we find it very difficult to conceive of this being necessary because of all the things we have discussed today—confidentiality rings, the end of the Wiley process, et cetera—but we have said that potentially there could be a justification in those circumstances for giving a claimant the option to go forward with the claim or not. But in order for that even potentially to be justified there would need to be real checks on the use of such a mechanism, and we have set those out. None of these is reflected anywhere in the Green Paper. For example, we would say you would have to retain PII, so this should only even be thought of after you get to the end of the PII process. Of course, the government Green Paper would do away completely with PII; there would be no balancing exercise conducted by the judge at all.

We have also said that there are lots of unanswered questions here in the Green Paper about the potential scope of any power. We have set out in the paper, between pages 16 and 18, a host of different situations where, on the Government's case, you might have a closed material procedure. None of these is really addressed in the Green Paper, and you simply could not have enacted a power that could be invoked in any of these situations. It would be quite unjustifiable. We would have to consider what proposals the Government might put forward, but at the moment they are completely limitless.

Q24 Lord Morris of Handsworth: Were your proposals offered pre-publication of the Green Paper?

Tom Hickman: No, I am sorry. We were simply responding to the Green Paper, and I hasten to add that they are not proposals in any sense of the word. We are simply examining the suggestion that was made by the Supreme Court in Al Rawi. As I said, that suggestion is not what the Government was arguing for in Al Rawi and is not what is in the Green Paper, because they want to completely get rid of PII.

Q25 Lord Bowness: I declare an interest as a holder of a solicitor's practising certificate. Can I turn to the practical implications, some of which I think you have already dealt with? In fact the Green Paper proposes to take a statutory procedure designed to enable challenges, which could not otherwise be made, to state action and make it applicable to the trial of a civil claim. Could I ask, Ms Rose, what are the practical implications you have not already covered of introducing closed material procedures into civil proceedings?

Dinah Rose QC: The essence of any civil claim is that it is the determination of a dispute between two parties. In that situation, the solicitors and barristers will be constantly seeking to monitor the progress of the proceedings and to give their client advice on the strength of the case at the outset for a whole variety of reasons that will be essential if you are seeking

funding, whether you are seeking funding from the Legal Services Commission, which must be given an assessment of the merits, or through after-the-event insurance or a conditional fee agreement. For all these funding methods, accurate advice on the merits, as far as it can be given, is essential.

During the proceedings, it continues to be essential. Just to give one example, settlement negotiations may take place and the defendant may make an offer of compensation under Part 36 of the CPR. Whether that offer is accepted or rejected is a crucial decision for the claimant's lawyers, because if a Part 36 offer is rejected and then damages at or below that level are received, there are cost penalties. But it is quite simply impossible—not difficult, but impossible—to give advice on the merits of a case if, first of all, you do not know what the entirety of the defence is and, secondly, what evidence is being deployed in support of it.

I have had experience of closed proceedings in acting for the Home Office—acting as a special advocate and acting for an appellant. One of the things that has always struck me from contrasting those roles is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may be not simply different in extent but wholly different in kind from the case they are actually meeting. You just cannot tell; it is a classic iceberg situation, where two-thirds is under the water. It seems to me again that this is an issue that has not been grappled with.

I have already given the problems that may arise at trial and how you test the evidence, so I will not go back over that. The final matter of great concern is that, in civil proceedings, there is a right of appeal, subject to permission, on issues of fact as well as issues of law. That raises the prospect of the Court of Appeal and even the Supreme Court being required to consider appeals from closed or partly closed judgments, hearing argument in appeals partly in closed, and of those appellate courts, even the Supreme Court, producing secret judgments. That is a very serious matter.

The idea that in a common law jurisdiction, where the law develops through the accretion of precedent and the application of legal principle to different facts, you might have a growing body of secret case law, accessible only to the Government and certain security-cleared advocates, is a very grave matter. It is already a problem arising out of the SIAC and control order cases; it is more contained because it is a limited area and because the right of appeal in those cases is only on an issue of law, but it is already a matter of concern to the senior judiciary what is to happen in relation to those cases. Extending that process to civil trials in general has very serious constitutional implications for the development of our law.

Q26 Baroness Berridge: The appeal thing was something the Committee raised very early on. Would it not be possible to have a safeguard that, in every case of this nature, there was an automatic right of appeal? I know that has cost implications for the Government. It may just be that I am not quite following, but why did you think the closed material procedures in SIAC and whatever were okay, and yet with this you are so vehement? Sorry, I just need that clarified.

Dinah Rose QC: Of course, I do not think SIAC is okay, but the problems are more contained: first, because it is a limited jurisdiction; and, secondly, because the right of appeal against the judgment of SIAC or a judgment in a control order case is limited to an appeal on the ground of error of law. That means that by their very nature the types of appeals that you get coming to the Court of Appeal tend to be purely on legal questions and, therefore, can be dealt with either wholly or mainly in open.

I still think there is a problem with secret judgments, but that problem will be magnified to a vastly greater extent by these proposals because you extend the secret process to a jurisdiction where you can appeal on fact and you extend it to common law jurisdictions, which depend on the development of case law and precedent. How can you develop

common law when there are two parallel tracts of the common law, one of which is not accessible to the people? I just do not understand how that works.

Q27 Baroness Berridge: You talked in the lecture, and I think it is a really important point, of the "frustration and helplessness" you feel as a barrister. Could you give us some contrast between you as a professional in the barrister situation and then you as a professional as a special advocate? What is it like being a special advocate and being cut off from the client and only really there as an officer to the court? What responsibilities do you hold in that situation? You have expressed the frustration, but what is the special advocate situation then?

Dinah Rose QC: The special advocate is an isolated figure because the special advocate has no access to the claimant. They cannot take instructions. Let me give you a simple example. Suppose an allegation is made that a particular individual attended a training camp in Afghanistan—this is a SIAC-type example—on a particular date, was seen there, and there is identification evidence that describes the individual as having a beard. If you are the special advocate, you cannot even take instructions to find out whether the claimant had a beard at that date or whether he might have in his possession any photograph of himself taken at that date showing that he did not have a beard. He might be able to rebut that identification evidence by something as simple as that, but you as special advocate cannot even investigate that question.

Baroness Berridge: So is it the same feeling of helplessness, with a sense of responsibility, but you do not have a client.

Dinah Rose QC: You do not have a client and you have no access to the client. You have no ability to get access to information to rebut the material that has been put against.

Q28 Baroness Berridge: Sorry, having been an advocate for a number of years but not to your level, let me ask: how do you do that then if you have no access to the client? The whole point of civil litigation is you have access to the client you are defending—

Dinah Rose QC: You cannot do it.

Baroness Berridge: You are saying it is impossible to be a special advocate.

Dinah Rose QC: I think that special advocates do a great job, but what they can do is severely limited. You will have heard from them—they have responded to this consultation—and you have heard from them on other occasions when they have made that point. To give you an example of what can happen, when I was a special advocate on a particular case, an individual's bail was revoked on wholly closed material that they had no opportunity to challenge. I, as special advocate, could not challenge it because I had no access to the material. The judge decided to revoke bail and send this individual to Belmarsh; he was called in and the judge said, "I'm revoking your bail." He turned to the judge and said, "Why are you sending me to jail?" to which the judge replied, "I'm sorry. I can't tell you that." How can this happen in an English court?

Q29 Baroness Berridge: When you are dealing with the claimants as a barrister—I know you personally feel frustrated and I know it is hard for us to understand without being in that situation—how do your clients react when all of a sudden you are going through this?

Dinah Rose QC: Utter incomprehension. You spend most of your time in the corridor. In one recent case we arrived for the beginning of the hearing and we were immediately told to go outside but not told why. We stayed outside until lunchtime and were then called back in, and we were told that in our absence the Government had made an application for an

indefinite adjournment and the court had granted it. I said, "Could you not have at least told us that they were applying for an adjournment? How can that fact have a national security implication? Surely we are entitled to be told that so we could make submissions." The judge replied, "You didn't need to know that." I thought it was remarkable that we now have courts operating on a need-to-know basis; I thought I had a right to know.
One of the problems with a closed procedure is that that is what happens. The claimant and the claimant's lawyers become irrelevant to the process. They are seen by the judge as a distraction; most of the submissions they are making are probably irrelevant because they do not understand what the real issues are in the case. You just do not know; you get up to make the submission and you have no idea whether it is on point or wholly off-target.

Q30 Baroness Berridge: You could never be sued, could you?
Dinah Rose QC: You cannot in any sensible way fulfil a professional obligation. I had another case where I was making submissions for my client and the judge criticised me for speculating. I thought, "I'm really not sure what I'm meant to do here. I have no information on evidence. Either I say nothing and my client could be at risk of torture, or I say everything I can conceivably think of that might be relevant in the hope that some of it is relevant." Then I get accused of speculating.

Q31 Baroness Berridge: Is there any guidance from the Bar Council in terms of professional conduct when you are in a closed process?
Dinah Rose QC: In a closed process? Not to my knowledge.
Baroness Berridge: Do you think some of that would be helpful, particularly in terms of your client? It is obviously difficult: having to brief people to go and give evidence is one thing, but do you think it would help them handle what is going on in these procedures?
Dinah Rose QC: I do not see how it would assist much. One of the problems with this whole field is that there is a gulf between those who have experience of it and those who do not. It is partly a generational gulf, of course, because these processes are relatively recent. That means that none of the senior judiciary has any experience of being advocates operating in them. There has been a long process of trying to educate the judiciary into what it actually means to conduct a closed process. I found that very frustrating, and you cannot really put too much weight on what the special advocates say. They are the experts; they are the ones who are at the sharp end and understand this process, and it is striking that their opposition to it is so strong and concerted. The problem is that a lot of those who think it is a great idea and a solution to problems just do not know what it is really like.

Q32 Lord Dubs: Could I just ask you a question about something you said a moment ago? You talked about seeing whether a person actually had a beard or not in their photographs. Can one take that a bit further? Suppose the claimant had evidence that he was not in the country that he was alleged to be in at the time.
Dinah Rose QC: Absolutely—of course.
Lord Dubs: If he had clear evidence that he was not, would that be admissible in these circumstances?
Dinah Rose QC: It would be if you were able to take instructions, but you would not be able to ask him if he had any such evidence, so you would not be able to put it forward.
Lord Dubs: Even if there is clear evidence that he was in Birmingham, not Afghanistan, at the time?
Dinah Rose QC: He might have an alibi, but you would be in no position to get that information from him.

Q33 Mr Shepherd: Therefore, this cannot give confidence to the wider public that justice is—
Dinah Rose QC: Or to the individual.
Mr Shepherd: Indeed the individual, but a justice system depends on the confidence of the wider community. In these circumstances I think this is what the burden of the whole thing is about. You cannot attest that justice took place in that case. It is popular with the public in the sense that this is about—
Dinah Rose QC: Terrorists.
Mr Shepherd: It is about threats as they see it to national security when it might not even be a threat to national security.
Tom Hickman: Can I just make a point on that?
Mr Shepherd: Of course.
Tom Hickman: In my experience, one spends an awful lot of time when you are shut out of these closed hearings, and generally in control order and SIAC cases, trying to persuade your client to engage with the process because it is in their interest to engage with the process because they need to have faith in the justice system. It is extremely difficult to make the case to your client that they could succeed or they could gain from the process when, as Dinah has so vividly explained, everything that they can see about the process is fundamentally unfair.
Dinah Rose QC: Another point to make is that the rules that the common law has developed are rules developed over centuries by judges seeking to ensure fairness, an effective process and the balancing of conflicting interests. What is so troubling about this legislation is that it tears all of that up from what appears to be a position of very significant ignorance.

Q34 Baroness Berridge: Can I just ask you one short question of detail and then a much broader question? First, you have very vividly described the tools that are there, but I find quite appealing the suggestion to have jurors who are sworn to confidentiality in a coronial situation. Do you think that is a good suggestion in any of those situations?
The broader point is that you mentioned the Home Office person who redacted embarrassing information. As an outsider looking at this, because the secrecy is so testing and we have to be so trusting in the integrity of the individuals involved—I do not want to cast any aspersions—because it is so closed, do you think there is the possibility of wrong motivations and wrong decisions going on without any kind of—
Dinah Rose QC: Accountability.
Baroness Berridge: Yes.
Dinah Rose QC: I think that is inevitable because the people you are asking to make the decisions are people who are not neutral but have an interest in the outcome. With the best will in the world, however professional they are, they cannot look at it in the same way that a judge would look at it. I am not really qualified to comment on the inquest question because it is not my field. I know there has been a submission by INQUEST responding to the Green Paper and I think they would be the people to talk to.
Baroness Berridge: But this does have the potential to go awry in a big way without anybody knowing about it. Perhaps that is stating the obvious.
Dinah Rose QC: Yes.

Q35 Lord Bowness: Can you just briefly tell us what the implications of an extension of these procedures are for law reporting? How will cases be properly reported if the records

are not accessible? In fact, how are they reported now? I do not know the answer to this, but what is the situation?
Dinah Rose QC: The answer is that there is already a problem and it is a problem that is getting worse. Indeed, the law reporters made submissions in the Binyam Mohamed case because they were so concerned about the closed judgments that had been produced in that case. We already have a problem where there are secret judgments and there is no procedure in place for what to do with those judgments. Is there to be some period of time after which they may be automatically opened, or should there be periodic consideration of whether they could be opened up wholly or in part? Are they to remain secret for ever? Nobody has even considered these questions in relation to the SIAC and control order judgments that we have now. As I said earlier, that problem would be magnified immensely if these proposals become law.

Q36 Lord Bowness: Dealing with the cases that exist at the moment, is a record actually taken?
Dinah Rose QC: Yes, there is a secret transcript and there is a secret judgment.
Lord Bowness: Forgive me, but who holds all these?
Dinah Rose QC: I imagine it is the court.
Tom Hickman: The court and the Special Advocates Support Office, I believe, hold some of the judgments.
Dinah Rose QC: But there is no database.
Tom Hickman: No, there is no searchable database, but part of the problem with the Government's proposals is that they are so wide-ranging. Are they suggesting that there will be a whole load of secret cases about actions against the police, for example? In theory, their proposals could apply to civil actions against the police.

Q37 Lord Bowness: Do the court reporters in these existing cases have very high security clearance?
Dinah Rose QC: The court reporters are not permitted to report the secret judgments. There are simply transcripts of those judgments produced by the judges.
Lord Bowness: Because I have never done it, it is a sort of unreal world, isn't it? If nobody reports a secret judgment and it remains secret, who has it?
Dinah Rose QC: The court has it.
Lord Bowness: The judge writes it down, presumably.
Dinah Rose QC: Yes, it is written down. The Government will have it; the Treasury Solicitors Department will have it; the Special Advocates Support Office will have it; and the court will have it.
Lord Bowness: And the defendant does not get a copy.
Dinah Rose QC: The defendant, who would be the Government, would have it, but the claimant will not have it and the claimant's lawyers will not have it.
Lord Bowness: At the present moment in existing cases?
Dinah Rose QC: If it is a SIAC case, the appellant and the appellant's lawyers will not get it, but the Government will have it.
Lord Bowness: That is handy, isn't it?

Q38 Lord Dubs: Can I put this to you? Despite your very persuasive arguments, if the Government decide to proceed with the Green Paper and get Parliament to agree, where does that leave the courts? What can the courts do in that situation?
Dinah Rose QC: I think one would have to see the actual form of the legislation. Because this Green Paper is so half-baked and there is so little that you can concretely get hold of, it is very hard to see how they could simply legislate along these lines without, for example,

very significantly amending the civil procedure rules and without starting to grapple with some of the problems about secret judgments—cost penalties and Part 36 offers. It is very hard to see how this is going to work. Apart from all the objections of principle, they need to produce legislation that is practical and workable. At the moment they show no signs of even having begun to understand that there is a problem.

Q39 Baroness Berridge: I know it is not directly applicable, but around the super injunctions and their secret nature, on the definition that we have of sensitive information at the moment in the Green Paper, would they be covered? Do you think there is an aspect of the judicial activism there, to keep secret the lives of celebrities, having muddied or expanded the secret waters, so to speak?
Dinah Rose QC: There is obviously a problem of secrecy. I think the super injunction issue is different from that which is dealt with here, because even on the very broad language of the Green Paper you are looking at public interest and you are looking at Ministers. I think you would struggle to find a Minister to sign a certificate that Ryan Giggs's privacy was a matter of the public interest. I am not saying it would not happen, but I am not sure that is at the forefront of my concern.
Baroness Berridge: The concern for the public is that we had secrecy of those judgments.
Dinah Rose QC: Those judgments were secret but both parties knew what was going on. You have to distinguish between an open justice problem, which is about excluding court reporters and journalists, and a natural justice problem, which is what this is about—excluding a party.
Baroness Berridge: That is very helpful, thank you.

Q40 Mr Shepherd: On the example you gave of a celebrity, et cetera, and seeking a super injunction, it could not arise, in a sense, in as much as the judge has the power to say, "There are no PII issues in this document."
Dinah Rose QC: Yes, and you would never get a PII issue in that kind of case. It is unlikely that these proposals might cover that kind of stuff.

Q41 Mike Crockart: We turn now to one area that has not been covered but is mentioned in the Green Paper—the Norwich Pharmacal jurisdiction. Can I declare that I am not a lawyer? Therefore, could I ask if you could explain, first of all, what the Norwich Pharmacal jurisdiction is, and then could you go on to have a look at whether it does need reform?
Dinah Rose QC: All that a Norwich Pharmacal order is is an order that a court may give requiring a third party, who is not a party to any proceedings, to disclose documents or information. That will be done if that third party has become innocently mixed up in wrongdoing. The Norwich Pharmacal order was originally devised for cases where, for example, a party had come into possession of somebody else's confidential information—it had been passed to them by somebody else who was in breach of confidence—and knew the identity of the person who had breached confidence. They themselves had not done anything wrong, but they knew who the person who had done wrong was, and they could be ordered by a court to disclose the identity of that person. That is the origins of the Norwich Pharmacal.
What happened in the Binyam Mohamed case was that a barrister I was working with called Ben Jaffey had the very clever idea of using that procedural device, which was originally invented for commercial cases, to ask the court to require the UK Government to give

disclosure of information about Binyam Mohamed on the basis that the UK Government had become mixed up in the wrongdoing of the US Government by being involved in his torture and rendition. It was an orthodox application of the principles that underlie Norwich Pharmacal jurisdiction, but on very unusual facts. That is all it was. We needed that information because Binyam Mohamed was facing a potential capital charge based on a confession made by him, he said, under torture. In order to defend himself, he needed to be able to prove he had been tortured. So we said, "If the UK Government has evidence that shows he has been tortured, they should be required to disclose it to help him because they were mixed up in the wrongdoing to which he was subjected."

Tom Hickman: Could I give an example of that? Let us say that somebody goes to a third country and they get arrested, and they are detained for three months, and interrogated and tortured. During those three months, individuals turn up who say they are from the security services of this country, and the individual later wants to defend themselves in court and they say, "Everything I said was said under torture," but that is being denied by the Government of that country. But they say, "The British Government can confirm this, because they were here." The question is whether the courts can require the Government to corroborate the testimony, and that is a simplified version of what was at issue in Binyam Mohamed.

Q42 Mike Crockart: The second part of my question was: does it need reform? Obviously there are national security implications there of the types of evidence that would be asked for in this.

Dinah Rose QC: It is very difficult to understand why there needs to be legislation on this issue. The Government itself says in the Green Paper that this has only even been applied for in seven cases. That seems like a fairly slender basis on which to abolish a whole area of common law jurisdiction. The reason why there have been seven cases is simply that the Government got itself involved in torture and rendition, and that is why they have arisen. It is hard to see why there is need for reform. Of course, in the Binyam Mohamed case itself, ultimately no disclosure was given. What happened was that the court said the requirements for the Norwich Pharmacal order were met in principle, but upheld the Government's claim for PII. Ultimately, what the fight was about in Binyam Mohamed was not about the Norwich Pharmacal order at all; it was simply about whether certain passages in the court's judgment should remain secret or should be made public, which had nothing to do with the Norwich Pharmacal application.

One of the other oddities about this proposal in the Green Paper is that it is completely futile. In many of these cases, it is not a Norwich Pharmacal application that the Government will be facing; it will be a straightforward application for disclosure. Binyam Mohamed is a very unusual case because Binyam was not seeking to bring proceedings against the British Government. He was seeking to defend himself against proceedings brought against him by the Americans; that is why he was using the Norwich Pharmacal jurisdiction. Far more usual will be cases like the Al Rawi case, where individuals are suing the British Government for damages and will just be making an application for disclosure. I do not understand the rationale for saying that you should abolish the Norwich Pharmacal jurisdiction when people can still bring applications for disclosure. It does not make sense to me.

Q43 Mike Crockart: Your argument would be that Norwich Pharmacal procedure stands and is able to be dealt with effectively though the use of PIIs thereafter.

Dinah Rose QC: PII, normal processes, yes—as it was in Binyam Mohamed. It is a normal part of the weaponry of a court for obtaining disclosure, but is only ever going to be used in rare cases in this field. It seems like a bit of a sideshow. Again, without wishing to sound

victimised, it sounds as though the Government again is just feeling sore because it lost the Binyam Mohamed case.
Mike Crockart: Because some documents were forced to be produced.
Dinah Rose QC: It was never forced to produce documents. All that ever happened was that seven paragraphs of the judgment, which had already been made public in substance in the US by a US judge, were made public by the Court of Appeal. It is a very odd, disproportionate response.
Mike Crockart: Does Mr Hickman have anything to add to that?
Tom Hickman: In PII, of course, the primary thing one is concerned with is whether the risk to national security outweighs the public interest. If there is a really weighty public interest reason for not disclosing the material, the courts will not disclose it. They have not disclosed it in any case and they have not threatened to disclose it in any case, so I do not understand why they are bringing forward this reform. There is some reference to cases we have not seen, but I do not think it is really fair to ask us to comment on cases that we are unaware of.
Dinah Rose QC: Although that does rather illustrate the problem of secret judgments.

Q44 Baroness Berridge: In a Norwich Pharmacal order, do you have to prove as a first point that the person you are asking for the documents was mixed up in the wrongdoing? It is not just that they have the documents; they have to have been mixed up in the wrongdoing.
Tom Hickman: Exactly, yes.
Dinah Rose QC: You have to show that there was wrongdoing and that it is at least strongly arguable that they were mixed up in it.
Baroness Berridge: Right—not just, "We think you have documents we'd like to get hold of."
Tom Hickman: No, exactly.

Chair: Thank you very much for your evidence today.

Angus McCullough QC and Jeremy Johnson QC; David Anderson QC and Lord Carlile of Berriew CBE QC

Oral Evidence, 31 January 2012, Q 45–99

EVIDENCE SESSION NO. 2. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Baroness Berridge
Lord Bowness
Mike Crockart
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth
Dominic Raab
Virendra Sharma
Richard Shepherd

Examination of Witnesses

Angus McCullough QC and **Jeremy Johnson QC**, Special Advocates

Q45 Chair: Welcome to this session of the Joint Committee on Human Rights on the Justice and Security Green Paper. Could you introduce yourselves for the record, please?
Angus McCullough: I am Angus McCullough QC, special advocate and barrister at One Crown Office Row.
Jeremy Johnson: I am Jeremy Johnson QC, a barrister specialising in public law and police law. I am also a special advocate and I practise from 5 Essex Court.

Q46 Chair: This is a question for both of you in relation to existing closed material procedures. In their response to the Green Paper consultation, the special advocates described closed material procedures as "inherently unfair". Can you explain why that is?
Angus McCullough: I can attempt that first. The question has to be addressed at two levels: one as a matter of principle, and the other as a matter of practice. In principle it appears obvious that, if a person is involved in proceedings and they are not told all of the evidence and allegations against them, and they are therefore unable to answer them, that is inherently unfair. You do not need to be a lawyer or, indeed, a special advocate to appreciate that.
In addition, the proceedings are contrary to the principle of open justice. Of course open justice is not an inflexible principle, but it is one which requires justification if it is to be breached. Of course, the courts have powers to disapply it, to make anonymity orders, to sit in private, but those incursions require strict justification. Closed proceedings represent the most extreme incursion into that principle because the opacity in relation to the proceedings is total. There is no transparency at all in relation to closed proceedings. As a matter of principle, they are unfair for both of those reasons. A party does not know the case against them, or a significant part of it, and so cannot answer it, and that is contrary to the principle of open justice.

Added to that, as a matter of practice, our experience as special advocates has led us to encounter a number of significant difficulties in performing the role within closed proceedings. You have got the response to the Green Paper proposals that the special advocates have submitted and that you, Mr Chairman, referred to. The principal difficulty that is encountered is the total prohibition on communication from the special advocate to the person whose interest the special advocate is meant to be representing. That prohibition even extends to purely procedural matters. There is also the practical inability to call any evidence to rebut allegations or counter material that is in "closed". I say "practical inability" because there is, under existing closed material procedures, some ability provided for in the rules for special advocates to call evidence, but that has not been reflected in practice by any ability for the special advocates to do so. Any attempts to identify witnesses who might be able to give expert evidence, to enable us to counter what is effectively often expert evidence on the other side, have not been forthcoming.
Thirdly, I would identify the difficulty that there is in the first part of our function, which is to argue for closed material to be made open, where that can be justified, when faced with an assertion by the relevant intelligence agency that it would simply be contrary to the public interest for that material to be disclosed. The courts show a high degree of deference to such an assertion, perhaps understandably, but it makes the task of a special advocate difficult in practice in that respect when performing our disclosure function.

Q47 Chair: Mr Johnson, do you wish to add to that?
Jeremy Johnson: I agree. On the narrow question of why they are inherently unfair, established principles of natural justice require that a party to legal proceedings knows the case they have to meet; knows the evidence they have to meet; has a right to be heard in order to respond to that case and that evidence; and ultimately knows why they have won or lost. It is inherent in a closed material process that a party to those proceedings does not know the full case that they have to meet and does not know all of the evidence that they have to address, and therefore they cannot be heard on that material. Some of the practical difficulties that Angus has just alluded to flow from that fundamental point. One of the reasons why special advocates cannot communicate with the appellant on the substance of the proceedings is that that would give away the very thing that is intended to be kept secret.

Q48 Chair: Thank you for that. Staying with the existing closed material procedures, again the special advocates' submission describes the Green Paper's claim that closed material procedures are "familiar to practitioners" as "seriously misleading". Why would they say that?
Jeremy Johnson: For my part, that is because, although in the narrow context of SIAC and control order proceedings there are a number of members of the Bar who have taken part in those proceedings, there is a very small proportion of members of the Bar who have taken part in the closed part of those proceedings. They are the special advocates, and it is a relatively small proportion of the body of special advocates that regularly act in closed proceedings, and the government lawyers. In the context of a proposal to extend this out to the full ambit of civil proceedings, it is potentially misleading to suggest that the procedures are well known to practitioners generally. The reality is that it is a relatively small number of practitioners who are familiar with what goes on in closed hearings.

Q49 Mr Sharma: Why will the proposals in the Green Paper effectively replace public interest immunity, or PII?

Jeremy Johnson: The starting point for PII, or for a PII issue, is that a government Minister or a chief constable, whoever it is, takes the view that disclosure of relevant material would be damaging to the public interest. That then triggers a process, which ultimately would have as its logical conclusion a judge having to balance on the one hand the public interest in keeping the material confidential and on the other hand the public interest in open justice and ensuring a fair hearing. The logical starting point in the Government's Green Paper for triggering a closed material process is an assessment by the Secretary of State that disclosure of material would be damaging to the public interest. It is the very same assessment that is made to trigger a closed material process as is made to trigger a PII application. Therefore, if Ministers and public authorities generally have the ability to seek a closed material process because they think disclosure would be damaging to the public interest, that would be the natural application to make.

Angus McCullough: As formulated in the Green Paper, the proposals would replace PII, where the Minister has fired the starting gun, as it were, and there would no longer be that balance that is inherent in PII, which Jeremy has just described, between the public interest in national security and the public interest in open justice. The degree of harm that disclosure would cause can be assessed, and may in many cases in relation to national security issues be determinative against there being fully open disclosure. Conversely, if the degree of harm would be relatively small, but the significance of the material to the administration of justice of the proceedings was high, the balance may fall differently. There is an important flexibility in PII that would be replaced and lost if the proposals in the Green Paper were adopted.

It is not what the Green Paper suggests, but there is theoretically the possibility of having a hybrid procedure, so only resorting to a closed procedure, in the way that we currently understand it, after PII has failed and after the ancillary tools that there are, and that PII can be operated in conjunction with, have failed. By those ancillary tools I mean, for example, holding proceedings in camera, making orders to restrict publication of sensitive information and, in more extreme cases, having confidentiality rings, so requiring a party's lawyers to maintain the confidentiality of particularly secret information. All of those procedures could have been tried and failed before resorting to a closed material procedure. That has been floated by a number of other respondents, and I think Mr Anderson, the Independent Reviewer, from whom you will be hearing later, has suggested that.

To go back to your original question, the Government's proposal would, as it is currently formulated, replace PII in the category of cases where the Minister certifies that sensitive information is involved.

Q50 Lord Lester of Herne Hill: I should just disclose my interest. I was a counsel for the third party in Al Rawi, namely the press on the open justice point. I wonder if you can help me with my puzzlement. In Al Rawi in the Supreme Court, my memory is that the Government's position was that it should be for the courts to make the determination, as with PII and as with Conway v Rimmer. The Green Paper seems to come to a different view, which is that it should not be for the court but for the Minister. First of all, am I right about that shift? Secondly, can you explain it?

Angus McCullough: You are right about that shift, and it is a shift of profound concern to a number of people who have submitted responses to these proposals. It seems seriously inconsistent with the notion of equality of arms in proceedings if one party to contested proceedings should have the ability to dictate the nature of those proceedings, rather than, as you correctly remember was the Government's position before the Supreme Court in Al

Rawi, recognising that the judge, at least under the common law, should and did, as they argued, have that power. If there were to be any closed material procedure, it would, in my view, be unconscionable for the Government to be determining when that procedure should apply. That decision should be in the hands of a judge, who is the best independent arbiter to make the decision on the basis of submissions from both parties.
Lord Lester of Herne Hill: Especially if the Government is party to the proceedings.
Angus McCullough: Exactly.

Q51 Mr Sharma: Do you accept that there will be cases in which the application of the ordinary law of PII does not produce a fair result?
Jeremy Johnson: I am prepared to accept, certainly conceptually, that the ordinary law of PII will result in cases where relevant evidence is excluded from the proceedings. Therefore, the court will not have before it all of the relevant evidence with which to determine the case. I do not think that that involves any departure from rules of natural justice so far as process is concerned—both parties to the litigation still see all of the material that is before the court and are able to be heard upon it—nor does it involve any departure from open justice. Whether there is an unfairness in the result because one party has not been able to deploy all of the evidence that might assist that party is a matter in which different people might hold different views. It is no different in principle from the result that obtains in a number of contexts where parties are unable to deploy evidence for any one of a number of reasons. Telephone intercept is one example, which will not be touched by the proposals in the Green Paper. There are all sorts of reasons why evidence might not be admissible, and this is just one.
Angus McCullough: I, for my part, would acknowledge a theoretical possibility that proceedings could not be justly tried on the basis of existing PII procedures, notwithstanding the flexibility of that procedure, which I am not sure the proposals in the Green Paper fully acknowledge, taken together with the court's ingenuity in making provision for material to be disclosed so far as it can be. What I am unconvinced by is that in practice there is a need for such procedures in civil litigation. That case does not appear to have been made out by the Green Paper. There is reference to one case, Carnduff v Rock, which the Court of Appeal determined could not be tried fairly. It is a somewhat controversial case. It does not have anything to do with national security. It was sensitive information related to a police informer. Jeremy knows more about the case than I do because he practises more in the area of police law, but it is worth bearing in mind that there was a strong dissenting judgment in Carnduff v Rock—Lord Justice Waller considered that it was inappropriate to strike the case out and that existing procedures could and should be tried. Carnduff v Rock is the only decided example that is pointed to in the Green Paper. There is extensive mention of Al Rawi, the Guantanamo Bay civil litigation claims, which were settled, but they were settled at a stage before the PII procedures had been tried. Those procedures had not played out. Even on the exceptional facts of Al Rawi, it is by no means settled that it can be put forward as an example of the failure of existing procedures when they have not been tested.
Chair: Mr Shepherd wished to ask a supplementary, and then Mr Raab.

Q52 Mr Shepherd: I hope that it is not diverting you. We have had this expression "confidentiality ring". I take it that the defendant does not know the material in front of them. Who are these, within a confidentiality regime, who cannot even alert him to matters

of fact, such as you were in the room on the occasion or not in the room on the occasion? What is this confidentiality ring?

Angus McCullough: A confidentiality ring is a restricted number of people who are made privy to highly sensitive information. It is an extreme procedure pretty much of last resort, because it involves separating a lawyer from his or her client, but it is better than neither the lawyer nor the client being made privy to the information.

Mr Shepherd: But it is of no use that the lawyer knows the information but the client does not know the information, and therefore is not able to inject anything into an appreciation of the facts.

Angus McCullough: With respect, it is of more use to the lawyer to know it than not to know it. It may well influence the approach taken to the deployment of other evidence in the case. It may well influence the tactics that are adopted in the conduct of the client's case, without breaching the undertakings of confidentiality that are made. It is unsatisfactory. It is a measure of last resort, but it is better than total non-disclosure.

Jeremy Johnson: It is also better than the special advocate process, because at least it means that the lawyer who is directly representing the interests of the defendant, in your example, has access to the information. That person will have a much closer relationship with the person he is representing and will be setting the overall strategy of the case. Although they will not be able to communicate the information that is confidential, they will still be able to allow it to influence the overall approach they take to the case.

Q53 Mr Raab: Mr Johnson, can I address a specific question to you? One of the points made about the proposals in the Green Paper is that they are very broad, so, for example, there will be nothing to preclude their application to civil claims against the police. Do you think that the current PII system works adequately for those kind of civil actions against the police, and therefore is that something where the scope of the Green Paper goes too far, in your view?

Jeremy Johnson: The short answer is yes. The principles of PII have been worked out through the courts over a number of decades and have reached the position we are now at, where the principles are well understood and applied routinely in police civil litigation. It is not at all unusual for sensitive material to be relevant to police proceedings. Very often there will be intelligence material that has informed the decision to arrest a suspect. If a claim is brought for wrongful arrest, that information is in principle relevant and has to be managed.

The sort of tools that Angus has alluded to, not just confidentiality rings but well before one gets to that stage, include setting out the issues in such a way that one avoids the problem by making admissions or concessions and providing a summary of the intelligence that underpinned the arrest without disclosing anything that is source-sensitive. Those sorts of approaches have worked well over the years, with the result that Carnduff is about the only example I can readily think of where a case has been absolutely untriable—or the court has decided that it cannot be tried. The principles simply work in practice. There is the potential, however, if these proposals are introduced, that a Minister will be able to say that disclosure of source-sensitive information would be injurious to the public interest. Rather than triggering a PII process, which involves discussion and work at trying to find a solution to that, it simply drives one into a closed hearing, where the person who is the claimant in the proceedings is excluded from being able to play a meaningful part in a section of the case.

Q54 Mr Raab: You have given one example of civil actions against the police where the PII system is adequate. Can you think of other types of case where this is not something that

should be sucked into a new closed material process—obvious ones that would be covered by the very general terms of the Green Paper?
Jeremy Johnson: I can give you an example of an area of practice that has been sucked into closed material process, which is parole board hearings, but in fact it is very rare for them to be used. As I understand it, the parole board strive to find alternatives and are successful, so that it is only less than a handful of cases out of many thousands where it has been assessed as necessary to use this process.
Angus McCullough: In trying to address the same question, I would perhaps try to turn it on its head. I do not think that the Green Paper makes out a sufficient case for sucking any additional proceedings into closed procedures, certainly not the closed procedures envisaged in the Green Paper. There is a dearth of examples in the Green Paper. I was also struck by the Independent Reviewer's memorandum to you in terms of his attempt to drill into the number of cases and the nature of the cases that were potentially involved and constituted the justification, which he says have met with an "uncharacteristic" lack of response from the Government.

Q55 Lord Lester of Herne Hill: Going back to Al Rawi, my memory is that the whole thing was entirely hypothetical and that the question was something like, "Are there any circumstances in which it would be in the interests of justice to have a closed material procedure?" without any specific examples being cited. There was the same entirely hypothetical approach, and I wonder whether my memory is right.
Angus McCullough: I am not sure whether I am in a position to agree or disagree with your memory. I was not involved in the proceedings at that stage. I have no reason to doubt your Lordship's memory.
Lord Lester of Herne Hill: Well, I may be wrong.

Q56 Mr Raab: You touched on Carnduff v Rock, which was a claim against the police that was struck out because it could not be determined fairly without disclosing sensitive material. There is some mention of this en passant in the special advocates' submission. In your view, either individually or collectively, was that case correctly decided or not?
Jeremy Johnson: It is a Court of Appeal decision. It was decided in 2001. It has not been overruled or even doubted judicially, explicitly at least, since then. The central premise of the case is that, if a case cannot be determined fairly, it should not be determined at all and the court should draw a halt to it. I would not quarrel with that central proposition. I would say two things, though. First, as a matter of generality, history has shown that it is very rare that a court is put in that position. Carnduff is an isolated example. I have had experience of a case that the police thought could not be determined fairly and relied on Carnduff, and it was given very short shrift by the Court of Appeal. I am not aware of cases where Carnduff has been followed.
Carnduff was preceded by a similar case of an informant seeking to sue for his reward, and the Court of Appeal allowed that case to go forward, so even on similar facts the courts have taken a different view on the particular circumstances that they are presented with. The other thing I would say about Carnduff is that it did not go through the PII process, and so it involved the court speculating as to what would happen if the trial ran the distance and whether it really would involve having to look at sensitive material that could not sensibly be disclosed. I wonder whether now, 10 years further on, with more use of things like confidentiality rings and more use of the civil procedure rules, which were in their infancy at

the time Carnduff was decided, the courts might require the parties to go through a PII process before taking that final decision that the case simply cannot be tried.
Mr Raab: Thank you. Do you have anything to add, Mr McCullough?
Angus McCullough: I do not think I do. It would be brave and brash of me to assert that Carnduff had been wrongly decided, it being Court of Appeal authority that has not subsequently been doubted. But I would echo what Jeremy has said about it having been decided quite a number of years ago now; procedures may have moved on, and it would not necessarily be decided on the same facts in the same way now, and it is a unique example.

Q57 Lord Morris of Handsworth: I have a couple of questions for you, Mr Johnson. Can you explain what further reforms to the special advocate system would go further on than the Government's proposals?
Jeremy Johnson: Yes. Let me preface the explanation, though, by saying that I do not think that any reform is going to undo what we refer to as the inherent unfairness, because the very nature of closed materials involves the inherent unfairness of a party not knowing the evidence that is being used in the case against them. In the paper that we have submitted we have set out a number of practical proposals that would assist us in our work, not to undo that inherent unfairness but at least to make the process a little easier. They involve, for example, a relaxation on the prohibition on communicating with the lawyer for the appellant, not on the closed material but on purely procedural matters that cannot involve any disclosure of any confidential material. They involve, for example, the setting up of a closed judgment database so that one begins to address the problem that is already happening of judgments being handed down by the courts in secret; no one knows about those judgments, and even individual special advocates will not know about them unless they are involved in that particular case. These are some practical suggestions that will make the job a little easier, but I do not think they begin to address the fundamental problem.

Q58 Lord Morris of Handsworth: In light of your response, do you think the Government's concern about the risk of inadvertent disclosure of sensitive information is without foundation?
Jeremy Johnson: If they are suggesting that there is a risk of inadvertent disclosure of sensitive information by allowing special advocates to communicate on purely procedural matters, I do think that is without foundation. There is no basis for that. There is, of course, always a risk of inadvertent disclosure of sensitive material, where sensitive material is being used, by carelessness in the procedures that are adopted, but I do not think that is enhanced in any way by allowing communication on procedural matters.
Lord Morris of Handsworth: So, a proportionate risk at worse?
Jeremy Johnson: Yes. It does not go to the inherent unfairness, but it does become a little tiresome and cumbersome when one has to go through quite a long-winded process simply to communicate with another lawyer about how long a trial is likely to take, for example.
Angus McCullough: To be fair to those drafting the Green Paper, I do not think that the Government has set itself absolutely against that limited relaxation. They say that they are continuing to look at the possibility of categorising communications with a view to permitting a restricted category. I think that is work in progress.

Q59 Lord Morris of Handsworth: Can you explain how more communication between the special advocate and open representative would work in practice?
Jeremy Johnson: On a very prosaic, mundane level, it would involve picking up the phone and discussing how long the trial is likely to take, when the open advocate will be needed, when the special advocate will be needed, and allowing diaries to be managed. Some of it is

as basic as that. On a more detailed level, where the special advocate considers there is a closed issue that has been decided in an erroneous way by the court and would wish the matter to go on appeal, it will be things like simply being able to say to the open advocate, "There is a closed point. I consider that it merits being tested on appeal. Please issue a notice of appeal and we will supplement it with closed grounds of appeal." You are not telling anything about what is sensitive or what the decision was; you are simply facilitating a procedure that will allow you to test the point on appeal.

Angus McCullough: It occurred to me that a further reassurance could be provided if the channel of communication were restricted to communication in writing, including e-mail, so one could have a fairly instantaneous dialogue, but it would then have the advantage of having an auditable trail of communication, which would provide a degree of reassurance and lower what risk there may be perceived to be that there would be some inadvertent blurting out of some sensitive nugget. It is not a risk that we who practise in the field regard as a significant one, but if it provided for reassurance, that could be a further safeguard—in other words, restricting it to written communication, including by e-mail.

Q60 Lord Bowness: I should declare an interest as I hold a solicitor's practising certificate, but I have not got any experience of what I am asking you about. In your memorandum, on this point you say that there should be an opportunity for the special advocate to communicate about the substance of the closed material through the court, possibly a designated judge, without automatically revealing the substance of the proposed communication to the Secretary of State. Can you explain to me what you envisage practically? Am I wrong in reading that a designated judge is separate from the judge who is hearing the particular case? If that is the case, how is that going to work?

Angus McCullough: That is one possibility that is canvassed in the Green Paper, and so we were addressing it on those terms. I say at the outset that I think there are problems with all of these suggestions, because as soon as one is seeking to communicate on matters that touch on the substance of closed material, you are liable to run into difficulties. If a special advocate has a matter on which, in the view of that special advocate, to pose the question would not involve revealing anything of sensitivity, rather than putting that question, as is currently required, through the Government and then through the court, the proposal is to have a procedure whereby that could be bypassed and one would go directly to the court. Whether it would be the court hearing the case or a designated judge with particular expertise in security matters, what is envisaged is that the judge would review the communication and say, "Yes, I cannot see any conceivable security interest in putting this question. It is so anodyne it is not going to reveal or tend to indicate anything of sensitivity, so I give you permission to ask it of the open representatives without going through the Government and them knowing that you have asked it." That is what the proposal involves.

If the judge were in any doubt, I would expect the procedure to provide for the special advocates being put to their election: "If you want to pursue this, you have to get the sanction of the Government to indicate that they agree that there is no disclosure that would be given by making the communication." It provides a possible route to ease the current restriction on communication.

Jeremy Johnson: We understand, though, that another rationale for that proposal is that, ordinarily of course, communications between a client and his or her lawyer are confidential, but the process that currently exists requires communications between a client's special advocate and a client to be exposed both to the opponent in the litigation and the judge.

That is the underlying thinking behind that: at least you are only exposing the communication to a third judge, who will not be involved in proceedings.

Chair: We need to make some progress.

Q61 Lord Lester of Herne Hill: In your written evidence, you criticise the Green Paper for not looking at United States law and practice in the survey in Appendix J. You also make suggestions based upon the possible use of American federal habeas corpus procedure. If I can put it this way, you are not experts in United States law. I do not know whether you have considered the position of the executive privilege for state secrets, for example, which operates in the States, and other matters of that kind. Are you asking us seriously to look at the United States as a model, or is this simply something that is floated more generally, if I can put it that way?

Angus McCullough: It is certainly a fair observation that we are not experts in United States law. The reference to other procedures in our response paper was born of what seemed to us to be the surprising inadequacy of the exercise that was performed at Appendix J, which includes no consideration as to the procedures that are operated in the United States.

My partial and imperfect understanding of those procedures is that there are really two extremes. There is an absolute blanket of secrecy over a category of material on the one hand, but on the other, in habeas corpus proceedings, there are provisions whereby security-cleared lawyers representing the individuals concerned have access to the secret and sensitive material, albeit under some extreme measures to protect the sensitivity of that material. The proposal we make in our response is that that should at least be looked at here if there is to be a thorough exercise reviewing the use of sensitive information in judicial proceedings in other jurisdictions, and it is not there.

Q62 Lord Lester of Herne Hill: I shall not pursue it—and I shall ask the Independent Reviewers, past and present, the same question—but my puzzlement is this: I assume that the driving force behind the Green Paper comes from the United States. I am assuming that the American security service, in particular, wishes to plug any gaps by having the equivalent of the United States law in this country. Working on that assumption, I then assume that the United States law is quite illiberal and prescriptive. Therefore, I am surprised when I read your evidence, where you seem to be under the impression that it is rather liberal and not restrictive. That is why I raise the point about executive privilege as it operates for state secrets in the States. I assume that you are not really in a position to comment on that.

Angus McCullough: There were a lot of assumptions that I am not in a position to comment on earlier on in your question, Lord Lester. As to the last one, I have already acknowledged, and I am sure that I speak on behalf of my colleague as well, that we are not in a position to comment authoritatively on American procedures, but, as I have indicated, our understanding is that they represent two categories: one very illiberal, and the other much more liberal than what we think we have here.

Jeremy Johnson: I just want to add a footnote on one of the other assumptions that underpinned your question—that the pressure is coming from the United States. I can certainly sympathise with the Government in relation to Norwich Pharmacal applications, where the Government has no option but to disclose material if required to do so by the court. Questions might arise in an inquest and public inquiries as well, but in routine civil litigation there is no question of the Government having to put national security at risk. If the Government ultimately lose on a PII application, they can simply bring the litigation to an end, either by discontinuing the claim, if they are the claimant, or by settling the claim by

making admissions if they are defendant. If that is one of the underlying concerns, I would suggest that it is answered by recognition of the fact that in ordinary civil litigation there is simply no question of the Government having to put national security or the public interest at risk.

Q63 Lord Lester of Herne Hill: Can I ask one more question, which is not about United States law but is about the Green Paper's use of Article 6 of the European Convention on Human Rights? The premise of the Green Paper seems to be that Article 6 of the convention is the standard rather than the common law. My question is this: I had always assumed that Article 6 provided a floor and not a ceiling. In other words it was the bare minimum in a Europe with non-common law procedures. Do you think that we ought to be looking at the common law and our own tradition and treating Article 6 as a floor, or should we, as the Green Paper seems to assume, treat Article 6 as the maximum protection there should be and nothing more in our system? Do you follow the question?
Angus McCullough: I think it is an easy question to answer, with respect: yes. Article 6 should be the floor and not the ceiling, and the common law should be closely examined, because it provides, in my view, greater protections than the minimum provided by Article 6. Furthermore, and it is a point that is easy to overlook, the category of proceedings to which Article 6 applies is limited. It remains an undetermined question as to just how limited it is in relation to ordinary civil proceedings. The unfairness of closed procedures is particularly acute where the House of Lords judgment in AF (No 3), which only applies where Article 6 applies, would not be applicable. In other words, you have no entitlement, even to sufficient information to enable you to give effective instructions.

Chair: Lord Lester, do you have any further questions?

Q64 Lord Lester of Herne Hill: Again, very briefly, is it not right that, where Parliament has given a blank cheque to Ministers to stop proceedings on grounds of national security, both European Courts have said that that is not good enough and used Article 6 and Article 13 of the convention. I am thinking of Johnston v Chief Constable, Tinnelly v United Kingdom and cases of that kind. In that sense the European rule of law does give examples of where Ministers given too much power by Parliament misuse their powers, and Europe comes in to try to curb the abuse. Is that right?
Angus McCullough: Yes, we obviously have an informed questioner, but that reflects my understanding as well.

Q65 Mr Sharma: Why do the special advocates think that there would be no advantage in legislating to identify proceedings in which the AF (No 3) disclosure obligation does not apply?
Jeremy Johnson: My answer to that is that it is already adequately catered for by the rubric of Article 6 and the manner in which it has been interpreted by the courts. To the extent that there is any uncertainty about that, it will ultimately be for the courts and the European Court to resolve that. If Parliament legislates, it is far from certain that it would come to the same conclusion that the courts would ultimately come to. The better approach is to allow the existing test, which is reasonably clearly set out in Article 6, to be applied on a case-by-case basis through the courts, as it has been over a number of years.
Angus McCullough: It is a seductive proposal, but in reality it would not save any time or trouble because the courts would still have to determine where the margins of Article 6 lay.

Q66 Baroness Berridge: Is there any guidance from the Bar Council to barristers as to their professional obligations when acting as a special advocate? Would it be helpful to have something put down on paper, because you are in a very unusual position? Could you comment on the suggestion from the Independent Reviewers that in one of the cases PII was not useful because it would have taken three years to complete the process? I am trying to understand how having CMP would chop down that time sufficiently. I can only presume that you would not have to disclose everything. Could you comment on your professional obligation, and in particular the change in timing, which is used as a justification for needing this?

Angus McCullough: Let me address the two questions separately. First, there is not any guidance from the Bar Council. I am not sure that it would be of particular assistance. The performance of our role does not involve any particular ethical difficulties. Our role is clear. We are there to represent the interests of the person who is denied sight of material. We are not there in some impartial role to assist the court. We are there to represent someone's interests in proceedings in which their interests are compromised because of the nature of those proceedings. I am not sure that further guidance would assist.

We are given detailed guidance, partly in open and partly in closed, as to the nature of the special advocate role. There is guidance there; it is published by the Treasury Solicitor's Department, which may seem a slightly unusual source, but the Treasury Solicitor's Department also houses the Special Advocates Support Office. Although it may be thought to be an unusual structure, in practice there is genuine and real independence for the lawyers who are supporting and instructing us from people housed within the same building who are acting for the Government in contentious proceedings.

Jeremy Johnson: Can I just add to the first part of that question, because I take a slightly different view? The work we do as special advocates is in practice very different from the work we do as ordinary members of the Bar in routine cases. The law we are applying is different, and the context within which we are applying it is very different. The fundamental feature of it is that one does not have a client from whom one can take instructions. That means that people coming into this work afresh can feel very isolated and not have a ready template to apply. Experience from routine litigation is of limited utility in that context.

All that said, I am not sure that guidance from the Bar Council would particularly assist. The Special Advocates Support Office has effectively provided open and closed guidance through the Treasury Solicitor to us. Usually, when somebody is appointed to their first case as a special advocate, they will be appointed as a junior counsel with somebody else who can provide guidance in the context of a particular case. On the whole that has worked.

Angus McCullough: I do not think there is any difference between us. Jeremy is focusing on the practicalities of the role, which is an extremely difficult one. It is as challenging work as I have had in my career at the Bar. I was focusing on the ethical part of your question. I do not think the ethics of it are particularly difficult when one is discharging the role.

Q67 Lord Lester of Herne Hill: The second part of Baroness Berridge's question goes to time, and I think it is important, because in Al Rawi the argument was, "There are thousands and thousands of documents and we have not got time to go through them, so let us give them to the special advocates". The question really is: if that is right, how does it save time?

Chair: That is a rhetorical question.

Lord Lester of Herne Hill: It is not meant to be.

Chair: Well, I will rule on that one. If we have time, we will come back to it.

Angus McCullough: If I can answer Baroness Berridge's actual question concisely, it would have taken a long time to have gone through a PII procedure in Al Rawi. I do not think it would have taken any less time to go through a closed material procedure.

Q68 Mike Crockart: I have a very brief last question, moving on from closed procedures to closed judgments. Mr Johnson, you mentioned it earlier on when you were talking about the case that you had put forward for extra or different powers. I wonder if we can look specifically at your response to the Green Paper. You mentioned the need for a searchable database of closed judgments. Can you explain what the current arrangements are for special advocates getting access to those judgments?

Jeremy Johnson: In order to get access to a judgment, you have to know that it exists, and it is usually happenstance whether you know it exists or not. Special advocates have regular meetings and discuss matters of law, and in that context tend to be aware in general terms of legal issues that have arisen, but it is little more than happenstance as to whether you know in a particular case if there is a decision that touches on the issue that you are litigating in that case.

Q69 Mike Crockart: Obviously it is a growing judgment load, but what sort of size is that? I am at a loss as to know exactly how much value access to those closed judgments would give if you have restricted knowledge by the very nature of the circumstances of those cases.

Jeremy Johnson: In the AF litigation in the House of Lords, the special advocates put together a paper that sought to distil some of the principles that had come out of a whole number of cases. That is the beginnings of a process that would lead to a searchable database. I agree that many cases will turn on their own facts. In many cases the closed judgments are purely factual and do not raise issues of law, but there are cases that do raise issues of law. It seems to me that there is merit in a process being adopted of either trying to isolate that issue of law and making it into an open judgment, because the issue of law on its own terms is unlikely to be sensitive, or at least having a mechanism in place so that those who work in this area have ready access to the law that is being applied in this area.

Chair: Thank you very much for your evidence today. Apologies to Lord Lester. Could you respond in writing to his question? We will prompt you with a letter. We need to make progress now. Therefore, thank you very much for your attendance and the comprehensive way in which you have answered our questions. Could the next witnesses come forward please?

Examination of Witnesses

David Anderson QC, Independent Reviewer of Terrorism Legislation, and **Lord Carlile of Berriew QC**, Former Independent Reviewer of Terrorism Legislation

Q70 Chair: Good afternoon and welcome to the Joint Committee on Human Rights. For the record, could you introduce yourselves please?
Lord Carlile of Berriew: I am Alex Carlile, the former Independent Reviewer of Terrorism Legislation.
David Anderson: I am David Anderson; I am the Independent Reviewer of Terrorism Legislation.

Q71 Chair: Thank you very much. Lord Carlile, could I begin by asking you a question about the need for change? Can you explain exactly how current court procedures are inadequate to protect national security? Also, could you give us some examples of sensitive information being damagingly disclosed in the course of legal proceedings?
Lord Carlile of Berriew: I think that current procedures are inadequate. The cases involving the Guantanamo suspects and Binyam Mohamed are examples of cases where current procedures are inadequate. Of course, it depends on the importance you attach to national security, but if you attach the importance that I and the Government in the Green Paper—in my view, rightly—attach to national security, one has to protect it, whether in the context of criminal proceedings or civil proceedings of whatever kind. The trick is finding the right method for protecting it.
As to examples, the Binyam Mohamed case might be a very good example. It would have been interesting for counsel to have been able to cross-examine Mr Mohamed about, for example, his holiday habits, which were unusual to say the least. But in order to do so that might have involved the disclosure of secrets, including the source or sources of intelligence. Plainly, that might have been very damaging to national security in general and to individuals in particular.

Q72 Lord Lester of Herne Hill: Of course, all of us take national security very seriously, but I am sure that Lord Carlile agrees with me that there have been examples where national security has been invoked without proper basis. This has been in cases like the ones I have mentioned already, such as Johnston v Chief Constable and Tinnelly v the United Kingdom, where Ministers have a blank cheque to stop proceedings altogether on grounds of national security; they use it, and then it turns out to be abusive.
Lord Carlile of Berriew: I agree entirely with Lord Lester, and I think one of the important tasks that the Committee has and, indeed, that the Government and Parliament have is to find the right balance.

Q73 Lord Lester of Herne Hill: I have asked the question of the other witnesses already, but this is for both of you. Do you regard Article 6 of the European Convention on Human Rights as a floor or a ceiling in this context when we are trying to get the appropriate standard? Should we be looking at the common law or at the European convention?
Lord Carlile of Berriew: I have heard Lord Lester using this architectural metaphor before, and I am not hugely attracted by the metaphor. If by a floor you mean a place where we keep our feet on the ground, then yes, I am quite attracted by Article 6 being used as the floor. I certainly think that we should apply our own common law standards in considering

whether Article 6 is sufficient or whether more might be done. It is a bit like the standard of proof in some civil and particularly disciplinary proceedings—you have to have a concept that is elastic enough to deal with the exigencies of the situation. There is national security and national security.

Q74 Lord Lester of Herne Hill: You will both be in a much better position than anyone else to answer this if you can. Am I right in thinking that the driving force behind the Green Paper, apart from what happened in Binyam Mohamed as such, is that we wish to have full co-operation with the United States security service in sharing intelligence secrets, and if we do not make some change to our system, they may reduce co-operation with us?
Lord Carlile of Berriew: It is undoubtedly one of the driving forces, as Mr Anderson has said in his memorandum to the Committee. If I can answer your next question or the one you asked of the previous witnesses, I most certainly would not adopt American standards. I much prefer the Australian model, for example, which is referred to in Appendix G to the Green Paper. I had an experience last year as a barrister of being instructed to negotiate in the United States on behalf of an organisation that is proscribed in the United States but not here or elsewhere in Europe. I kept being met with the term "state security", to which judges in the United States have an extreme level of deference that is unimaginable on the Strand.

Q75 Lord Bowness: Mr Anderson, in your memorandum you say that you accept that cases in which PII does not lead to a fair result are likely to exist. How many actual examples of such cases are you aware of?
David Anderson: I have pressed the Government on this. They say in Appendix J to the Green Paper, I think, that there are 27 cases to which sensitive information is central. I asked them for details of those cases; I did receive certain details of them and I have indicated the categories into which they fell. What I was not able to ascertain from the Government was how many of those cases it could really be said were incapable of being fairly tried without a closed material procedure. The reason I said I think there probably is a problem is that we have already introduced a closed material procedure in the context of, for example, control orders, SIAC, asset freezing and proscribed organisations. These are all areas where one would expect intelligence information to be at the absolute centre of the case.
It would not surprise me if there were civil cases in a similar category. However, in terms of what I have seen, am I able to put a number on it? No I am not. I am cautious because, as the Committee raised with the last witnesses, one is conscious that there are whole other fields of litigation. I refer not only to litigation against the police, where the identity of an informer, for example, may be very sensitive, but also to litigation about prisoners and their categorisation. Very often there is an informer somewhere there, whose evidence is very sensitive. I would be very interested to know what those entrusted with that sort of litigation say about the adequacy of PII and whether a closed material procedure is necessary, because there is not much about that in the Green Paper.

Q76 Lord Bowness: I assume from what you are saying that you think it is at least likely that such cases will arise in the future.
David Anderson: Yes. Look at the parole board litigation. There was the case of Roberts—a case earlier than Al Rawi—in which it was held that it was possible for the parole board to operate a closed material procedure in certain cases. As Mr Johnson quite rightly said in his

evidence to you, that procedure has been very infrequently used. I can see the argument for making a closed material procedure available to our judges and putting it in their procedural armoury, but in the expectation that it would be used only when it was unavoidable. I would not anticipate that that would be very often.

Q77 Mike Crockart: That was really the central point of the next question I was about to ask. If such cases do arise in the future, is it not the case that merely more imaginative use of the powers that are available at the moment, such as confidentiality rings, might actually be able to deal with those cases short of using the closed procedure outlined in this case?
David Anderson: Certainly, a great deal of ingenuity is used in such cases. I have been in a very few of them myself, and I am aware from talking to others of just how resourceful people are. But I would suggest that a confidentiality ring, for example, is not the answer to everything. It drives a barrier between counsel and client, which can be very difficult to maintain. It is all right if it is a commercial case and there is a particular figure that has to be kept from the client because it has something to do with the competitor's pricing or something like that; that can be managed. But when the whole central allegation of the case is something that you have to keep from your client, that is very difficult. I think it is for that reason that the House of Lords in a Scottish case, Somerville, in 2007 went so far as to describe a confidentiality ring in cases of that kind as wrong in principle. I am not sure that one would try to extrapolate that comment too widely, but it shows that they are not an answer to everything.
Lord Carlile of Berriew: Can I just put in a word on that? Mr Anderson and I have shared experience, albeit from different viewpoints, of the work of the Competition Appeal Tribunal, where confidentiality rings are used frequently for the purposes that Mr Anderson described a few moments ago. They work reasonably well, but I am very concerned about the use of confidentiality rings in cases where, for example, the liberty of the subject is at stake, and I think it brings us close to the sort of ethical questions that Lady Berridge was asking earlier. In a typical criminal case, as a matter of law there can be no confidentiality between counsel and his or her client, and I see this as being a similar area in ethical terms. So, I would ask the Committee not to be too enthusiastic about confidentiality rings in this range of cases. They are not right in principle here.

Q78 Baroness Berridge: Can I just ask a supplementary? You have talked very highly about national security, and the balance we are dealing with here is natural justice, and it is obviously a very difficult area. We heard evidence last week from Dinah Rose, who said that basically clients are often put to proof in civil proceedings of having to reveal damaging information or settle. Why are we putting the Government in a separate category here? Would that not be a price to pay for retaining your national security? There are going to be cases where you decide not to reveal the information and not to disclose it. She just put it as an accident of civil litigation generally.
Lord Carlile of Berriew: If you will forgive me, I am not completely clear about the question, but perhaps I can try to answer it in this way. I think closed material procedures are necessary, generally speaking, to protect national security, and it is national security that is the issue, not the nature of the proceedings. I would favour closed material procedures in a wide range of cases, but subject to control by the court. Obviously, the procedure has to be triggered by the person who asserts national security, and that is going to be the Government, or occasionally an interested party, perhaps in judicial review asylum cases. Once that has been triggered, I am strongly of the view, and I think Mr Anderson shares this view, that it is the court that should decide in trying to make the balance that you described at the beginning of your question.

David Anderson: My view is that a system founded on PII does not threaten national security. The reason for that is that, if the Government feels its hand has been forced and the court is requiring it to disclose something that is confidential, it can pull the prosecution if it is a criminal case—and of course it sometimes does. If it is a civil case, it can settle the case, and I am quite sure that in routine cases against the police and so on that is a course that is sometimes taken.
However, I would not be quite as relaxed as perhaps Dinah Rose was about that possibility. It seems to me that it is corrosive if not of national security then at least of justice, and that there is a public interest in these very sensitive national security cases being fairly resolved. If Government has to settle a vast and high-profile series of damages claims brought by people who went to Guantanamo, while feeling that it has perfectly good evidence on which to defend the case, that is corrosive of trust in the security services; it is corrosive of trust in the authorities; it is corrosive of trust in the legal system. So, I do not put it in terms of national security until we come on to Norwich Pharmacal, which is a slightly different issue. I put it in terms of justice.

Q79 Lord Lester of Herne Hill: I think this is really for David Anderson. You recommend that closed material procedures should only be available in civil proceedings where they are strictly necessary, which oddly enough is the same test in the American Attorney General's memorandum on the same subject. How could any legislation ensure that closed material procedures can only be resorted to by courts if the just resolution of the case cannot be secured by other procedural means? How could that be done?
David Anderson: I think you have to build certain safeguards into the legislation. The first of them is that the judges must have control. Plainly, an application for a closed procedure is always going to be made by the Government or by somebody else with information of that nature to protect, but it seems to me it has to be the judges who decide. Secondly, you have to try to circumscribe the subject matter. The Green Paper talks about sensitive information, which is a very broad category; I would prefer something limited to national security, at least in the absence of any evidence that the problem is further reaching than that. Then the third point, which you have raised, is that you would have to write in something like, "Only if just resolution cannot be obtained by other procedural means." The question is whether you entrust the Government and Parliament with the task of elaborating those words or you trust the good sense of the judges. My tendency would be to trust the judges on that.

Q80 Lord Lester of Herne Hill: I understand. As I understand it, you are not saying that PII processes must be exhausted first, or are you saying that?
David Anderson: I think the judge might well decide that they should, but it is very difficult in advance to dictate that this is always going to be the case. If the Government was correct in what it told the Supreme Court in Al Rawi, and I have no reason to suspect it was not—that PII was going to take three years and was going to be futile, because at the end of that process the Government would have deprived itself of the information that it needed to defend the case—one could understand that, from the point of view of the judge at the beginning of that process, there would perhaps be another way of doing it. I think it would be unwise for the legislation to be too prescriptive about that.

Q81 Lord Lester of Herne Hill: In the Human Rights Act there is something that says, "You can only get damages when you have tried everything else." Would you envisage some

such thing that says, "You can only used closed material procedure when you have tried everything else," or some last resort language of that kind?
David Anderson: I do not think legislation should require people to bang their head against a brick wall, and if the exercise is plainly going to be futile, I do not think legislation should require it to be performed. It is reasonable to entrust the court with an element of predictive power, and if the judge reasonably takes the view that just resolution is not possible via PII, I think the court should be able to back its judgment, subject of course to appeal.

Q82 Lord Morris of Handsworth: My question is to Mr Anderson. Could you explain why it is profoundly wrong in principle that a closed material procedure should be triggered by a decision of the Government and not the courts?
David Anderson: I think it is wrong in principle both as a matter of perception of justice and as a matter of actual justice. It is not my job, thank goodness, to try to sell laws to the public, but I am not sure how you would sell a law that enabled one party to the litigation simply to click its fingers and dictate that subsequent stages of the proceedings were going to be heard in secret. I think that would simply cause people to be intensely suspicious of what the Government was about.
I think it also threatens actual justice. I would disagree with the special advocates when they suggest that Carnduff v Rock is a very strange case that will probably never be followed. It was after all widely approved by members of the Supreme Court in the recent Al Rawi and Tariq cases. If you have a case that the Government thinks might be struck out under Carnduff v Rock, and it takes the view that if they just hold their nerve the court is likely to strike out the case and they will not be bothered with it any more, why should it opt for a closed material procedure, which means opting for all its dirty washing to be brought out in court? It seems to me profoundly wrong that the Government should give itself that decision. Like any other case management decision, it should be for the court to take, as it can balance the interests of both sides and not just the interests of one.

Q83 Lord Morris of Handsworth: Just for clarity in my mind, are you saying that in all cases, in all circumstances, the responsibility should fall to the courts and not the Government?
David Anderson: Yes.
Lord Morris of Handsworth: No qualification to that?
David Anderson: No.
Lord Morris of Handsworth: And the basis of your judgment on that?
David Anderson: That is on the basis of my belief that the court is there to hold the ring between the parties. There is usually something to be said on both sides. There may be cases where it is very clear—I do not know—that a closed material procedure is necessary, but in that case it should be the court that decides.

Q84 Lord Morris of Handsworth: Yes, but is it not the Government that is ultimately responsible for national security and not the courts?
David Anderson: Yes, it is, but even under the existing procedure, it seems to me, there is no threat to national security, because the worst that can happen is that the Government is required to produce evidence that it is not prepared to produce in open court, whereupon it is open to the Government to abandon whatever issue that evidence goes to. That might not be very satisfactory from the point of view of fairness, because you might end up settling a case that really ought to be fought, but I do not think it is a problem from the point of view of national security.

Q85 Lord Lester of Herne Hill: Can I just follow up on what Lord Morris has asked? Is it not the responsibility of Parliament, the Executive and the courts to protect justice and national security, and strike a proper balance? It is not the responsibility of any one of the branches of government as distinct from the other, is it?
David Anderson: That is certainly right, particularly in the context of a case to which one of those branches of government is a party.
Lord Carlile of Berriew: I think we are in danger of a semantic dispute here. In Lord Morris's question he used the word "triggered" and this was picking up something that had been said by Mr Anderson. I did not interpret Mr Anderson to mean that the Government could not trigger closed procedures, but I think he is meaning that the Government should not determine closed procedures.
David Anderson: It could request it.
Lord Carlile of Berriew: Yes, exactly, and to that extent I think we are at one.

Q86 Mr Sharma: Can you explain how your proposals to allow more communication between special advocates and those whose interests they represent would work in practice without any change to the current legislative framework?
Lord Carlile of Berriew: Can I start by saying that I think the special advocates, in their memorandum and here, have sold themselves short? I think if you look at the cases, and I have looked in detail at all the control order cases over the years, the special advocates have been extremely effective and have changed the outcome of many cases. However, I think that the special advocates should be allowed to communicate on procedural matters far more often than they do. I also believe, and recommended in my reports when I was the Independent Reviewer, that they should be permitted in certain instances to communicate with the people whose interests they were representing on questions of fact, but subject to controls.
For example, there might be an issue as to whether the subject of a control order—or a TPIM now—was in a certain town at a certain time on a certain date. I can see no respectable argument against asking the controlee or TPIM subject where he or she was on that date at a particular time and obtaining the answer. It might be extremely instructive and save a huge amount of time before the court or tribunal. Therefore, it is my view that this should be more feasible, and if the rules need to be altered—and they are only rules; it does not require primary legislation—then they must be altered.
One thing I would wish to add about this is that you will see from the Green Paper that the level of training of special advocates is vestigial or small. They are given a one-day training course when they are appointed, and there is practically no ongoing training. They organise events themselves through the Special Advocates Support Office, I believe. In my view, they should have far more training in the way in which they deal with secret material. All of them are very good advocates, but they come into this sector without any experience of the secret world. Also, in my judgment, they should be given much more support in the preparation of the papers they are given by the security services.
David Anderson: Can I just come in on one point? I accept that the control order cases are a good guide to how special advocates function, and I agree that they do a very good job. But I think it would be a great mistake to assume that, if we go into a closed material procedure in civil litigation, it is going to be like control order proceedings. In control order proceedings, thanks to the Strasbourg court and to our own Supreme Court, the appellant

gets the gist of the allegations against him; he knows in essence what the case against him is and he has enough information to enable him to instruct the special advocate properly.
That is not so in all other closed material proceedings, and here I go back to a question of Lord Lester's. He asks about Article 6 and the common law; the common law is the inspiration for Article 6 and it still goes further than Article 6, as Lord Dyson said in the Al Rawi case. There are whole areas, such as the immigration area, where Article 6 does not apply and where you are not guaranteed a gist of the allegations against you. A special advocate's job is very difficult in cases where the individual involved can know very little indeed about the case in question. Those are not just marginal cases; they are not just immigration cases. Even in the field of asset freezing, for example, if you are subject to an asset freeze it does not feel very different from being subject to a control order. The Government is continuing to argue, so far successfully, that there is no application of Article 6 and no obligation to gist. So although they do a good job, in cases where there is no gist that job is particularly difficult.

Q87 Baroness Berridge: Lord Carlile, could I follow up on your point about the training that is needed? From what has been described, who is keeping the special advocate accountable? Clearly, the client-lawyer relationship is a very important relationship in terms of professional obligation and your duties to your client. Where is that? I have a missing piece: who is keeping the special advocates accountable in that sense with that missing obligation to the client?
Lord Carlile of Berriew: As I understand it, the answer to your question—and you have experience of this as a barrister—is that it is on the back of counsels' briefs and in counsels' notebooks. As far as I am aware, there is no formal audit trail, other than court orders, of any relationship between counsel and the people whose interest they represent. Of course, there is very little contact at the moment anyway, so there may not be much to keep. If the rules are relaxed or if practice changes, then of course there would have to be a detailed audit trail of all contacts, and it may be that contacts would have to be recorded in some way, which is very easily done, subject of course to the same rules of legal professional privilege applying to such contacts as to normal client-lawyer relationships.

Q88 Baroness Berridge: I understand that with the move to general civil procedure the appeals are different—they are not on law; they can be on fact. So who would have the obligation to advise a client as to whether they could appeal in a civil procedure that has involved the closed material procedure? Would it be the special advocate or would it be their counsel?
Lord Carlile of Berriew: Generally speaking, it is their own counsel, but I cannot see any objection to the special advocate giving at least general advice to the effect that an appeal should take place. Indeed, my understanding is that special advocates under present dispensation have the ability to advise appeals. If appropriate, those appeals are taken at government expense.

Q89 Lord Lester of Herne Hill: Before coming to my next question, I want to follow up something that Lord Carlile was saying just now about communicating fact. The only case in which I ever appeared with this problem was on behalf of the People's Mujahedin of Iran (PMOI) in one of those proscribed organisation hearings, where we had precisely that problem—namely, you did not know which place you were alleged to have been in on a particular day—and eventually my clients withdrew from the proceedings on the grounds that it was manifestly unfair. Then a much better counsel much later, from Mr Anderson's chambers, managed to win a case on their behalf in Luxembourg. Is the present position—

because I just do not know—that a special advocate could in fact say to counsel on behalf of the organisation, "The allegation is that it was in Oxford," or is the position that you still cannot even say that if you are the special advocate?

Lord Carlile of Berriew: I do not think the position is that you cannot; I think they just do not. They should be able to do so. I know a lot about the PMOI case and they were entirely successful in the end in front of POAC, the Court of Appeal, which strengthened the decision of POAC, and in Europe of course, but not in the United States as yet. They were the organisation I was referring to earlier, actually. I believe that AF standards should apply to all proceedings in any event. I can see no respectable argument against gisting in all circumstances, otherwise the Government should withdraw from the case. I would say to the Committee that, if you want to get a body of opinion about withdrawing from cases on disclosure grounds, you should ask the Public Prosecution Service of Northern Ireland, who have done it over many years, having considered disclosure issues very carefully in a situation in which they have separate disclosure judges.

David Anderson: Just in answer to your question, Lord Lester, the position as I understand is that, if a special advocate thinks it is important the person should know that the allegation is about Oxford, he will make submissions to the court for disclosure of that as part of the gist. He may also, to very much the same effect, make an application to the court to put that specific question to open counsel for the individual concerned. Their complaint is not that they cannot make such applications—they can; their complaint is that the Government is sitting there as they make the application, and therefore the Government knows what they are up to when they are asking about Oxford.

It is interesting to hear Mr McCullough; he accepted that this is a very difficult issue, for reasons that are given in the Green Paper, at around paragraph 2.30, and that is why I suggested that rather than come to a quick off-the-cuff view, it is something that might repay proper study and a working party of some kind, preferably chaired by a High Court judge.

Lord Carlile of Berriew: Can I say there is one point that I disagree with Mr Anderson about? That is the Government being present when the question is put. In every criminal case these days, the defence are obliged to put in a defence case statement. The defence case statement, if it is done properly, reveals issues like alibi and other evidential material. I think openness between the two sides in the case is a very good thing and does no harm at all.

David Anderson: I am pleased to say that Lord Carlile does not disagree with me about that. I simply said that it is a very difficult issue, as it obviously is, although, like him, I cannot see why the special advocate should not be able to pick up the phone, or at least write an e-mail to his opponent the day before a procedural hearing, and say, "Look, it's going to take three days instead of two," or "I'll be calling another witness." I can see no problem with that at all.

Q90 Lord Lester of Herne Hill: The notion of playing the game with all cards face up on the table is an interesting one.

David Anderson: It is the way that criminal law is going.

Lord Carlile of Berriew: It is not a parlour game; we are talking about accessing the truth.

Q91 Lord Lester of Herne Hill: I was being frivolous. One of the things that special advocates float is the idea that we should adopt an American model of directly instructed, security-cleared lawyers who receive sensitive information subject to protective orders.

They were kind enough to say they were not experts, but would either of you like to comment on that idea?
Lord Carlile of Berriew: No thank you.
Lord Lester of Herne Hill: Do you mean you do not want to comment?
Lord Carlile of Berriew: No thank you; I do not want the American system. I have some experience from my years as Independent Reviewer of looking at the way in which the American Executive exert power over secret matters, and I think it is completely counterintuitive to our common law tradition.
Lord Lester of Herne Hill: Thank you.
David Anderson: I think what they like about the system is that defence counsel are served with confidential information and they are trusted to look after it. But I think one has to look at that in the context of two other things: the first is the operation of the state secrets principle and the possibility of executive orders that might keep such information away from everybody; and, secondly, I think it was reported towards the end of last year that the commander of Guantanamo signed an order requiring the interception of communications between lawyers and clients. Although I do not claim to have an in-depth knowledge of all this, it may be that the degree of trust is not quite as great as it might at first appear.

Q92 Lord Bowness: Gentlemen, you seemed to give us, as I understand it, a slightly different approach to the proposals on gisting. If I am correct, I think Mr Anderson thinks it is unwelcome that there is a proposal to legislate to define the categories of case in which disclosure obligation does not apply. On the other hand, Lord Carlile I think thinks it is a good idea. Could I ask, Lord Carlile, why you think it is a good idea?
Lord Carlile of Berriew: We are back to Lord Lester's architectural metaphor. If we apply what we regard as appropriate standards of justice, the person whose rights are being questioned should be given the opportunity of at least knowing the basis of what is alleged against him or her. I cannot see that national security would suffer from an appropriate degree of gisting, though there may have to be some kind of statutory definition of either what gisting means or what it may include—a kind of provision we are very accustomed to.
David Anderson: Once again I think we are very much on the same page. We are both very much in favour of gisting. The courts have identified categories of case in which they say gisting is not required; they have also said that it is not a hard-edged area of law. In other words, it is one for them to decide on rather than for Parliament. The second reason I would be reluctant to see Parliament legislating on this, as they say, to define the categories in which gisting will not be required, is that judging from the stance they have taken, both as various Bills have gone through Parliament, such as the recent TPIM Bill and the Terrorist Asset-Freezing etc Bill that went through in 2010, and also from the stance they take in the courts, they will do everything they can to resist the principle of gisting. I suspect that neither Lord Carlile nor I would like the legislation they produce very much.

Q93 Mr Sharma: You have partly explained it, but can you explain why you are against legislating to provide greater certainty about the context in which the AF (No 3) disclosure obligation does not apply?
David Anderson: Just to summarise two reasons: first, it is not an area where certainty can sensibly be provided by legislation; secondly, I do not think I would like the legislation very much if it came out.

Q94 Lord Lester of Herne Hill: Mr Anderson, I think you indicated that you thought that the introduction of closed material procedures in civil proceedings would provide an

opportunity to provide for the admissibility of intercept evidence in those proceedings. Can you explain why you think that is so?
David Anderson: Yes. Section 17 of RIPA, as the Committee will know, prevents evidence being adduced or questions being asked in court that disclose the contents of a domestic intercept or even the existence of a domestic intercept. But there are exceptions in Section 18 for, I think, all the procedures where CMPs currently operate—the Investigatory Powers Tribunal, control order proceedings, SIAC, POAC and asset-freezing procedures—subject of course to the condition that nothing is disclosed to the individual himself.
I can see no logic in failing to extend the same power to civil CMPs. The whole point of a civil CMP is that the court should be able to determine the case in the light of all the evidence. In circumstances where secrecy functions as a protection against the inadvertent disclosure of very sensitive evidence, I cannot see why intercept evidence should not be part of the body of facts that the court considers.

Q95 Lord Lester of Herne Hill: Lord Carlile, do you agree?
Lord Carlile of Berriew: I agree because I think there is a very fundamental difference between civil proceedings and criminal proceedings. In criminal proceedings there are the complexities of quantity connected with the CPIA obligations of disclosure. In a criminal case it may not be possible to produce evidence that may undermine the prosecution case because it may not have been retained. The Chilcot committee is still struggling with that problem after four or five years. I cannot see those problems in civil proceedings, where one is dealing simply with what is available.

Q96 Lord Lester of Herne Hill: Mr Anderson, you have suggested that the Norwich Pharmacal jurisdiction might be reformed to introduce a system of exemption from disclosure based on traditionally reviewable ministerial certificates. How could a system of that kind be compatible with the right of access to court guaranteed by Article 6.1 of the European convention? Sorry, am I usurping somebody else?
Chair: No, do not worry.
Lord Lester of Herne Hill: I am so sorry.
Chair: You are not the first.
Lord Lester of Herne Hill: May I transfer the question?
Mike Crockart: I would have asked the same question.
Lord Lester of Herne Hill: I am so sorry.
David Anderson: Could I say briefly first that perhaps the prior question is whether anything needs to be done at all. I think there is no doubt that the Americans and perhaps others were very upset by the original application of the Norwich Pharmacal principle, which they perceived as a failure to acknowledge the control principle. They said, "Well, if we give you our secret information on the basis that you promise to keep it to yourselves and you then start showing it to other people, we're not going to give you as much as we did before." That seems to me a reasonable position to take.
One thing I should perhaps have questioned the Government more carefully on is the seven cases they refer to as having raised the difficulty. It is certainly not just Binyam Mohamed; they refer to seven cases. But I wonder how many of those seven cases post-date the judgment of the Court of Appeal in Binyam Mohamed in February 2010, in which the Court of Appeal gave a great deal of weight to the control principle and a great deal of deference to the Secretary of State, in deciding both what national security required and also how it had to be balanced with the requirements of justice in other proceedings.

On the basis that something does need to be done or may need to be done, not least to reassure our international liaison partners, it seems to me that some of the proposals in the Green Paper are simply too absolute, and you are not going to get away with a blanket exclusion of all evidence in the hands of the security service, or even all evidence in the hands of the Government, as they suggest at one point. A conclusive certificate, of the sort that was issued in Tinnelly and McElduff and Johnston v Chief Constable of the Royal Ulster Constabulary, two of Lord Lester's great forensic triumphs, would presumably also not outlast the onslaughts of Lord Lester. So, what I have suggested is something more modest: either a ministerial certificate that will be judicially reviewable or perhaps a rebuttable legislative presumption against the disclosure of certain types of national security material. It might not be watertight, but it will be something and it could help to provide the necessary reassurance.

Q97 Baroness Berridge: Can I just follow you up on that point? If you look at the public, these were not cases of information that what the Americans were up to was insignificant. These were really serious allegations, and I know you know much more than I, but these were very serious allegations—that we were complicit in rendition, in torture, et cetera. We would only have disclosed that if we had got ourselves muddled up in the wrongdoing, so I hear what you say, but is there not an issue here that we are over-responding to something that actually we just should not have been muddled up with in the first place?

David Anderson: First of all, you are right—the phrase is mixed up in the wrongdoing, and it does not mean that you actually have to be a tortfeasor. It does not mean you are actually in the frame legally, but it does mean that you have got mixed up to the extent that you have picked up some knowledge about it. That is the only basis on which the Norwich Pharmacal order was sought.

Of course, they are always sought in desperate cases, and Binyam Mohamed was facing a capital trial. Therefore, one would expect the courts to be very sympathetic towards him. But it seems to me that the reality is that, if you start giving away secrets that you promised to keep to yourself, it is inevitable that people are not going to give you those secrets to the same extent that they have before. I have said in my report, having made plenty of inquiries about this, that that is happening and that the Green Paper is not being alarmist in the way that it describes that reduction in willingness to share intelligence. It is a very hard choice and I think in the Norwich Pharmacal area one is very much in this business of balancing justice against national security. The difference between this and the other areas we have been discussing is that, once this information is released into other proceedings, it is not in the Government's hands anymore, so they cannot do anything to stop it being publicised. That is why there is a risk to national security. I quite agree it is an unpalatable choice, and they are hard cases, but at the end of the day, this intelligence sharing is very important to us. It seems to me that we should do, within limits, what we need to do to make sure that it continues.

Q98 Baroness Berridge: What I find difficult is that we know it is the Americans pressuring us and actually this started out with us getting mixed up, allegedly, in American wrongdoing. I find that a little bit rum, if that is the right word.

David Anderson: Of course, if the British Government is sued, the police are sued, or MI5 are sued and all these things have happened—then the Government has a choice under the current procedures. It can either release the material into open court or it can withhold it on PII grounds and then end up possibly having to settle the case. At least in that situation, where they are defendants, there is not the same risk to national security because the

Secretary of State can always pull the plug. That is what the Secretary of State cannot do under Norwich Pharmacal. That is one respect in which I differ from Dinah Rose.

Q99 Lord Lester of Herne Hill: The difficulty that we are in, and I do not just mean this Committee, is that we do not know and probably never will know the bottom line, so far as the United States is concerned, for our legislation. We do not know whether the approach that you have both taken and special advocates have adopted would satisfy the United States, or whether the security service would be told by their counterparts, "That's not good enough." What I find troubling, and I do not know whether you want to comment on it, is that as legislators, if we are faced with a demand for something tougher, we are going to find it very difficult to resist that unless we know exactly what it is that we are being asked to do and why. That seems to me to be a practical difficulty, and neither of you presumably knows exactly what it is the United States are seeking to persuade us to do.
Lord Carlile of Berriew: I certainly do not know, but I would say to you that we should not only talk about the United States in this context. The control principle is very important and relates to many foreign intelligence agencies and extremely useful information that comes into the hands of British intelligence agencies as a result. We cannot throw away the control principle.
Lord Lester of Herne Hill: No, of course not.
Lord Carlile of Berriew: Otherwise, I certainly agree with the conclusions that Mr Anderson has reached in the paper he has placed before this Committee.

Chair: Thank you very much for your co-operation today and your evidence.

Joshua Rozenberg and Ian Cobain; Jan Clements and Dr Lawrence McNamara

Oral Evidence, 7 February 2012, Q 100–139

EVIDENCE SESSION NO. 3. HEARD IN PUBLIC

Members Present

Dr Hywel Francis MP (Chair)
Baroness Berridge
Lord Bowness
Baroness Campbell of Surbiton
Mr Rehman Chishti MP
Mike Crockart MP
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth
Mr Richard Shepherd MP

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Examination of Witnesses

Joshua Rozenberg, Legal Correspondent and Broadcaster, and **Ian Cobain**, Investigative Reporter, The Guardian

Q100 Chair: Good afternoon. Welcome to the Joint Committee on Human Rights' evidence session on the Justice and Security Green Paper. Please introduce yourselves for the record.
Ian Cobain: My name is Ian Cobain. I am a reporter with The Guardian.
Joshua Rozenberg: Joshua Rozenberg. I am a legal journalist and commentator. Perhaps I should say that I have written a couple of pieces on the Green Paper. One was for The Guardian Online law page on 16 November and one was for the Law Society Gazette on 12 January. Though they were mainly reportage, it would be fair to say that in those pieces I was critical of the Government's proposals.
Lord Lester of Herne Hill: I should declare an interest. I represented the media as an interested third party in the Supreme Court in the Al Rawi case. I shall not ask any questions that touch on that because there would be a conflict of interest if I did.

Q101 Chair: I will begin with a question to Mr Cobain about the effect of the Green Paper on investigative journalism. How important is material disclosed in legal proceedings as a source of information for journalists?
Ian Cobain: In the past it has been vitally important. We tend to work with two strands. One is to look at allegations of involvement in wrongdoing by looking at complaints and seeing if there is any pattern, and the second is looking at judicial proceedings. Very often evidence that emerged in court in the quite recent past tended to corroborate what we had heard elsewhere. We are heavily reliant on documents that have been disclosed in court, which have tended to contradict the assurances or denials that we have received elsewhere.

Q102 Baroness Berridge: Can you give us some examples of situations where you have managed to get the information you referred to only through legal proceedings, and where it entered the public domain only by virtue of these proceedings? Perhaps you could comment on any difference there may be between the public interest immunity process and information that would or would not come out through closed material procedures. I am referring to the contrast between getting information through PII and through closed material procedures.

Ian Cobain: I first asked the Government a question about Binyam Mohamed in July 2005. I was told that the British Government and its agencies never used torture to extract information. Then in February 2010 the court ordered the disclosure of the seven paragraphs that showed that the security service had been aware of the way in which Binyam Mohamed had been treated before one of its officers was dispatched to go and ask questions. So there is obviously a discrepancy there. There have been two main cases—Al Rawi and others and the Binyam Mohamed case—that have resulted in the disclosure of evidence and documentation and have given us a true picture of certain government actions since 9/11. As far as I can see, the Green Paper will prevent that from happening again, frankly. To some extent, I do not think that such reporting, that we are collateral damage if you like, I'm sure it is a central part of the intention. We are collateral damage. It is probably not a central part of the intention.

Q103 Baroness Berridge: Perhaps I did not phrase my question about PII and the closed material procedure clearly. Can you as a journalist give us a contrast between what you learn under PII—because the court is very ingenious about balancing national security and natural justice—and what you learn when the same case takes place under closed material procedure?

Ian Cobain: I will give you some examples of what we learnt and then tell you that it is my view that we would not learn these matters if the proposals were adopted. For example, in the case of Al Rawi and others, documentation showed that a decision was taken in the second week of January 2002 that British nationals and others who had been detained in Afghanistan should be consigned to Guantanamo. After that decision was taken, there were assurances by Ministers that any suggestion of British involvement in rendition amounted to a conspiracy theory. It was only once the documentation was disclosed that we could see how closely involved the British Government had been in the rendition—a horrible euphemism—of their own citizens. It resulted in reporting such as this, which I suspect you will not see once the proposals are adopted.

Q104 Lord Dubs: Mr Cobain, you have been very helpful to the Committee over the years; thank you for that. You have partly answered this question, but I will put it to you anyway. How will the proposals in the Green Paper affect your ability to investigate and report on matters of public interest and concern? You have given a couple of examples. Are there any other examples of your investigative reporting—you mentioned torture—that would not have been possible if the proposals in the Green Paper had been in place? In other words, are you almost out of a job if the Green Paper is implemented?

Ian Cobain: No, we will still report on allegations of wrongdoing that are made against the Government. What we will not be able to see is the judicial scrutiny of those allegations. Once they disappear into what is effectively a closed court, we will not be able to see how the allegations are being examined and tested. It is not entirely clear, but there is every possibility that the process will end in both open and closed judgments, so we will not know

entirely what the court has concluded. We will still report on the allegations, but it will be far less satisfactory. The readers will be presented with allegations but will be uncertain where the truth lies.
Lord Dubs: So the sooner it gets to the courts, the sooner you are stymied.
Ian Cobain: I am not sure that that is necessarily true. We reported on Binyam Mohamed's allegations in 2005 and they did not effectively reach the court until the middle of 2008, and then through to early 2010. Had those proceedings been closed, the allegations would still have been out there, but we would not have known what the truth of the matter was and there would have been plenty of scope for people to issue denials that would have been difficult to deal with.

Q105 Lord Dubs: In its response to the Green Paper, Guardian News and Media Ltd pointed out the possible impact of the proposals on historic litigation such as that brought by Kenyans arising from the treatment of the Mau Mau in 1950. Are you aware of any examples of such historic claims in which the Green Paper proposals would prevent the public disclosure of information, which in turn would prevent public scrutiny of a previous Government's actions?
Ian Cobain: I asked the Ministry of Justice this and its answer was not clear. Ultimately it said that, yes, the documentation that so far has not been transferred to Kew could be subject to the closed material procedure. That is my understanding. I know that people from other former colonies have been watching the Mau Mau litigation and thinking that perhaps they, too, might have a case against the British Government. So there is a possibility—I put it no higher than that—of litigation in future based on historic allegations.
Lord Dubs: So there might be others apart from Mau Mau.
Ian Cobain: Yes, there could well be.

Q106 Lord Lester of Herne Hill: I wonder whether you accept that there are exceptional cases where the media should be prevented from seeing evidence—for example, documents—as you are prevented already in some family proceedings held in camera, in public immunity situations and in closed SIAC hearings where special advocates are used. Do you accept that some extension of those kinds of restrictions would be justifiable in narrow circumstances where national security was directly implicated, or is your position that the existing restrictions are probably unnecessary and that you certainly do not want to see any more?
Ian Cobain: I can see that there are occasions when proceedings must be held behind closed doors. The control principle is very easy to understand and one can understand anxieties about breaches of that principle. I cannot say that I would support any extensions of those procedures. The procedures that exist seem to work very well. The Green Paper states that "there is already evidence that the flow of sensitive material has been affected. The risk is that such material withheld by a foreign partner might, when pieced together with other intelligence material […]". The Government are placing their case at quite a low level. The next page of the White Paper states that, in the Court of Appeal's decision that caused such concern, the critical factor was that the information had essentially already been disclosed in the United States. So the Government's own case for extending this, based on possible breaches of the control principle, does not seem to be that strong. It seems possible that there is a great deal of concern about the possible disclosure of information that has not been gleaned under the control principle but that could possibly be quite embarrassing.

Q107 Chair: Could you say a little more about the sort of material you obtain that is disclosed in legal proceedings? What kind of material is it: written statements, government documents?

Ian Cobain: In the Binyam Mohamed case, what was withheld were seven paragraphs of a court judgment that set out the court's understanding of what another set of documents—which was never disclosed—explained about what was happening to Binyam Mohamed after he was detained in Karachi in April 2002 and before the security service questioned him. It was just seven paragraphs of a High Court judgment, but it was absolutely vital to our understanding of what the British Government knew about the treatment of Binyam Mohamed before they started interrogating him. In the case of Al Rawi and others, a host of documents were slowly extracted from the Government. They started disclosing all sorts of material, such as newspaper cuttings and government reports, before eventually disclosing one or two documents, including a telegram from the Foreign Secretary that had gone to the various UK missions around the world, explaining that no objection would be made to the transfer of British nationals to Guantanamo. Another document showed that the Prime Minister had been made aware of allegations that detainees were being mistreated—"tortured" was the Prime Minister's word—and that this understanding had been reached before the point at which individuals were transferred to Guantanamo. Another document showed that the United States was quite satisfied for these British individuals detained in Afghanistan to be repatriated to the UK. In other words, the Americans said, "You can have them back", but nevertheless they ended up in Guantanamo. That is the sort of documentation that was disclosed before an agreement was reached on Al Rawi and others.

Q108 Lord Bowness: I should declare an interest as someone who holds a solicitor's practising certificate. How easy is it for reporters to obtain copies of documents in ordinary legal proceedings, where closed material procedures are not used? Is there an established procedure for doing it? Do you get access to the pleadings and the skeleton arguments of the parties?

Joshua Rozenberg: It is surprisingly difficult. In order to cover a court case these days—High Court, Court of Appeal or Supreme Court—you really need access to the written documents lodged by the parties. The court has them and counsel has them and, if the press does not have them, it is almost a conversation between the lawyers and the court, in which the court can understand but the press cannot. We normally get hold of the pleadings and the filed documents if we possibly can. It varies. I know one barrister who will bring several copies of his skeleton argument and give them out to any member of the press who asks. Sometimes you are told that, if you e-mail the solicitors, you will get a copy the following day or by lunchtime, which is not much use. Sometimes you are told that you will not get a copy because the lawyers are worried that the court does not want you to have them. If you say, "Well, I think the court does," you sometimes get into an argument and you have to threaten to make an application to the court to get them. I was trying to get hold of the printed case, as it is called, before the Supreme Court in a case last week. I had to make application to the court in writing and eventually I got the documents from the lawyers. It is quite a performance and that is in a case where there is no secrecy and no attempt to hide anything.

Q109 Lord Bowness: Do you have any experience of the additional difficulties that would flow from trying to report the proceedings in closed material cases?

Joshua Rozenberg: The first problem, of course, is that you may not know what the case is. If you look at the website of SIAC, the Special Immigration Appeals Commission—it is not particularly easy to find—you will see that some of the cases are listed only by an initial rather than by the names of the parties. We depend a surprising amount on lawyers on one side or the other in a case telling us that something is coming up that is going to be of interest to us and, through us, the public. If the case is anonymous because the individual does not want to be named, and the Government certainly does not want any publicity, it tends to be quite difficult for us even to know that a case is coming up, let alone going on; it is difficult for us to cover it, waiting outside in the hope that it will go into open session at a time to be decided. There is nothing more disheartening than sitting outside a closed court and having no idea whether you are completely wasting your time or whether suddenly it is going to open up and you are going to be let in to see you know not what.

Q110 Baroness Campbell of Surbiton: Mr Rozenberg, you have already touched on this, but how will the proposals in the Green Paper affect your ability to report legal proceedings?

Joshua Rozenberg: We do not know because, we do not know how widely they will go if they go as far as the Government is proposing. As I see it, they would cover international relations, crime prevention, police informers' identities and perhaps even commercially sensitive information in which the Government has no direct interest. If all those were to be subject to these closed material proceedings, it would very much limit our ability to cover a wide range of cases. A point that I will add to what Ian Cobain said is that one of the advantages of reporting court proceedings is that they are privileged; we have privilege if we publish a fair, accurate and contemporaneous account of what is said in court. We then are not going to be sued for libel even if we publish material that the individual concerned would rather not have published. Court material and court proceedings have a great advantage for us in terms of the ability to inform the public of what is going on. If that were inhibited to the extent envisaged in the Green Paper, I think that the public would be very much the poorer.

Q111 Baroness Campbell of Surbiton: Do you have any proposals that you fear most? You read out quite a few, but is there one of particular significance?

Joshua Rozenberg*:* I suppose that there is really a range. To take Lord Lester's point, I see a limit—I am not suggesting that we should have unlimited access to all court proceedings. But if you look at the trend supported by successive Governments, it is towards greater openness. For example, the family courts—although there are limits on what we may report—are now open to reporters to at least observe. The Court of Protection allows parties to apply for access from the media, and the media have reported cases like that. So the trend is to greater openness. If this were to lead to a move towards a wide-ranging closed procedure, I think that it would be a great shame.

Q112 Baroness Campbell of Surbiton: How big a problem for reporters is the inaccessibility of closed judgments, do you think?

Joshua Rozenberg: The problem with closed judgments is that we do not know what they contain. The fundamental point about these proposals is, one would hope, that if they were to be introduced the courts would do as much as possible in open court and would issue open judgments as well as closed judgments. It would be very disturbing indeed if cases led only to closed judgments. As Dinah Rose has said, there would then be a mass of precedent that was available to only one side—the Government and perhaps the special advocates—and not to other parties. You would hope that the court would lean over backwards to do as much as possible in open court and to produce open judgments, as they do at the

moment, even though there are closed judgments at the moment. The real problem is that you do not know what is in the closed judgment and how far that closed judgment goes. There may be cases that can be understood only if you are able to get access to a closed judgment, which you would not have under these proposals.

Q113 Baroness Berridge: How freely can you report, though, given what the restrictions are under public interest immunity? Will this make it worse?
Joshua Rozenberg: You are right to say that, if the court decides that public interest immunity applies, we do not get access to the information, but at least we have the feeling that the court has carried out a balancing exercise and perhaps has even heard from the press making an application on whether material of a certain sort ought to be covered by public interest immunity. So, yes, there is a limit to what we can report. The fear is that we would not have any rights to make an application to the court before it went into closed session, not least because we would not know why it was going into closed session.

Q114 Lord Lester of Herne Hill: I am very interested in what you have just said. I am searching for a balanced position. If the starting point is that there is going to be a modification of natural justice to deprive a claimant of access to material the disclosure of which would damage national security, the press cannot put itself in a stronger position than the claimant. In other words, if a judge decides, having looked at the evidence, that it is appropriate for there to be a closed evidence procedure, it will limit the principle of natural justice. You are arguing for the principle of open justice, which is also vital. However, it seems to me that the principle of open justice cannot trump the principle of natural justice. In other words, once a balance has been struck in a way that ensures a fair hearing—and the judge has done the balancing—I presume that you are not suggesting that the press should have greater rights than the claimant.
Joshua Rozenberg: I think that is right. We do sometimes have access to information that the claimant does not have, but only for a brief period. For example, we might have access to documents issued under embargo by a committee such as yours. There are circumstances in which we the media get access to judgments of the courts in advance of the parties. I can think of occasions before the House of Lords became the Supreme Court when we would have access at some point, the lawyers would have access earlier, as you well know, but the parties might not have access until much closer to the delivery of the judgment. However, generally I accept the point that we should not have rights that the parties do not have, although we are sometimes trusted in court proceedings and allowed into cases in circumstances where those involved are not given access.

Q115 Lord Morris of Handsworth: My question is to both of you. The Government are refusing to publish responses to their Green Paper, saying that they are confidential unless the respondent expressly consents to publication. Would you comment on that?
Ian Cobain: I was really very surprised when I heard about this. It strikes me as being slightly bizarre that you can have a public consultation process in which some of the submissions remain secret. I do not understand why this is being done. It does not seem to be a particularly good idea.
Joshua Rozenberg: It is certainly not consistent with current practice. Although the Green Paper has a foreword from the Secretary of State for Justice, it does not seem to come from the Ministry of Justice. Looking back at discussion papers published by the Ministry of Justice, the most recent one is entitled—a little inelegantly—Getting it Right for Victims and

Witnesses. Under the heading "Confidentiality", it states: "Information provided in response to this consultation […] may be published or disclosed in accordance with the access to information regimes […] If you want the information that you provide to be treated as confidential", be aware that there is a code of practice, and explain why you want it confidential. "If we receive a request for disclosure … we will take full account of your explanation", but we cannot promise that it will be confidential. That seems to be the standard practice with all consultation papers issued by the Ministry of Justice—and, I dare say, by other government departments. It is a public consultation and unless the parties ask for their response to be confidential, it will be treated as public. I fully accept why certain public bodies such as the security service, in responding to the Green Paper, would not want their response made public, but the default position ought to be that a submission is public unless somebody says otherwise.

Lord Morris of Handsworth: Are you saying that you can recall no precedents in your professional career?

Joshua Rozenberg: I think that we are moving to greater openness in public consultations. The situation here has been ameliorated to some extent by the fact that a rather good website called the UK Human Rights Blog, run by a chambers called One Crown Office Row, put out an appeal to anyone who had sent in a submission to the Government in response to the Green Paper, asking them to send a copy of their response to the website. They have published the ones they received. Of course, they received only the responses that the people who made them wanted to make public, so inevitably it will be partial. However, it is a valuable public service—and, one would think, one that a government department would want to provide itself.

Q116 Lord Lester of Herne Hill: I should say that I have put down some Parliamentary Questions for Written Answer on this topic but have not yet got the answers. Mr Rozenberg, when you said that you could understand if the security service, for example, kept its submissions confidential, I take it that you were referring only to matters in evidence that are sensitive when it comes to national security. Hypothetically, are you saying that if the security service put forward arguments, they should be kept under a cloak of secrecy?

Joshua Rozenberg: I agree with the point that you are making. I accept that there might be some information that the security service would provide in response to the Green Paper that they would justifiably want to keep secret, but I would like to see their arguments in support of the Green Paper that are not already reflected in the Green Paper itself.

Chair: Thank you very much for your evidence today.

Examination of Witnesses

Jan Clements, Editorial Legal Services, The Guardian, and **Dr Lawrence McNamara**, University of Reading

Q117 Chair: I will now ask the two other witnesses to come forward. Welcome to the Joint Committee on Human Rights. Please introduce yourselves for the record.
Jan Clements: Jan Clements.
Dr Lawrence McNamara: Lawrence McNamara. I am a Reader in Law and a Research Councils UK research fellow at the University of Reading.

Q118 Chair: Thank you. Could I ask you, Dr McNamara, about the overall impact of the Green Paper on the media? You say that making closed material procedures generally available in all civil proceedings would have a "significant detrimental impact on the ability of the press to access and report information". You go on to say that this would constitute a "major retreat from open justice traditions". Can you briefly explain why you said this?
Dr Lawrence McNamara: There are a few reasons. My starting point is that the media in this context is not a substitute for the public but it is the eyes and ears of the public. That underlies all the issues relating to the media. The proposals are so significant because they will see the normalisation of justice occurring behind closed doors. There are already a number of situations in which closed material proceedings can be used. SIAC is the most prevalent. Even the fact of the Green Paper encourages us to accept that SIAC is relatively unproblematic. The Green Paper itself is part of that normalisation. The effect on the media comes about partly because courts are so important. In my current research, one point that is often made is that information comes out in court; it is where detail comes out and where the parties cannot craft or spin the information. This is what makes it so important. The proposals in the Green Paper are still somewhat vague. They are necessarily not detailed. However, they suggest that there will be a system in which the Executive will not notify the public that they propose to use closed materials; in which the Executive will have the upper hand in deciding whether closed material procedures are used; in which civil matters, or large parts of them, will be held out of the public eye; in which no systematic records are proposed to be kept of how often or to what extent closed proceedings are used; in which significant parts of judgments are likely to be kept secret; and in which there will be no identifiable limit on how long those things will remain secret. So in terms of the effect on the media, on public access to information and on scrutiny of the state and of those who are alleged to have committed offences or behaved in a way contrary to the interests of the state, we will end up with whole categories of activities and scrutiny that will become less and less visible.

Q119 Lord Lester of Herne Hill: I wonder whether you slightly overstated the position. As I read the Green Paper, the ultimate judge will be the judge and not the Executive. You said that the Executive would have the upper hand, but I take it—perhaps I am wrong—that what is envisaged is that the Executive will apply for closed procedure and the judge will look at the evidence. Then the judge and not the Executive will make the decision. Assuming I am right, that would not involve the Executive having the upper hand, would it? It would be the judge who would judge the balance between the interests of national security and justice.
Dr Lawrence McNamara: I have three responses to that. The first is that my reading of the Green Paper is not entirely the same as yours. As I understand it, one proposition is that

judicial review principles will apply, including the possible irrationality of the decision-maker, which will very much give the Executive the upper hand. It is a serious question in the Green Paper about whether the decision is for the court. The second aspect is that inevitably in national security matters the judiciary defers to the Executive. This is quite clear from recent judgments. The Binyam Mohamed case made it quite clear that the Executive is in a great position. The third thing depends on how any legislation that would come about would be structured. However, if the Australian position is any indication, one legislative factor there is that national security carries the greatest weight. I realise that I stated my position very strongly, but I do not think that I overstated it.

Q120 Lord Dubs: This question is primarily for Jan Clements. Guardian News and Media Ltd stated in its response to the Green Paper that the proposals amount to "an unnecessary and unjustifiable restriction on the media's role as a public watchdog". Can you give us some examples from your own experience of cases in which your newspaper has challenged government secrecy in a way that would be more difficult, or impossible, under the Green Paper proposals?

Jan Clements: The Binyam Mohamed case has already been mentioned. In that case, we intervened, together with other media organisations, to challenge the Government's attempt to restrict the publication of seven paragraphs in the open judgment. The case is very interesting because it shows how under the current regime national security is already taken seriously by the courts. There is still a 32-page closed judgment in that case, in which the court made it quite clear that it respected the Government's arguments. When it came to the paragraphs in the open judgment, the issue came down to the importance that the Government placed on the control principle and sharing intelligence with foreign agencies, as against the public interest in knowing about allegations of torture. We have to remember that context when we talk about the case. Obviously it is one of great public interest. I fear that in future the arguments that were played out in court and considered very carefully would not take place. The whole thing would probably occur under a closed material procedure and the court would be deprived of the very important role of balancing those interests. That is one example; I am sure that there are others.

Q121 Lord Dubs: In its submission, The Guardian also mentioned the impact of the Green Paper proposals on the reporting of inquests of great public interest. Can you give me some examples of that?

Jan Clements: Again, if we look at the current situation, there are often very important inquests. The kind of cases that the Green Paper will cover are inquests of the greatest public interest, such as deaths in police custody or the 7/7 inquest, for example. That deserves some examination. There were very clear representations from the Government about holding the inquest in closed session because of the intelligence material that might be involved. Lady Hallett decided that the coroner did not have the power to hear those inquests in closed session, but managed the inquest successfully. A chief of staff from MI5 gave evidence anonymously. The interested parties—the families—were very keen to know the facts. They were in court to hear his evidence. Reporters were in a nearby room to hear his evidence but were not able to see him. So the courts already have considerable powers to manage difficult and sensitive cases in a way in which we can at least get access to some of the key information. That inquest illustrates that it is not just the media but properly interested persons—the relatives of victims—who would probably be deprived of the information in future. That is our fear.

Lord Dubs: Presumably some of the inquests of concern are in Northern Ireland, are they not?

Jan Clements: Possibly, yes; even probably. I do not have experience of Northern Ireland inquests. Another example would be the friendly fire cases. In 2003, the American Air Force shot members of the British Household Cavalry in a friendly fire incident. In that case there was an argument about the admission of evidence. For example, there was a video of what had happened. In the end the video was leaked to The Sun and finally admitted to the inquest. The video showed evidence of apparently reckless behaviour, and the verdict in the case was unlawful killing. The danger is that that kind of material would be excluded in future.

Q122 Lord Lester of Herne Hill: This was before your time, but I wonder whether what happened with The Guardian in the case of Home Office v Harman illustrates what you and Mr Rozenberg have talked about. In that case, Harriet Harman, as the NCCL legal officer, passed to David Leigh on your newspaper information about unpleasant regimes for prisoners that had been disclosed to her in confidence. That was all read out in open court. She was then held to have committed a serious contempt and had to go to Strasbourg, where I represented her. The Strasbourg court said that the principle of open justice had been violated. There then had to be rule changes to allow journalists to obtain evidence read out in open court. That seems to be an example of a highly restrictive attitude that the courts could take in the context of inquests and other situations that you referred to. I do not know whether you have any knowledge of that case.
Jan Clements: Only through reading a little about it. I agree with you; that is right. That would be our concern.

Q123 Lord Morris of Handsworth: My question is to Dr McNamara. Can you tell us about your empirical research into the effect of closed court proceedings on press freedom in Australia?
Dr Lawrence McNamara: Certainly. I undertook some research in Australia, predominantly around 2007. I interviewed about 10 journalists and nine lawyers. Some were media lawyers and some were criminal lawyers. I was interested in the effects of counterterrorism laws on the media's ability to report matters of public interest, especially terrorism and security. The main findings that are most relevant in this context were that the legislative regime there—the National Security Information (Criminal and Civil Proceedings Act) 2004—had had a major effect on the ability of the media to access information. One particular thing that arose was that the default position became to use closed proceedings where possible. There have not been as many cases in Australia as there have been here, and the cases in Australia were criminal cases. None the less, the patterns were sufficiently evident. The other effect was what I would describe as a culture of closure and caution. Once you start to shut down proceedings—and of course there were penalties for unauthorised disclosure—we had a situation in Australia where lawyers were very cautious in dealing with journalists. They would not necessarily tell the journalists things that they could tell them. There was an incident where a journalist just wanted to get the spelling of a lawyer's name right, but another lawyer was very reluctant to talk to them. In the current research I am doing in this country, again there is great caution in any matter surrounding terrorism and security. The other aspect of the Australian research that was particularly important was when the parties—the defendant and the prosecution—consented on the way evidence should be managed. I can deal with that more if you like.

Q124 Lord Morris of Handsworth: Can you say a bit more about the methodology? How did you conduct the research and what were the key findings?
Dr Lawrence McNamara: The research was conducted as a series of interviews, lasting from about 25 minutes to 90 minutes, with 19 people. Most people were interviewed on their own, although a couple were in pairs—perhaps those from the same organisation. In that sense, the methodology was fairly standard for empirical socio–legal research. The findings operated at a number of levels. There were the specific effects on the closure of court proceedings, which are probably the most relevant to the Green Paper, and then there were these slightly broader cultural things that went with it. One of the other notable findings was the question of whether there is a chilling effect in terms of self-censorship by the media. There was no evidence of a chilling effect as such. There was still a very robust attitude to reporting and seeking out information, which is certainly what has emerged in my current research in this country. But there is certainly a sense of caution and of not wanting to get things wrong. There is also a sense not just of self-censorship but of what is controlled information by the state in these circumstances and using closed procedures to control information.

Q125 Lord Morris of Handsworth: Did anything specifically emerge from your research that would be relevant in the debate that we are having?
Dr Lawrence McNamara: Probably the point that I would really pick up on is what happens when parties want to consent to closed proceedings. Under Australian law, this can be done and then the court authorises it, if you like. In the Al Rawi decision, this arose briefly but was not addressed; as I recall, the court said, "Well, we won't particularly address that here." Section 22 has been described by an Australian practitioner as appearing to be innocuous when it is actually one of the most important parts of the Act. It really is important. It might be that both parties do not want the information to be made public—and there might be good reason for that—and the judge who is managing the trial may have very good reason to approve the management of evidence. One of those reasons is that, once you get a legislative regime, it is very cumbersome, complex and time-consuming. With criteria that do not include open justice as one of the considerations, which is the position in Australia, you can end up with a situation where the parties effectively take control over what comes out to the public. That is a really dangerous position to be in. It raises all sorts of problems. It is not just the kind of information that might prejudice or damage national security; a whole lot of information that may not actually have that effect will get swallowed up under those consent agreements.

Q126 Baroness Berridge: This is a question for Jan Clements. Does the law on public interest immunity as currently applied by the courts cause any problems from the point of view of media freedom?
Jan Clements: In this context, we are talking about public interest immunity in civil claims. I was discussing this with the other witnesses earlier. There is very little information about how often it is used in civil claims. It is certainly very rare, in my experience, but that may just be the kind of cases that come across my desk as a newspaper lawyer. In fact, I can only recall the two cases that are cited in the Green Paper. I would be very interested to find out more—this may be something that the Committee would want to take up—about how often public interest immunity is in fact relied on in civil proceedings. I think that it is extremely rare. Normally it comes up in criminal cases. Obviously the newspaper's aim is to get access to as much information as possible and to report on cases as accurately as possible, so we will push at the boundaries and challenge reporting restrictions where we can. Usually, that is where our battles lie—in challenging orders made by the court where we feel that they are drafted too widely and prevent us from reporting. It is very rare for us

to be involved in cases concerning public interest immunity, so I would not see it as something that is at the top of my list of problems as a lawyer for a newspaper at the moment. In a way, it is something of a red herring in the Green Paper—I do not know about the colour coding there. I am not quite sure how serious a problem public interest immunity is.

Baroness Berridge: But there are no attempts that we are aware of to argue that public interest immunity in criminal cases has been found wanting as a mechanism.

Jan Clements: No. We have challenged reporting restrictions in high-profile trials; we have won some arguments and lost some. The procedure seems to have worked effectively in some very high-profile criminal trials concerning terrorists in this country, but it is not really a major problem for us.

Q127 Lord Lester of Herne Hill: I think that the Government argument goes something like this. Public interest immunity involves the complete exclusion of a piece of evidence from a trial, and whether that can go ahead or not has to be considered. They are saying that in the interests of justice there should not be cases that are impossible to bring because of a national security situation. The closed procedure is in the interests of justice because it allows claims that should be brought to be brought to trial, subject to the closed evidence procedure. That is why they say that the public immunity procedure is not good enough. I think that that is their argument.

Jan Clements: Yes, I see that. I agree that that is the way the Government are putting the argument. However, when we look at its operation in the criminal context, there are rare cases where prosecutions have not gone ahead because of public interest immunity. There is no suggestion that these provisions should be brought in to the criminal process. That suggests that it is rather odd. Obviously, from the Government's point of view, the argument would be, "We are then the driver of the action, so we can say that we aren't going to pursue this." The situation is different when the Government are the defendant in a civil claim. That is clear. However, I am not sure that even the examples in the Green Paper show that it is a serious problem for Government. The few cases that are cited do not necessarily show that they were settled because of these PII considerations. Certainly in Al Rawi, the case was settled before the Supreme Court had finally decided on the closed material procedure. Obviously, the settlement was confidential, so we do not know on what basis it was made. It could be that the sheer quantity of disclosure made it uneconomic to pursue it, or it could be that there were problems with the defence. We really do not know; we are just speculating. So I do not think that the case that this is a real problem has been made out. The other issue that I would like to raise about PII is that it is used rarely, because it means the exclusion of evidence for both parties. That is a good thing. What concerns me about the closed material procedure is that it would be a little too easy to rely on it, because you can have your cake and eat it, in a sense—you can say, "We're going to run on this evidence but it is not going to be accessible to the other side and the public won't know about it, which will be great." In some situations, that will suit everybody.

Q128 Baroness Campbell of Surbiton: The Guardian News and Media states that the court must not be deprived of its current role of balancing the public interest in open justice on the one hand and the public interest in secrecy on the other. Could you explain, and perhaps give examples of, how this judicial balancing currently works?

Jan Clements: Yes. Some of the examples that I have given illustrate this. In the Binyam Mohamed case, the divisional court looked at national security. In this case, we must also

remember that we were not talking about operational intelligence or the names of secret agents. It was not that kind of national security. The Government were arguing that because the information had come from a foreign power, and because of the control principle, it should be protected. The court had to balance the need to keep that secret with the public interest in knowing about allegations of torture. That comes out clearly in its judgment. The way I read the proposals, the court would be deprived of that kind of balancing exercise. It would be very likely that the Secretary of State's assertion that this was sensitive information would go unchallenged. It would be very difficult to challenge it. It is the same in the other cases that I cited, such as the inquests. The same thing applies. Have I answered your question?

Baroness Campbell of Surbiton: I think so, yes.

Q129 Baroness Berridge: Dr McNamara, what evidence is there that the use of closed material procedures became widespread once they had been introduced in Australia? Why might there be a tendency for them to be used more frequently than was intended? Is the closed material procedure that Australia has identical to what is proposed in the Green Paper?

Dr Lawrence McNamara: I will answer the last question first. The closed material procedure in Australia is not identical to that proposed in the Green Paper, partly because the Green Paper's expression of it is very much in general terms. It is also not identical because Australia does not use special advocates, so I envision that there would not be a direct parallel. Having said that, there are significant parallels in the approach to issues at the crux of things. What evidence is there that the procedures became widespread? It is difficult to say, as there has not been the number of cases in Australia that there have been over here, especially in the criminal context. Terrorism prosecution cases in Australia are still in single figures. Some of them had about 10 defendants, but I am talking about the number of trials. It would be more than single figures now, but it will not be more than 20. The concern about procedure became widespread because it became the default position. As one lawyer put it to me, these things become a tool in the arsenal of the state and of the parties. They are available to be used and they will be used because it makes things easy. That comes back to some extent to the issue of consent between the parties, which excludes open justice. That becomes the real problem. The evidence translates more so to this country. Here you have SIAC, but there are other contexts, as the Green Paper observes, where proceedings are closed. That is the best answer that I can give.

Q130 Lord Morris of Handsworth: My question is to you, Jan. The Guardian News submission points out that, under the Green Paper proposals, sensitive information is defined much more widely than in the current law of public interest immunity. Can you explain the significance of this?

Jan Clements: The way it appears in the Green Paper, the category of sensitive information seems very wide. It seems possible that it would apply to all sorts of scenarios that would go way beyond national security: for example, to claims against the police, to the inquests that we mentioned and to all sorts of civil actions where the operational policy of the state authorities—the police or the intelligence services—might come into question. The test is very low: whether it is likely to harm the public interest. One can see that there would be lots of situations where you could argue that information would be likely to harm the public interest—many more situations than it would be possible to use at the moment to exclude material from court proceedings. That, too, would prevent us from reporting these cases.

Q131 Lord Bowness: Dr McNamara, I would like to go back to the research that you are doing on the effects on media freedom in the UK. It suggests that the courts in England and

Wales have demonstrated a stronger commitment to open justice than their Australian counterparts. Does this mean that we can rely on courts upholding the open justice principle, irrespective of what is in legislation, or do you agree that Parliament will still have a major responsibility for ensuring that the principle is protected in the legislation?

Dr Lawrence McNamara: On the first point, the Australian courts have open proceedings rather than open justice. Whether there is a difference between the two is something I will not pursue, but it is a big distinction. In the British context, I do not think that the courts can just be left alone on the basis that in this country there is a demonstrated commitment to open justice and open proceedings. This is mainly because once you put in place a legislative framework, the courts of course will be bound by it. This is one of the big choices that is being made about the common law traditions and principles of open justice, as opposed to a more restrictive legislative regime. If there is to be a legislative framework that governs this, it has to take account of open justice and parallel common law traditions.

Q132 Lord Lester of Herne Hill: I was wondering whether you have any recommendations on how in legislative terms we might improve on the Australian position. We know that the Australian Law Reform Commission proposed that open justice should be an express consideration when national security law was involved, but the statute did not state that. We have the benefit of the Human Rights Act, which safeguards the right to freedom of expression, but as I understand it the case law in Strasbourg has not yet got to the point where there is a right of access to important information. There is an open justice requirement, but that refers to natural justice rather than anything else. Against that background, and without the benefit of a written constitutional guarantee or anything of that kind, what would you recommend that any legislation should state to ensure that open justice is taken properly into account?

Dr Lawrence McNamara: I will preface my answer by saying that my position on the Green Paper is that these are not good proposals and that they should not become legislation.

Lord Lester of Herne Hill: At all?

Dr Lawrence McNamara: At all. So any of my recommendations, for instance those that I made in the written submission, need to be read in that light. The best way to take account of open justice is under the existing framework. If you do bring in legislation in this country, there are things that can mitigate or attenuate some of the most significant problems. Certainly, including open justice as a criterion that the judiciary must consider in deciding how evidence should be managed in civil proceedings would be very valuable. In my written submission, I framed it as a right for media organisations to be heard in these matters. I would reframe that as a right for non-party interests making open justice representations to be heard. That is important because when both parties have an interest in having closed proceedings, especially where issues around scrutiny of the state come up, there needs to be room for representations to be made to the court, even in an advocates framework. There needs to be that openness. I would add to my written suggestions by saying that there needs to be a strategy for establishing when judgments can become open. Perhaps in a judgment there should be a requirement for an open indication of why the judgment is closed, of what factors would be relevant in considering how long it should remain closed, and of a point in time at which it should be reviewed—we could say a maximum of five years. Otherwise, you will end up with a roomful of secret documents, which over time will become a real problem. Those are some suggestions that I would make.

Jan Clements: I would like to add to that. I will not comment on the first part of what you said, but what you said about closed judgments applies now. No one seems to have addressed the point about closed judgments in criminal or civil proceedings. We do not know for how long they will remain closed, in what way we might be able to challenge that when the matters that made it closed in the first place have moved on and things have changed, and at what point they will be in the public domain. So that point applies already.

Q133 Lord Lester of Herne Hill: I understand perfectly your point about closed judgments and about how the matter could or could not be dealt with. What I do not understand—I am sure that this is my fault—is Dr McNamara's point. Where the parties agree that some piece of information should not be disclosed, I do not see how the media can turn up—by definition not knowing what the information is—and make a submission of any value to the court, other than, "We are the eyes and ears of the public, so please think about that". If that is all that they can say because they do not know the information, it seems to be a bit pointless. I apologise for putting it brutally.

Dr Lawrence McNamara: On the first part of your question, the point is that consent refers to dealing not necessarily with one piece of information but with tranches of information. So you end up with a situation where other information will be swallowed up by the agreement, rather than just the specific things that, for instance under PII, might be more narrowly dealt with. The second point baffles me, too. It was one of the real issues in the Australian research. One lawyer said, "You are left making submissions in the dark". I very cautiously wonder whether one option is in certain circumstances to have a special advocate who makes open justice representations, with the question in mind of whether the court should approve some agreement between the parties. The special advocate would then have access to the relevant information. I agree that it is very difficult to get around the problem of lack of knowledge. This comes back to the more fundamental point of why the Green Paper proposals are so flawed at heart.

Q134 Lord Dubs: Dr McNamara, you have done a lot of work in Australia and in this country. Have you looked at any other jurisdictions, for example in the EU or in the United States, from which we might also draw some conclusions?

Dr Lawrence McNamara: I have not looked meaningfully at anything in the European Union. I did some comparative exploration with the US position, but for a range of reasons I found the nature of the law there to be very different. The experience and legal strategies were quite different, so I did not find the US position useful as a point of comparison. Canada is another jurisdiction that I have not looked at but which my reading suggests—and I know that some of the other submissions suggest—would warrant attention, but I cannot speak to that.

Q135 Mike Crockart: I will return to something that you dealt with to a certain extent when you answered Lord Lester's question. You talked about possible mitigating factors to the closed material procedure, in particular the ability of non-parties to make informed submissions about disclosure and the recommendation that media organisations should be notified of any application. You even talked about the possibility of being represented by special advocates. Given the background that you do not think that the proposals should go forward anyway, how do you think that that could be written into any legal framework, and how, ultimately, would it work in practice?

Dr Lawrence McNamara: I defer very much to those whose expertise is in drafting legislation. Questions about how that would best operate are much more for those engaged in the practice of the law. I presume that it would be written in some way that referred to standing to make submissions—that is, a right to apply. I suppose that notification is the first

thing. There should be a period of notification so that the public, not just the media, will be aware when the closed material procedure is being contemplated. I imagine that that would not be difficult to legislate for. The standing issue is the next thing. That requirement could be that the court should hear some submissions, including from those with particular open justice interests. Again, I do not think that I can adequately frame that in specific terms at this point; I am sorry.

Q136 Mike Crockart: Can I then turn to Ms Clements as a potential party trying to take this sort of thing forward? How do you think it would work in practice?
Jan Clements: I will preface my remarks by stating our view that, if the proposals in the Green Paper were in force, it would represent a very serious undermining of open justice principles that I am not sure could be ameliorated in this way. It is a bit of an Alice in Wonderland scenario, where special advocates go into a closed hearing but are not able to communicate with their clients. We would face all the disadvantages that have been set out for any parties who are excluded. It is difficult to know what kind of submissions we could make that would be useful, or how we could do that without being able to go back and take instructions from the journalist who would probably know in much greater detail the relevance and significance of the information that was being discussed. All those problems would arise. On top of that, it may again give an illusion of open justice having been dealt with in a tick-box way, and might make it easier for a court to decide, "We'll go into closed session and just get a special advocate to represent the media's interests". That may sound glib, but I am very concerned that it could backfire and not be of any practical use to the media.

Q137 Lord Lester of Herne Hill: I completely understand what you have said, but both of you are working on the basis of a root and branch objection to the Green Paper as a whole. Let us suppose that you adopted the position that David Anderson QC adopted in his evidence to us as the Independent Reviewer. He saw that there probably was a very narrow group of cases where genuine national security interests might justify a closed evidence procedure, provided that there was full judicial control of what was happening. There would be a very narrow definition of national security, and full judicial protection, in a very small number of cases. Would you still have the kind of fear that you both expressed if national security were narrowly defined in that way? The same applies to what was said about the Norwich Pharmacal procedure. Or is your position, "We want none of it, just the status quo"? I understand that position but would love to know your answer.
Jan Clements: I think that the case has not been made for the necessity of this procedure, even in a narrow group of cases—so I am saying that we do not want it. Although there may be only a very few cases, they may be very important. The kind of "ifs" that we would have to accept—the possibilities that might make it a little more acceptable—are not included in this proposal because the court is deprived of its judicial role. So that would be another kind of proposal.
Dr Lawrence McNamara: Perhaps I may add to that. I agree that what Lord Lester is describing is very different from what the Green Paper describes. That is the problem with the Green Paper: it contemplates vastly more than a narrow group. Were it a different Green Paper, I think that I would still adopt the same position as Jan, but I might be a little more inclined to be interested in seeing how narrowly national security would be framed and what safeguards there would be.

Q138 Lord Morris of Handsworth: I have another question for Jan. I just want to explore the issues and assumptions around confidence in the courts. The Guardian News submission refers to the damage that would be done to public confidence in both the Government and the courts if the Green Paper proposals were to become law. Can you explain why that would undermine trust in the courts?

Jan Clements: In some elements of our judicial system there is a tradition of secrecy, for very good reasons. The family courts have operated very secretly because their main concern is protecting the interests of children. That is a very justifiable thing, but the public perception of the family courts has been one of mistrust. There has been intensive campaigning for the courts to open up about why they make their decisions and to provide more information to the public. That is an example of an area where there is a lot of secrecy and where there has been historically very little trust. Hopefully that will change as things open up a bit more. In all the inquests I referred to, the interested persons were very concerned that they should have as much information as possible. Secrecy undermines confidence. Particularly with these proposals, the public may perceive the court as simply going along—hopefully not, but it could easily be perceived in that way given the proposals—with the Secretary of State's decision that a matter should be heard in private. Both the Government and the courts would then be mistrusted.

Q139 Baroness Berridge: Dr McNamara, does your empirical research throw any light on whether closed court proceedings have a detrimental effect on public trust in the courts, and has there been an opinion poll on what is happening to public trust in the courts?

Dr Lawrence McNamara: I am not aware of any polling, but even that would come down to certain impressions. My research in this country prompts me to say that there are two findings. From my interviews with journalists, I know that they certainly view SIAC as a prime example of closure. It is not so much that there is a lack of confidence in judges who deal with SIAC matters, but there is no way of knowing whether one should have confidence in the closed proceedings. To some extent—this could be putting it a little strongly, but not too strongly—journalists have written off SIAC as a meaningful avenue through which to get information. As the earlier witness, Mr Rozenberg, said, you do not know what is going on and it is difficult to find out information. The more widespread that is, the more damaging it would be and the more it would translate into a wider lack of confidence. The converse of that was shown in interviews with the judiciary that I conducted as part of the current project. I spoke to about 15 judges. One observation that was made was that the aim was to have criminal justice in the same form as in other criminal trials. That has given people confidence in the courts. One judge said, of a defendant who was unfamiliar with the British justice system, "He looked at us like we were all mad because there were fair hearings, there was representation, and the system worked and functioned in the open". Equally, the interviews with journalists suggest that it is really valuable when you can see what is going on. Those two things together make me think that the more the courts were closed, the more public confidence in them would inevitably be damaged.

Chair: I would like to thank you both very much for your very helpful evidence today.

Isabella Sankey, Angela Patrick, Alice Wyss, and Helen Shaw

Oral Evidence, 28 February 2012, Q 140–169

EVIDENCE SESSION NO. 4. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Baroness Berridge
Lord Bowness
Rehman Chishti
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth
Mr Virendra Sharma
Mr Richard Shepherd

Examination of Witnesses

Witnesses: **Isabella Sankey**, Policy Director, Liberty, **Angela Patrick**, Director of Human Rights Policy, JUSTICE **Alice Wyss**, Researcher, Amnesty International and **Helen Shaw**, Co-Director, INQUEST, examined.

Q140 Chair: Good afternoon and welcome to this evidence session, which specifically has non-governmental organisations as witnesses to our inquiry into the *Justice and Security* Green Paper. Could you introduce yourselves for the record, please?
Isabella Sankey: My name is Isabella Sankey. I am Policy Director at Liberty, the National Council for Civil Liberties.
Angela Patrick: My name is Angela Patrick. I am Director of Human Rights Policy at JUSTICE.
Helen Shaw: I am Helen Shaw. I am Co-Director of INQUEST.
Alice Wyss: I am Alice Wyss. I work at Amnesty International, at the international secretariat.

Q141 Chair: Thank you all for coming along. To those of you who have given us a memorandum, we have been very pleased to receive them. The acoustics are not brilliant in this room. At least one of you recognises that from past experience and you are very audible. Please ensure that everyone can hear you. We will not be offended if you shout. I will begin by asking you all the same question. You all see the proposals in the Green Paper as a serious threat to long-standing constitutional traditions in this country, as well as the UK's compliance with various international human rights obligations. Could each of you summarise, very briefly, what you see as the most important rights and principles that are threatened by the proposals in the Green Paper?
Angela Patrick: I am quite happy to kick off. JUSTICE's main concern on reading the Green Paper was the complete oversight of the Government with regard to mentioning principles of open and natural justice as understood in the domestic adversarial system. These are, as

the Committee understands, long-standing, centuries-old common law rights of due process. The rights at their core, if you break down how they have been built upon in terms of the principles themselves, include such basic ideas as the right to an open hearing, the right to be heard in your case and the right to confront the evidence against you. These are core rights that have been supplemented over the years by other things that I am sure the Committee will be familiar with: the right of equality of arms and the right not to have one party act as a judge in its own case.

In *Secret Evidence*, a report that JUSTICE compiled in 2009, we tracked the history of these principles back to the classics, like Seneca, through *Medea*, and various other things, like Lord Denning's famous statements. But you do not have to go back that far to unpack these important common law rights. All you have to do is read *Al Rawi* and *Tariq*, cases that triggered the Green Paper. These principles were at the heart of the Supreme Court's judgment. The justices talked about things like fundamental, foundational, constitutional rights, which meant that they considered that there was no case for the court acting to introduce any kind of closed or secret procedure. What we said in our submission to the Committee is that is the starting point. These rights are fundamental and central to the interests of the adversarial civil justice system in this country. The starting point has to be, is there a compelling case for change?

Isabella Sankey: Angela has outlined very well the various principles in common law that the Green Paper almost entirely ignores in quite a striking way. Liberty also thinks that the Green Paper very much skims over the obligations of Article 6. While they are not as stringent as our own common law requirements when it comes to civil trials; the Government will get themselves in a mess, certainly in the courts, if they go ahead with the proposal as outlined in terms of potential Article 6 litigation.

In addition to a complete failure to really engage with common law principles in the Green Paper, the Green Paper also rides roughshod over open justice principles. While open justice is of course not absolute, and there are lots of precedents in our legal system for secrecy in certain situations, previously those inroads have had to be justified on an individual basis, so the Government have to argue why something cannot be disclosed in open court and available to the press and the public. What this Green Paper proposes is that specific justification should no longer be required across the civil law.

Alice Wyss: In order not to repeat what Angela and Isabella have already put very forcibly, Amnesty International would like to highlight the fact that the Green Paper essentially ignores the impact it might have on the right to an effective remedy for victims of human rights violations. We think that a number of the proposals are inconsistent with a range of aspects of this right, notably the introduction of closed material procedures into civil cases for damages. It undermines the right to access to justice by potentially denying individuals access to a meaningful procedure in which their claim can be fairly adjudicated upon. Access to justice is an essential element of the right to an effective remedy.

In addition, the resultant secrecy that will probably occur if these proposals are implemented in their current form really restricts the ability to access information about human rights violations. A common thread that runs through the Green Paper is an underestimation and a lack of appreciation and real respect for the right to an effective remedy for victims of human rights violations, particularly with regard to the point about access to justice. Also, if the proposals are implemented there are real concerns about whether the Government will more easily be able to avoid proper scrutiny of their human rights record. So for us, particularly with the context of the Green Paper, which is targeted at cases where there are credible allegations of human rights violations, to move those cases further into the shadows is not the best way to uphold the principles of fairness, transparency and openness that my colleagues have already spoken about.

Helen Shaw: I am obviously going to be commenting on the inquest-specific proposals. We would echo what colleagues have said about the fundamental common-law principles of openness, transparency and family involvement that underpin the inquest system in general in this country, but are also all the stronger in cases that engage Article 2 of the European Convention, the right to life.

We would also like to say at this point that the fundamental difference with an inquest is that it is about finding out the truth. It is about a family's opportunity to find out how their relative died, rather than being about litigating on facts that are already known and being engaged in a dispute. There is no choice, and it is about finding out the truth. So we would echo what colleagues have said, but we think that the inquest proposals really sit rather oddly in this Green Paper.

Chair: Mr Sharma now has a question for JUSTICE.

Q142 Mr Sharma: In your evidence, you argue that the analysis in the Green Paper "neglects the analysis of the European Court of Justice in *Kadi*" and the application of the EU Charter of Fundamental Rights. Can you explain the relevance of the EU charter to the Green Paper?

Angela Patrick: There are broadly three reasons why we regret that the Government did not engage with the rationale in the charter jurisprudence. At the outset, the Committee is aware that the decision in *Kadi* was an asset-freezing decision, which engaged Article 47 of the charter, which is the equivalent of Article 6 of the ECHR but—arguably, rightly—provides a different degree of protection to Article 6. It does not apply only to civil rights and obligations or criminal charges, but goes much further. In the case of *Kadi*, what you have is the court looking at a similar situation, where information has not been provided to the person subject to the asset-freezing order, and the court considers whether the person has had access to a fair trial.

In the first part of *Kadi*, the court talks about his not having had a fair hearing because there have not been sufficient safeguards necessary to have a sufficient degree of procedural justice in his case. That is unpacked in *Kadi II*, where they say that in order for the degree of disclosure in that case to be sufficient, it cannot simply be that he only understood vagaries about the case against him, but instead he in fact had to understand the case and the evidence on which it was based in order for him to have had a fair trial. What has become clear, against the background of the EU case law and the charter, is that the court starts with looking at whether a fair trial is possible, looking into all the circumstances of the case. What they have said clearly is that the irreducible minimum for a fair trial is the notion of minimum disclosure, which the European Court of Human Rights talked about in *A and Others*, and that the real question is whether there has been a fair trial in practice.

That is a bit of background. There are three reasons why we think the charter is relevant. Firstly, it is of course only engaged when EU law is in play, but that covers a lot of areas, and those areas are expanding. Secondly, this is another international court, a credible international court, looking at what due process really means in practice, and it is saying that this does not work: secret evidence, when it is truly secret, does not work. Somebody is not going to get a fair trial unless they know the case against them and have the evidence available to them to allow them to challenge that.

Thirdly, we do not say that any part of the different levels of law that we say are overlooked in the Green Paper is conclusive. The charter, like common-law rights and the role played by the European Convention, is only one part of the picture. We say that the fact it is not dealt with in the Green Paper is simply another occasion of failure to grapple with the

analysis that really should have been at the heart of this decision-making process: what is the legal framework that Parliament have to grapple with and what are the compelling reasons that they should be looking for? To us, the fact that the charter, like the common-law principles, is left out of the picture seems to suggest that the Green Paper is starting from the prospect of secrecy first, and thinking about what justice requires later.

Q143 Lord Lester of Herne Hill: I should say that I am on the Council of JUSTICE, but I have had nothing to do with the preparation of any evidence. I hope that what I am about to ask does not sound too narrowly English and common-law based. Do you really think it adds strength to the argument to go to the case of *Kadi*? I have a paternal interest in that case; my daughter was counsel for Mr Kadi. Do you really think it adds anything to start talking about EU law and the charter when English common-law principles require really no further instruction from other sources? The principle you are talking about is so deeply rooted in the English common law that I am not quite sure why we should put European icing on the cake.

Angela Patrick: As I said, it is not the whole picture. We are not saying that it is determinative. What we are saying is that it is yet another example of due process of rights, which JUSTICE accepts, in its written evidence, are mostly founded on principles from English common law. It is simply yet another example of a credible international court looking at instances where individual claimants or individual applicants trying to seek due process are challenging these issues, and the analysis comes down in favour of more openness and a greater ability to have access to the case in favour. We are simply saying that, yes, start from the common-law principles, but, if you have any doubt about them—simply given that the Government do not seem to have addressed them themselves—there are other international obligations on us that show how, in principle, these rights and common-law notions are broken down and that jurisprudence falls down in favour of more disclosure rather than less.

Q144 Lord Dubs: My question is to Liberty and JUSTICE. I think you have gone some way to answering the question, which is obviously not surprising, and I think that Liberty and JUSTICE may have slightly different emphases in answering, but the question is simply this: is the use of closed material procedures ever justifiable?

Isabella Sankey: At the outset, I think I should say that Liberty is opposed entirely to the proposals in the Green Paper, both with regard to the extension of closed material procedures into civil law generally and the proposals on restricting the availability of the Norwich Pharmacal order application.

In answering the question of whether closed material procedures are ever justifiable, it is important to bear in mind their history. As the Committee will know, closed material procedures were introduced in the Special Immigration Appeals Commission in 1997. That is where they started in this country. That was in direct response to the decision in *Chahal v United Kingdom*, which found that our previous process for determining when foreign nationals could be expelled on national security grounds was very much wanting. They were, in some sense, I would say, justifiable at that moment in that particular context, given that they were very much an improvement on what went before.

What we are now being asked to consider is whether they are justifiable when extended much more broadly than the national security context in immigration law specifically. We very much agree with the evidence that has been submitted by the Special Advocates to the government consultation, in which they say that not only are the Government's proposals "insupportable", for all of the reasons that I and colleagues have outlined with regard to the inroads that would be made into our adversarial justice system, but that the context in

which they currently exist needs to be revisited because of the "fundamental unfairness" of the closed material process, even with the presence of Special Advocates.

Angela Patrick: I would entirely bolster what Bella has just put on the record. In our position, JUSTICE has in the past examined the operation of closed material procedures quite closely, as we have explained in our submission to the Committee, and reached the view that it is very much in keeping with what Special Advocates themselves have said and the concerns the Committee has previously raised about the operation of these systems in practice. They are simply unfair. It is impossible, in practice, for those who are in the system to challenge that unfairness. It is very difficult, and once they are in place it is exceptionally difficult to roll them back.

In terms of aspects of the CMP procedure, JUSTICE has said, for example, that PII might itself be improved by the use of a public interest advocate, appointed to inform the court. But as Bella said—like the other occasions when the Committee itself has said, "Actually, what about a Special Advocate on this occasion or that occasion?"—JUSTICE's aim then was to improve the process to ensure better access to justice, more open proceedings and better and improved transparency in the system. It was not, as in this case, a notion that you expand something to reduce the degree of procedural protection that would be available to both parties.

Q145 Lord Morris of Handsworth: The independent reviewer of terrorism legislation and the Bingham Centre for the Rule of Law both accept that there are likely to be some cases in which a fair trial of the claim cannot proceed because of the amount of material that cannot be disclosed on public interest grounds. Do you accept that there might be cases in which the application of the ordinary law of PII does not produce a fair result?

Isabella Sankey: The issue with PII, and the only context in which one party may claim that PII has not produced a fair result, is if one party feels that they have not been able to adduce and make admissible evidence that they would like to rely on. This happens in all sorts of contexts when determinations have to be made about whether evidence will be admissible or not. With the Government it is most likely in the PII context, but in other completely private disputes, evidence may not be admissible for all sorts of reasons. These are just basic rules about admissibility. So we would wholly dispute the idea that the Government suffer from some particular unfairness because of PII. We would certainly not accept that the case has been made in any compelling way that there is a great threat of more cases in future not being able to be determined because of too much PII-sensitive material.

The only case that the Government have been able to point to is, as the Committee knows, the case of *Carnduff v Rock*. Liberty respectfully submits that case was arguably wrongly decided in the Court of Appeal. The dissenting judgment of Lord Justice Waller in that case is something to which very scant attention has been paid in the Green Paper. The decision has not been followed since. We would argue that the innovations in PII mechanisms, whether that be redactions, witness anonymity or even the use of confidentiality rings, which are certainly less than ideal, mean that same decision is very unlikely to be reached again. The only other case that the Government have been able to point to is that of *Al Rawi*, and there we very much have to take the Government's word that they were unable to continue with that case because too much material was PII-sensitive. We would have very short memories indeed if we always took the Government at their word when it came to claims about PII. You only have to look back to Matrix Churchill and a number of other, very recent examples of ill-founded claims of PII, whether it is *Al-Sweady* or other examples that I know that Dinah Rose put to the Committee when she gave evidence.

Angela Patrick: I support Bella's position. I would like to expand a little. As the Committee will be aware, we have also said that we doubt this risk that we are going to be deluged with cases that will be struck out left, right and centre because of an inability to hear them. Of course, the basis of this is *Carnduff v Rock*. We have expressed with respect that, while we have not gone so far as to say that the case was completely wrong, it is dubious authority for trying to prove that change is necessary, if that is the only case for change. It is a Court of Appeal decision. There is nothing subsequent until the Supreme Court's consideration in *Al Rawi*. The decision itself in *Carnduff v Rock* is based on an extremely unusual set of facts that was brought before the Court of Appeal. The decision to strike out itself was taken on the basis of the open pleadings, and both parties were able to make some arguments. So that in itself was very unusual. The claimant in that case accepted that if the police case was right, his case should be struck out. That is extremely unusual. There had been no PII process at all in *Carnduff v Rock*. It was all in the way of preliminary processes. It is also an old case. PII has developed exponentially since it was heard. The court has had at its fingertips a number of measures it could have explored in terms of meeting the public interest in practice before considering whether to stay the claim in the interests of meeting the wider public interest in non-disclosure.

Looking again at the Supreme Court's review of the case, there is not any subsequent application of the case to rely on. What the Supreme Court is doing in *Al Rawi* and *Tariq* is looking at the case in terms of identifying the risk that the Government want it to assess. We are not talking about the Supreme Court being asked to take the decision itself on how it might act if it had a set of facts in front of it. As far as the Supreme Court's citation of *Carnduff v Rock* goes, it is its conclusion that there is a theoretical risk. The Supreme Court itself talks about the risk of another case arising as a "rarity". Some of the judges themselves explore this notion; for example, Lord Kerr looks at it being "more palatable" perhaps to consider a strike-out as opposed to a full extension of the closed material procedure.

Actually, the wider implications have already been covered by Bella. It is not unusual in civil cases for the procedural rules that are in place to maintain the credibility of our judicial system to have an adverse impact on one side's case or the other's. We put this to the Supreme Court in *Al Rawi*. We said that the Government have to take the risk that in some cases, if they do not get PII, they may have to settle. On the other hand, if *Carnduff v Rock* is right, there may be a minimum of cases where there is a likelihood not of strike-out but of stay, and that in practice might be something that is just an ordinary side effect of maintaining the credibility of our civil justice system.

Chair: Your answers are so comprehensive you are anticipating some of our questions.

Q146 Lord Lester of Herne Hill: The answer has raised a lot of other questions. I wonder whether one of you can put yourself in the position of the Government. I think that Ms Sankey suggested that the Government are not to be trusted, but, in spite of her scepticism, let us assume that Governments can be given some credibility. In *Al Rawi*, as I recall—I was simply appearing for one of the interveners in the case—what the Government were saying was, "Look, there are so many documents that we would have to go through in order to make sure that they could safely be disclosed that it would take two or three years to do that." I forget how many thousands of documents it was, but they said to the Supreme Court, "It is simply not practicable for us to have that obligation, and therefore we will transfer it to the Special Advocates and they can look at it themselves." That was part of their argument. Now, as I listen to both of you, I am not sure whether you are accepting the argument in the Green Paper that one of the advantages of what the Government are proposing is that it would make it possible for some cases to be fairly determined that cannot now be determined—we do not know how many there would be—and that there is something unjust when, to take the *Al Rawi* set of facts, the Government have to cave in and

pay out a lot of money because they cannot pursue the case from a practical point of view. Do you accept, as David Anderson QC accepted in his evidence, that there may well be, at least theoretically, a small number of real cases where it would be more fair to operate this procedure than to compel the Government simply not to be able to defend themselves or Britain in a court? Do you accept that, theoretically at least, what David Anderson QC said was true, or are you saying that there are no such cases and you think that the existing system is perfectly alright? It would help us to be quite clear about where you stand on that.

Isabella Sankey: Absolutely. I was not intending to imply that the Government can never be trusted, more that there should be a healthy amount of scepticism in assessing government claims of public interest immunity, given past recent experience. On the issue of accepting future theoretical cases, it is a very hypothetical question. Indeed, in reading David Anderson's submission to this Committee and also his oral evidence to you, he did not seem to base that assertion on anything other than the fact that he has been told by Government that there may be such cases. It is our view that, because of the inherent unfairness of closed material procedures and the central problem identified by Lord Kerr in the *Al Rawi* litigation—that CMP may positively mislead the judiciary and allow perverse judgments to be reached—opting for a closed material procedure is never going to be fairer than going through the public interest immunity process.

On the important issue you raise about expediency which the Government argued in *Al Rawi*, I can only really defer to Special Advocates that have an understanding of how lengthy or otherwise CMP procedures can be. It is my understanding that, in previous evidence given to this Committee, they felt that there would be no real difference in the timeline for hearing *Al Rawi* through to the end. So that argument does not really stand as far as they are concerned, and I can only agree with them.

Angela Patrick: I would agree with Bella. As you said, my answer to the previous question gave rise to other questions. Your question, I think, breaks down into three stages. You asked whether we accept the hypothetical that there might be a risk that some cases might not be capable of being heard. I would say that is a hypothetical risk that has never arisen since *Carnduff v Rock*, and it is just that—a risk. We think that it is extremely unlikely that it would be reached in practice, given modern principles of PII, and if it were, there would be extremely few cases that would be exceptional. The real question for the Committee is whether that notion of risk and that minimal number of cases is enough to provide compelling evidence for a change of the nature that the Government are proposing.

On the second argument—whether it is unfair that the Government do not get to put their information in front of the court—I entirely support Bella. It is a false assumption that it creates fairness that one side gets to put its information into play without challenge. Again, we would refer back to Lord Kerr's assessment that that is a "deceptively attractive" argument, because it is incredibly simple and it appears obvious on its face that, if the court has seen it, it is much fairer. Actually, we have an adversarial system in this country. A case is only worth how much it stands up to challenge. If a case is only put behind closed doors, without any opportunity for the claimant in a civil case to challenge the defence, it undermines the credibility of the court.

The final point is the expediency argument. Again we would defer to the Special Advocates. It is a question of whether or not it is a compelling reason if what you are really being faced with is an argument about expediency, when what you are talking about is balancing two exceptionally important public interests, the interest in open and natural justice and the interest in national security. We think that the PII system provides a valuable opportunity for judicial oversight of that balancing mechanism. What is being proposed here is the

removal of that balance and that judicial oversight in favour of ministerial discretion, which we think would be highly inappropriate.

Q147 Lord Lester of Herne Hill: But suppose that the proposal was not quite as it is in the Green Paper but was that, instead of the Minister making a decision that the closed evidence procedure should be followed and then the judge being able to do a review by way of loose judicial review principles, the judge would do precisely the same balancing in this procedure as would be done in public interest immunity—in other words, the Minister applies to the judge; the judge would then see all the relevant material, and the judge himself, not on judicial review principles but on the merits, would decide how to balance the interests of justice and national security. Would your answer then be different, or would you have the same objection? You have just said that you have confidence in the public interest immunity procedure. Supposing that you adapted that and applied it to this kind of situation, what would then be your response to that?

Angela Patrick: My response is twofold. The first part would be that we maintain our principled issue that, as soon as you impose a closed material procedure, you create the problem that you are trying to fit an adversarial system into a system where you do not have one side of the case effectively represented. That in itself, to us, inherently creates an unfairness that cannot be addressed by any of the safeguards that we have seen so far. They are not safeguards; they are justifications for using a system that we think is incredible. You do not get rid of that, or get rid of the risk that what is happening is encouraging the court to reach a conclusion that is in itself inherently unjust, because the court has only heard one side of the story. You will never get rid of that in any CMP procedure, even if the court objectively says, "The only way I can get this case in front of me and allow it to be heard is to have a CMP." In our view, that is always going to be objectionable.

The second point to that is if from a practical perspective you are saying, "We go through all this PII exercise and the court stays in play," does that not undermine the initial argument, which was, "We would quite like to skip through all this analysis, and we do not want to have an effective examination of the competing public interests"? Our concern, from a practical and pragmatic perspective, is that once you open the door to some form of CMP, be it discretionary or otherwise, that CMP will be the goal of a Government seeking to protect something that they legitimately believe needs protection, such as a sensitive piece of information, and that the whole process will be to persuade the judge that he does not have to go through a stage-by-stage exercise of looking at every piece of information and evidence, considering the public interest and where the balance lies. They will be saying, "Do you really want to spend three years tied up in this? Shall we not just jump to the conclusion that the end point is a closed material procedure?"

We did a lot of research in 2009 about existing closed material procedures. The Committee, I know, has done years of work looking at how they work in practice. Once they are in play, it is exceptionally difficult to examine whether they are working effectively or fairly. We, and a lot of other academic and legal commentators have criticised them across the board for being unfair, opaque and undemocratic.

Q148 Chair: We have quite a lot of questions to get through. Could I ask all the witnesses to be a bit more brief? Isabella Sankey, you wanted to say something.

Isabella Sankey: I very briefly wanted to answer the question that Lord Lester posed. I think that even if the judge adopts the oversight of the mechanism that the Government propose, with respect, he would not be undertaking the same exercise that he currently does with the PII process. It would not be a balance of national security arguments versus the fair administration of justice, because, for all the reasons we have outlined in terms of the inherent problems with CMPs, I do not think that they can be classed as mechanisms

that allow for the fair administration of justice. Indeed, Lord Kerr went so far as to say that it would be a leap to call CMP a judicial process because of the inherent flaws. So even if the judge is the determiner of whether or not you go to CMP, the judge has essentially been co-opted into an inherently unjudicial process.

Q149 Lord Lester of Herne Hill: So it follows from what you are saying that you would reject as unfair all the existing uses of closed evidence proceedings, for example, in SIAC, and say none of that is fair.
Isabella Sankey: We would say it is not as fair as it would be in an open process. What we have accepted is that, because of the particular constraints that national security requires in certain contexts, the fairness or otherwise of the closed material procedure would depend very much on the context. In the SIAC system, as I said earlier, because the background was something less fair, it was more fair than that. There are stages of fairness.

Q150 Rehman Chishti: With what you are saying at the moment, Ms Sankey, are you saying that we should not have PIIs or behind-the-scenes hearings? If you are, speaking as somebody who has prosecuted and defended many cases before coming to this place, you may never be able to get undercover operations before the court to have a successful prosecution.
Isabella Sankey: We have no problem with the current working of PII. Indeed, we think that the Green Paper does not show anywhere that PII mechanisms are failing to protect national security. As others have said, I would say that, in the last 10 years or so, the courts have developed some very imaginative and creative ways of ensuring that, in the criminal and the civil context and, I should also mention, in the coronial process, trials can proceed very well under the PII process. Indeed, we have heard government arguments about how unsatisfactory PII is when they have brought forward previous proposals for secret inquests. We have heard time and again, as different inquests were coming up, that they would not be able to proceed in a proper way, but actually what happened was that ways were found in which evidence could be put in open court, sometimes with certain restrictions, to allow all the requirements of Articles 2 and 6 to be met.

Q151 Rehman Chishti: Finally, on that very point, are you then saying that you fully support the PII procedure and application as it is applied in the court at the moment?
Isabella Sankey: Yes, we do.
Angela Patrick: Can I supplement that? I will be very quick. I would not like there to be any confusion on the record about whether JUSTICE supports the current use of CMP. JUSTICE quite firmly put on the public record that we think that the existing use of CMP is unfair and does not work, and that it should be rolled back. In terms of PII, we think it is an effective system and there are lots of innovative ways in which it has been supplemented over the years to make sure that it works in practice. What we have said in terms of PII is that, if you were going to roll back existing CMP, there are ways of bolstering PII to make sure that it is a more effective system in practice. The core of that, as we have said, is that you could adopt some form of public interest advocate, almost an amicus role, where somebody is appointed as a special advocate, not in the terms currently seen but to assist the court in determining and challenging the Government's claims for national security in cases where it is considering the balance between open justice and non-disclosure.

Q152 Baroness Berridge: In Liberty's response to the Green Paper, you said specifically that the proposals in the Green Paper "would have prevented the worst practices of the war on terror from being exposed … through a combination of litigation and investigative journalism". Can you be specific for the Committee about what litigation you had in mind, and what practices would not have come to light if these particular proposals in the Green Paper had then been in force?

Isabella Sankey: The two particular areas of litigation were the *Binyam Mohamed* litigation and the *Al Rawi* litigation before it settled. In the *Binyam Mohamed* litigation there was obviously an application for a Norwich Pharmacal order, which he was ultimately unsuccessful in adducing, because public interest immunity prevented it, incidentally. But it was as a result of that litigation that the "controversial" seven paragraphs of an earlier Divisional Court judgment were actually published by the Court of Appeal. It was in those paragraphs that we had confirmation, for the first time in a court judgment of the UK, of his mistreatment and mediaeval torture and our knowledge of it. That was a very significant moment in the campaign to bring to light the worst excesses of the war on terror, and it was following that judgment that the matter was referred to the Attorney General and then referred on to the DPP for investigation, so it certainly inspired some further investigation into the allegations.

In terms of the *Al Rawi* litigation, before the Government decided to settle in that case, there were a number of documents that were disclosed that showed: how closely involved we were with the rendition of UK nationals in 2002; that the Americans had said that UK nationals being held in Afghanistan could be returned to the UK and that our Government did not seem to take them up on that offer; that the former Prime Minister Tony Blair knew about allegations of torture back in 2002 before British nationals were transferred to Guantanamo Bay; and that the former Foreign Secretary David Miliband was responsible for giving the green light to MI6 for intelligence-gathering operations where there was a risk of torture of detainees. There were a number of factual statements that were adduced through the process of this litigation that we say would have been shut down if the current Green Paper proposals had already been in place.

Of course, all of the allegations that were confirmed through this process led to the present Government announcing very early on that they were going to set up a judge-led inquiry into the allegations. It is open to question whether that inquiry would ever have been announced if it were not for the litigation to which I have referred. In our view, it is quite ironic that this Government are now also proposing to shut down the very avenues by which those operations came to light.

Alice Wyss: Can I just add a supplementary to that? Just to echo what Bella said, the context of these proposals is crucial. The cases being referenced are *Binyam Mohamed* and *Al Rawi*. This comes out of a period in our history where there are serious allegations of UK involvement in human rights violations. In those kinds of cases, it is essential to have open, transparent and fair mechanisms that allow access to the truth and to information that demonstrates what happened to those individuals, so those claims can be fairly adjudicated upon and have a proper response. For us, the context of the Green Paper and where the proposals are coming from is something that we cannot forget when we are looking at how they might then be applied in the future.

Q153 Lord Bowness: You have all touched on this in a way. Your evidence to us shows that you are concerned about the potential scope of the application to make closed material procedures available in civil proceedings, and particularly that this is not limited to material relating to national security. If it was confined to matters of national security, would your concerns about the proposal for CMP in civil proceedings be alleviated, perhaps if it was

made explicit that the use of such procedure was an exceptional measure of last resort, when there was not any other way of getting a fair trial?
Isabella Sankey: I can answer this very briefly: absolutely not.
Lord Bowness: I do not often ask a yes or no question, but that is fine; I am sure the Chairman would like a yes or no answer from everybody.
Isabella Sankey: Could I just add one thing? In our experience, and at the risk, as I say, of sounding like a cynic once again, government consultations tend to ask for rather more than they eventually get round to legislating for. While the sweeping nature of these proposals left us aghast, we imagine that there will be some sort of compromise that the Government seek to reach, in light of the fact that there has been such resistance, not least from those upon which they hope to build this new system. That said, we do not see that the case has been made at all for an extension, even in the more limited scenario that you posit.
Angela Patrick: Again, no. The Committee is quite familiar with the last time and the time before that that the Government proposed new forms of secret evidence procedures. On both of those occasions, they were talking about inquests. If you recall, on those occasions the trigger was wide, then it was narrower, then it was narrower still; but on each occasion they were never able to define precisely what national security was intended to be. In fact the Committee itself asked some quite pointed questions about what the evil was that these proceedings were intended to address. The Government on that occasion—and I am sure that they were trying to ensure that they were meeting their own concerns about the need for change—were unable to define it precisely enough to satisfy the Committee. We think that, despite our principled objection to the use of CMP across the board, it is always going to be difficult to define what you attach these proceedings to.
Lord Lester of Herne Hill: I want to find out how strong your commitment to natural justice really is. Suppose that the evidence was that the United States was no longer prepared to share very sensitive intelligence data with our security and intelligence services, because it finds our procedures unsatisfactory because they are so leaky that matters that ought not ever to be disclosed are disclosed. What would you say about that?

Q154 Chair: Can I prevent you answering that question? Can we first have the other members of the panel respond to Lord Bowness's question and then come back to Lord Lester?
Lord Lester of Herne Hill: I am so sorry.
Alice Wyss: I will go next and then INQUEST. No would be the simple response. In addition to what Bella and Angela have added, I would note that narrowing it down to just national security also ignores the essential importance of the PII process of balancing competing interests. Even if you can narrow it down—which, for reasons that have already been outlined, is a problematic thing to do—but you are unable to balance the interests of national security against something such as administration of justice or, for example, evidence of human rights violations, just because you have narrowed it down you do not get a proper, fair procedure ensuring effective remedies or fair trials.
Helen Shaw: I would echo colleagues in saying no. I would also add that we have shown hopefully in our written submission a number of inquests that actually did engage questions of national security—the Nimrod crash, the death of the MOD scientist Terence Jupp, the 7/7 inquest and the Jean Charles de Menezes inquest—where it was perfectly possibly under the current legislative framework for an inquest to balance the needs of national security with the need for openness and Article 2 compliance.

Chair: Now, with regard to Lord Lester's question, he did jump the gun, because Baroness Berridge was going to ask a question. We have parked Lord Lester's question, but I am now unparking it. Was it specifically to one person, Lord Lester?

Q155 Lord Lester of Herne Hill: If the Americans will not co-operate, what is your response?

Angela Patrick: My answer is that there are a lot of hypotheticals in that outline. The first point would be that, while I am happy to engage with the idea that they will not co-operate, that is not what it says in the Green Paper. The Green Paper talks about maximising the potential for intelligence exchange. I am sure that there has been some very frank discussion behind closed doors, but actually that is not what is on the table here. The Government are talking about the fact that there is not any risk to what they call life-endangering intelligence exchange. They are simply talking about maximising the benefit of that relationship.

The second point is that the Americans may have assessed the operation of our system from the outside, looking in. Have we actually made any effort to explain to them how the system really operates? We never heard this argument until we had the case of *Binyam Mohamed*. We explained this in much more detail in our submission, and I do not want to go over this too much, because Bella has already answered it, but it is a really exceptional case. What has been found most offensive is seven paragraphs of a Divisional Court judgment that rehashes material that was already published in the US. In that judgment, the court itself was exceptionally deferential and clear about the significant and important weight that it must give to the Secretary of State's assessment of the US fears. The judges themselves say that, had this material not been disclosed in the US, simply off the back of the control principle concerns that they had heard, they would have applied PII and would not have had the material disclosed. On my reading of that, it is actually quite a well-functioning system and it would have protected the material from getting into the public domain. I just ask, has anybody had that conversation with those people who are saying that the system does not work?

Isabella Sankey: If I could quickly add to that answer, as Angela says, there is no suggestion that the Americans are talking about withholding life-saving intelligence from us. Putting that to one side, I think that it is possibly one of the most offensive arguments of all, and probably the most offensive to constitutional principle and the rule of law, to argue that essentially intelligence-sharing arrangements should be above the rule of law and that the courts should be completely ousted from hearing applications that relate to information held by our security services. If this principle were to be accepted, we would be taking ourselves back several decades in terms of accountability of the intelligence services.

As Angela has said, in the *Binyam Mohamed* litigation the judiciary said that the control principle would have been ultimately upheld after the PII balancing process was undertaken, so the information would not have been put into the public domain. We should also remember the context: the application began while Binyam Mohamed was in Guantanamo Bay, having been detained by the Americans for several years and tortured, and was facing a prosecution by the Americans on a capital charge. They were seeking his conviction and possibly his execution. What he was trying to elicit was information to demonstrate that he had been tortured. You cannot really posit a more serious set of allegations and consequences facing an individual. The fact that the Americans, we are told, are making this argument in relation to that case is particularly offensive.

The other important point to bear in mind is that the irony is, of course, that the information he sought ultimately came out through the American courts, which heard testimony in a habeas corpus application and put information into the public domain regarding the exact circumstances of his torture and treatment, so there is a huge irony there.

One last point—I am aware that this answer is quite long, but there is a lot to be said on this—is that I think there is a serious misunderstanding in Government about the system that currently exists in the United States and the supposed guarantees that they can give to us about being able to withhold our intelligence or prevent information that we give them being disclosed through the court process. We have commissioned some research at Liberty into the American system and have received some help from our colleagues at the American Civil Liberties Union, which is our sister organisation in the United States. What it has told us is that State Secrets Privilege doctrine developed in a very similar way to our doctrine of Public Interest Immunity, through the common law and with a very similar procedural test, i.e. that a judge will look at material: it is a test of admissibility and there is a balancing exercise as happens under PII.

What has happened in the last few years in the States, and at the height of the war on terror, is that a test that was actually very similar to PII has been conflated with another common-law rule (that had previously applied to a very small number of cases concerning contractual arrangements between the security services in America and former employees), which barred the justiciability of those claims. So the situation we now have in the United States is that the State Secrets doctrine has been somewhat expanded by the lower courts to bar certain claims like *Binyam Mohamed v Jeppesen Dataplan* from being heard, rather than allowing an admissibility balancing exercise as under PII. This has happened not without controversy. Indeed in that *Binyam Mohamed v Jeppesen Dataplan* litigation where this principle was expanded, the judgment was made by a majority of one. It was six to five.

Chair: I have to stop you now. If you feel that I have been unfair, please send us a memorandum. But there are a quite large number of questions to be posed to you, and I want to be fair to all of you and to the Committee. Baroness Berridge, you were ahead of Lord Lester, who cut in on you and has apologised.

Q156 Baroness Berridge: Just a very quick question to Ms Sankey. You said from your experience that you have seen Green Papers before and there is often an ask that is much greater than what you actually end up with. That is a classic negotiation technique. To look at the detail for a moment, what do you think are the obvious overasks in the report? Do you have an opinion on what the obvious overasks are in the Green Paper?

Isabella Sankey: Given the lack of any compelling evidence that there is a problem to be dealt with, we would say that all of it is an overask. But the typical overask in this paper is the idea that it will be the Secretary of State that makes the determination rather than a judge. That is presumably something that will be quite easy for the Government to give away as negotiations progress. There is also the expansion in scope from what was originally asked for in *Tariq*, which covered national security, to the entire "public interest" including international relations, etc. There are a number of overasks.

Angela Patrick: I would just add that, as Bella says, the starting point has to be: where is the compelling reason for change? That is the test that the Supreme Court applied. Although obviously Parliament is sovereign and has discretion to act as it should, we think that should be the starting point for any change here. So we also think that the whole thing is an overask. If you want an easy contrast, look at what was being asked for in *Al Rawi*, when they were asking the Supreme Court to exercise its jurisdiction and contrast exactly the additional elements that Bella has identified.

Simply I would go to the test itself. Effectively, the Green Paper is proposing to give the Minister an unprecedented discretion to simply say, "I think that it is likely that this sensitive material will harm the public interest," with no qualifiers: "I think it is likely that there will be

some harm because this material is sensitive." When you look at the definition of "sensitive", it is simply that the Secretary of State thinks that this material is likely to harm the public interest. So, put simply, what the Government are asking for is a ministerial say-so that they think that it is not in the public interest for this material to be heard in the open.

Q157 Mr Sharma: It may already have been answered, but I will still put it. Can you explain why you are against legislating to provide greater certainty about the particular contexts in which the disclosure obligation does not apply?

Isabella Sankey: Our principal objection to this is that is simply unnecessary and will actually further complicate and perhaps lead to even greater satellite litigation. The current situation is that the boundaries of Article 6 in different contexts are being tested in the courts. This will have to continue in individual cases, because the determinations are always going to be very fact specific. The only reason we can see why the Government want to legislate—and it is made quite clear in the Green Paper that this might be the motivation—is that they want to restrict the principle in certain contexts. We think that is unjustified. As I say, we also think that it is unnecessary.

Alice Wyss: I would echo what Bella has said. If you look at what has happened since *AF (No. 3)*, the Government have frequently argued to restrict the application of *AF (No. 3),* be it in so-called light-touch control orders or in different types of proceedings, so legislating is, as Bella said, unnecessary because these questions have still come before the court. The motivation as to why it is necessary to place it in legislation is questionable when you know that previously the Government have so forcibly argued to limit the contexts in which *AF (No. 3)* applies. It is not necessary and I would question the motivation as to why now the Government think it is.

Angela Patrick: I echo my colleagues' concerns. I would also add that the Committee itself has grappled with this problem. The Government have a very restrictive approach to the interpretation of the existing case law. If we are just looking at *AF* and the case law under the charter—*Kadi* and those other cases that are currently being considered by the CJEU—we would say that sceptical and very narrow approach to any list that might be produced would not only not achieve the Government's objective of clarifying the law and creating greater legal certainty but, if you set a list in stone that is doomed to fail, it would create more difficulty for individuals securing a hearing compliant with Articles 6 or 47 of the charter. It would also exacerbate the number of cases being brought successfully, if not in the domestic courts, then definitely in international tribunals.

Q158 Lord Lester of Herne Hill: One of the issues raised in the Green Paper is about the Norwich Pharmacal jurisdiction, that is to say, the jurisdiction that allows disclosure of documents where somebody is mixed up with wrongdoing involving somebody else. In the evidence given by David Anderson QC, unlike his evidence on the control principle generally, he found this to be an area where some reform might be a good idea. He accepted that the novel application of the principle to national security matters had caused nervousness among the UK's international partners and had a negative impact on the flow of intelligence information to our agencies. He said he regarded respect for the control principle as vital to our UK national security. First of all, I assume that none of you, any more than I, can second-guess his judgment about that, because his view about the risk is based upon his own position as independent reviewer, so unless you have some alternative information let us start with the assumption that he is right in saying that the control principle is important and that there is the risk that he has referred to of a negative flow of intelligence information. Really, there are two matters. One is, will you accept his judgment on that, and if not, why not? The second is that, if you do accept his judgment, then would

you also accept that, in this area, some limitation on the Norwich Pharmacal principle on national security grounds might be justifiable? He suggests having a system where non-disclosure is based on judicially reviewable ministerial certificates, but it could be done in some other way. What is your response to that issue?

Isabella Sankey: We have no way of knowing what the discussions are behind closed doors with regard to the Americans or any other of our intelligence-sharing partners, but I would refer back to the point I made earlier about how this is perhaps one of the more offensive arguments in favour of shutting down open justice and natural justice.

Q159 Lord Lester of Herne Hill: We are only talking about the Norwich Pharmacal principle.

Isabella Sankey: Sorry, in that case ousting the jurisdiction of the courts. There are similar aims that I think are being sought. The idea that you undermine the rule of law because a particular community of public officials have asked you to is particularly offensive. I would also refer back to the point that we do not believe that the Americans are able to give any sort of certain guarantee that there is not a risk of certain information that we give them being disclosed through the court processes in the United States.

Q160 Lord Lester of Herne Hill: It is my fault, but you are not really answering the question. We are talking here about a peculiar British procedure, under Norwich Pharmacal, which allows a far-reaching disclosure of documents against somebody who is involved in wrongdoing with somebody else. I think all that is being said is that, in that context, some restriction on national security grounds would, so says David Anderson QC, be justified. It is that narrow issue, not the closed evidence procedure in general or fair trial, but that imaginative use of that procedure in the *Binyam Mohamed* case—which I think was the first time that it was used in that sort of context—that David Anderson QC is dealing with. That is where your evidence would help us.

Isabella Sankey: Yes. With respect, I do understand the question you are asking in relation to Norwich Pharmacal. It was actually an orthodox application of the principles but for an unusual set of facts. What is being proposed is shutting down an entire area of common-law jurisdiction in its application to public bodies, potentially. I think that my statement that it is an ousting of the court's jurisdiction is relevant because that is exactly what is being proposed.

What I would say is that in that case the control principle was ultimately upheld. Of course it is a principle to which our judiciary are rightly going to have regard, because it relates to national security, but the argument that the control principle is being undermined or completely ignored is simply not true. The disclosure was not made in the *Binyam Mohamed* case. I do not think that the argument has been made, and I would also add, because I think it is relevant to the argument over the control principle, that it is quite rich for the Americans supposedly to be asking us to change an aspect of our judicial system to protect their information when our understanding is that they are not able to offer that guarantee to us, if that makes sense.

Lord Lester of Herne Hill: It makes sense. I do not know whether it is correct or not.

Angela Patrick: I would just add to what Bella has said that of course we cannot, as Lord Lester helpfully proved, challenge what David Anderson has heard or seen behind closed doors about the degree of nervousness on the part of our intelligence partners, but what we can question is: (a) what has caused that nervousness; and (b) and how we resolve it. The only analogy that is popping into my head is a child telling you that there is a bogeyman in

the cupboard. The only result is not that it gets them out of bed every night when they tell you that the bogeyman is there. You might want to tell them, "Look, there is nothing in the cupboard. Why are you frightened?" and try to address their nervousness through alternative means as opposed to giving into their demand that it is time they got up and watched *Coronation Street*.

What I am trying to say is that, if you actually look at how the Norwich Pharmacal proceedings were used in *Binyam Mohamed*, it was an exceptionally unusual case. It was new and innovative in terms of its application to this kind of factual scenario, but if you unpack why the jurisdiction exists, it is intended to help individuals access justice when they can only get their case heard through the decision of the court to order disclosure of material held by a third party. There are a number of hurdles that you have to get over in order to make your case stick. They are quite significant. Everybody talks about being mixed up in it: yes, you cannot just be a witness, there has to be some evidence that you are embroiled, however innocently, in the claim. The claim has to be arguable and the court has to be persuaded that it is appropriate to exercise its jurisdiction. As we saw in the *Binyam Mohamed* case, part of that included whether it was appropriate for the court to exercise its jurisdiction given the significant public interest issues in play. What was important about *Binyam Mohamed* was that there were significant public interest issues weighing against the national security arguments. As Bella has outlined, what was in play here was a man arguing that he needed this information to help in his defence in a capital trial. That is what the court had in front of it.

If you unpack it, the court did not actually resolve the Norwich Pharmacal issue, because the material was disclosed by the Americans during American proceedings to security-vetted counsel in the US, so it never came to a conclusion. Then there was a PII exercise, which would always be the case if this jurisdiction was being sought. If the court thought it was in the public interest to exercise its jurisdiction, the Government would have a second argument: "Even if it is in the public interest to exercise your jurisdiction, we ask for public interest immunity." That exercise was not fully played out in *Binyam Mohamed*, but, as I said earlier, the PII exercise they considered in terms of disclosing the terms of the original judgment was extremely deferential and respectful of the Secretary of State's assessment of the danger and risk that was posed to the control principle. So in terms of nervousness providing a compelling reason to oust the jurisdiction of the courts, we would say that perhaps there are other ways to quell that nervousness or to question whether it is well founded.

Alice Wyss: I echo what Angela has said. We respect the importance of the control principle, but I also think that it is problematic if the control principle trumps everything, so that it does not matter that the evidence that we are talking about is evidence of an individual who has been tortured or an individual who has been rendered from one country to another and then ill treated. We think that the idea that the control principle should always trump that and that there should not be a court overseeing it—carrying out a balancing exercise of listening to the Government's national security arguments as to why they do not want to disclose the evidence but also looking at the importance of having that information disclosed and there being a public disclosure of the truth—is problematic. As has already been made clear, with regard to the Norwich Pharmacal order in *Binyam Mohamed* they were not even looking for public disclosure: they were looking for documents to be given to the lawyers cleared by American security.

Angela has already highlighted that in the Norwich Pharmacal test there are five stages. As far as we are aware the Government reference seven cases in the Green Paper. There has been disclosure of seven paragraphs of the judgment, but there has never been a disclosure by a Norwich Pharmacal order of any document of intelligence material of operational sensitivity so far. This is in part because of how stringent that test is: you can only take a

Norwich Pharmacal claim if there is no other possible avenue for you to go down and if you can demonstrate to the court that it is absolutely necessary for you to have that information and the court thinks it is appropriate. It cannot be used in a wide-ranging evidence-gathering exercise. That is not what the current procedure for it is. The idea of nervousness from the Americans meaning that we completely shut down and give de facto secrecy—because at the moment the proposal is that material the UK intelligence agency have or have handled automatically will not have to be disclosed by a Norwich Pharmacal order—is a really problematic way of approaching this particular jurisdiction.

Q161 Lord Lester of Herne Hill: Am I allowed a very brief supplementary or not? It just occurred to me that I did not do justice before to your use of the *Kadi* case in Luxembourg. Listening to you it occurs to me that there was more in that point than I realised, because in *Kadi* the United States procured the United Nations to produce criteria for seizing terrorist assets without due process of law. What the *Kadi* case established, unless I am mistaken, through the Luxembourg court is that European principles of due process must be read into the American/UN procedure. So *Kadi* may be more important than I realised because it is an example of where the United States was not putting forward fairness principles strongly, but, within our jurisdiction, the courts insisted upon them. I apologise if my question did not do justice to it, but I now understand better. Is that what you were getting at?

Angela Patrick: That is part of the context in terms of looking at the wider question of reading our law according to the notion that you do not just start from a perspective of security but have to question it in terms of what the fundamental principles of our jurisdiction are. But as I say, it is only one part of the picture.

Chair: To end, we have a series of questions to INQUEST.

Q162 Rehman Chishti: I have a number of questions. You touched upon them briefly earlier. I will ask the first just for general comment, and then ask two specific follow-on questions for you to clarify. The first is that the Government suggest in the Green Paper that there have been cases in which coroners have concluded that they may have been unable to conclude their investigation because of the exclusion of material, and that reform of inquests may therefore be warranted in order to enable more full and comprehensive conclusions. What is your view on that?

Helen Shaw: As far as we know—and obviously we do not know everything, but we do know a lot about many of the inquests, particularly ones that raise contentious issues—there has only been one case that has not been able to conclude at inquest, which is the case of the police shooting of Azelle Rodney in 2005. That is now subject to an Inquiries Act 2005 inquiry, which is due to start in September. So really we feel that the case is not made by the Government in the Green Paper. Certainly it is no stronger than it was in 2008, when the Counter-Terrorism Act was being considered, or in 2009, when the Coroners and Justice Act was being considered and similar proposals about certified inquests—so-called secret inquests—were raised. We do not think that the argument has been made.

I would just add that we certainly feel that it runs counter to the messages and signals that are coming from the judiciary at the moment in terms of openness and transparency in relation to inquests. In paragraph 3 of our submission, we refer to the 7/7 London bombing inquests, where there was a challenge to the coroner, which was unsuccessful. Also, recently in the Azelle Rodney inquiry there was an application for anonymity for all the

police officers involved, which was not successful in the Administrative Court. We do not see the evidence for the need for change.

Q163 Rehman Chishti: There is a saying, "Great minds think alike," and you have answered my next question, which was about how many have not been completed. You say that it is one. The other question is this: how many cases are you aware of in which the investigation has been less thorough and less effective because sensitive material has been protected from disclosure by PII?
Helen Shaw: None. I would say again that, while we do know a lot about inquests, we do not know about every single inquest that has taken place. But I would again draw the Committee's attention to our written submission, where we have gone through a number of cases that have raised highly sensitive issues, where, with the pragmatic approach from the bereaved families, and also coroners and indeed judges who have been sitting in some of those most contentious cases, a way has been found within the existing legislation, by the use of PII and other special measures, to enable the inquest to carry out its function of establishing the truth about how somebody died, in the broader circumstances where Article 2 is engaged, and balance the needs of security or sensitivity. So we are in the situation, with regard to the proposals in this Green Paper, of being very puzzled, yet again, about why there is a further attempt to try to bring in something that runs counter to the ethos and the purpose of an inquest, which is to find out the facts about how somebody died.

Q164 Rehman Chishti: Just for clarification, from what you have already submitted and from your recollection, the answer is none.
Helen Shaw: None.

Q165 Mr Sharma: A few questions from me. Could CMPs be introduced into inquests compatibly with Article 2 of ECHR?
Helen Shaw: The short answer to that would be no. The longer answer would be that we think that it fundamentally challenges some of the really key components of Article 2 and an Article 2-compliant investigation and the minimum standards that need to be met, in particular that the investigation must be seen to be independent and effective, that the next of kin need to be involved and that there is a sufficient element of public scrutiny. We think that if you were to introduce closed material proceedings into inquests, you would exclude the family, and therefore you cannot meet the minimum requirements of an Article 2-compliant investigation.

Q166 Mr Sharma: How would the introduction of CMPs into inquests affect public confidence in the inquest system?
Helen Shaw: It would be really damaging. One of the functions of an inquest is to allay public suspicion and, particularly where the state has potentially been involved in someone's death, to ensure that there is a thorough, public and open scrutiny of the circumstances and that the full facts are established. There is already a lot of public suspicion about what has actually occurred in relation to many contentious deaths—in custody, for example—and if these kinds of proceedings were to be brought in, where it was maybe possible to exclude families and the public from the hearings, you would undermine the important public confidence function, and also the function of allaying suspicion that there has been wrongdoing that has not been uncovered.

Q167 Mr Sharma: My last question is, do you have any comment on the response of the Coroners' Society of England and Wales to the Green Paper, which generally supports the

idea of amending or adding to the Coroners Rules to enable a coroner to have a CMP for part or all of the inquest?
Helen Shaw: Our first response was one of surprise that the Coroners' Society said what they did in their response. I was thinking about that in relation to the Coroners' Society being a voluntary organisation that coroners choose to belong to, because the response does not sit very well with the conversations we have had with coroners about these issues, and, indeed, over the years, when the previous proposals about certified inquests were brought forward. I wonder whether the views of, for example, the judges who have sat in some of the high-profile inquests have been canvassed. As we have said in our submission, there is a huge range of measures that can be, and have been, used successfully so that sensitive material can be dealt with in inquests adequately for all involved. In particular in the 7/7 inquest, all parties were satisfied with the way that inquest was conducted, despite the very serious matters that it was examining. So we are slightly surprised by the Coroners' Society response. We also wonder whether it reflects the views of all coroners.

Q168 Baroness Berridge: Your analysis of the Green Paper suggests that the only real problem that needs addressing is the admissibility of intercept evidence in inquests. Can you explain why you reached that conclusion and what legal reform is needed in your view to address that?
Helen Shaw: The reason why we reached that conclusion is because the only case that has not been heard at an inquest, as I have said, is the Azelle Rodney case, which involves material that is related to the Regulation of Investigatory Powers Act. Obviously that was the issue that was debated in Parliament at length during the proposals on certified and secret inquests. During those debates, an amendment was passed by the House of Lords that was subsequently rejected by the House of Commons, which was an amendment to RIPA to allow a coroner and a family and their counsel to be part of the ring of confidentiality in any inquest that involved intercept evidence, obviously knowing that they would sign a confidentiality agreement on pain of being subject to criminal prosecution if that was breached. At that time, that was seen as a way of sorting out not only this problem of coroners having been left out of the ring of confidentiality when RIPA was originally enacted but also the Article 2 problem in terms of the involvement of the family. I would say that it is a very rare occasion when this occurs. It has only occurred once, to our knowledge. So it is not a hugely pressing issue that we think is holding up other cases. We do not know of any other case.

Q169 Lord Morris of Handsworth: Are there any measures falling short of the introduction of CMPs into inquests that would address some of the Government's concerns in the Green Paper?
Helen Shaw: We have outlined, in our written submission, a whole series of measures. We gathered together the different measures that have been taken in the cases that we refer to: the Diana and Dodi inquest, the inquest into the 7/7 bombings, the Jean Charles de Menezes inquest, the Terence Jupp inquest—he was an MOD scientist who died in an explosion. We hope that what we have done is to set out, in that submission, a whole series of measures: the use of PII; the use of special measures in terms of securing documents; and the use of different ways of dealing with witness anonymity or witness security. We hope that, with the reform of the inquest system, there will be a more comprehensive set of guidance given to coroners, because as you probably know one of the problems at the moment with the inquest system is that there is not a uniformity of practice across the board. Hopefully, with

the appointment of the Chief Coroner, those matters will be made more uniform and there will be better training. Indeed, there has recently been guidance issued by the Ministry of Justice to coroners on the application of their powers under rule 43, which is to report to bodies that actions need to be taken to stop further deaths occurring in the same way. We certainly see that, if there were to be some guidance that drew together the good practice that already exists, so that all coroners who were faced with these thorny issues around how to deal with sensitive material would be able to choose and apply the best practice, there would not then be the necessity of bringing in any of the things that are proposed in the Green Paper.

Chair: Thank you very much for your evidence today. You have covered a great deal of ground. I hope you feel that we have done you justice. If you feel that there are points that we have not covered adequately or if you feel that you did not have the opportunity to answer all the questions fully, we would be very pleased to receive a further memorandum from you. Thank you very much.

John Wadham and Eric Metcalfe; Rt Hon Kenneth Clarke QC MP and James Brokenshire MP

Oral Evidence, 6 March 2012, Q 170–232

EVIDENCE SESSION NO. 5. HEARD IN PUBLIC

Members Present

Dr Hywel Francis (Chair)
Baroness Berridge
Rehman Chishti
Mike Crockart
Lord Dubs
Lord Morris of Handsworth
Mr Dominic Raab
Mr Virendra Sharma
Mr Richard Shepherd

Examination of Witnesses

Witnesses: **John Wadham**, Group Director Legal, Equality and Human Rights Commission, and **Eric Metcalfe**, Barrister, Monckton Chambers, examined.

Q170 Chair: Good afternoon and welcome to this evidence session on the Green Paper on *Justice and Security*. Could you introduce yourselves for the record, please?
Eric Metcalfe: My name is Eric Metcalfe. I am a barrister at Monckton Chambers. I was previously Director of Human Rights Policy at JUSTICE, the human rights organisation.
John Wadham: I am John Wadham. I run the Legal Department at the Equality and Human Rights Commission.

Q171 Chair: Mr Metcalfe, could I begin with a question to you in relation to the scale of the existing use of secret evidence? We note the commission's evidence, which says that the continuing lack of accurate information concerning the extent of the use of closed material is a serious problem. Is its use more widespread than the Green Paper seems to suggest and does it matter that the scale of its use should be known before Parliament legislates on the matter again?
Eric Metcalfe: It is certainly the case that the Green Paper does not accurately represent the extent of the use of closed material. One of the difficulties is that it is very difficult to define exactly what is meant by closed material. Is it proceedings in which a special advocate may be appointed? Because, as you will know from hearing evidence on this issue already, it is possible to have the appointment of a special advocate in a proceedings without necessarily closed evidence being used, for example, in a public interest immunity application, and vice versa: it is possible for closed material to be used without a special advocate ever being appointed, as is the case before the Investigatory Powers Tribunal. The Green Paper really does not provide an accurate picture. A good example is the non-statutory use of

special advocates in proceedings before the Parole Board. That was an example where there was no express legislative provision governing the use of special advocates in closed proceedings. There had, however, been a previous set of rules under the Parole Board which allowed for limited disclosure of closed material to the person's barrister or solicitor, but that was a different procedure that had operated since 1997. Again, unfortunately, the Green Paper really does not provide an accurate picture of all the different statutory proceedings and non-statutory proceedings in which either the special advocate may be appointed or closed material may be used.

John Wadham: I think it is also worth going back a little in history to see how the system first got established, because the idea of secret evidence in this context is a very unusual system and, we would say, contrary to the fundamental common law traditions in this country. It was designed for a very small category of people who were going to be subject or potentially subject to deportation because their presence in the UK was not conducive to the public good—what we used to call the "three wise men procedure". In the case of *Chahal v the UK*, we had a process which was fundamentally unfair. The European Court said we had to have a better system and, as a result of some examples from the Canadian system, we came up with an alternative. But when I and others were involved in discussing with the Government the nature of that alternative, we expected that this exceptional procedure would be used in only that context. What has happened—and this should be of concern to the Committee, I think—is that it has expanded, as Eric suggested, into a mass of other kinds of tribunals, other kinds of processes and is being used much more often. We expected it to be used in 10 or so cases a year, and what has happened is it is much, much larger than that. I was happy with, in a sense, countenancing it because it was a fairer procedure than the procedure that existed before and it was restricted to those processes.

Eric Metcalfe: It is interesting to note that the Lord Chancellor this morning in a newspaper article suggested that the secret evidence or the closed material procedure would only be applied to a handful of cases. You go back to Hansard in 1997 when the Special Immigration Appeals Commission bill was first being debated and you find similar statements by Home Office Ministers Mike O'Brien and Lord Williams of Mostyn saying exactly this, that the special advocate closed material procedure in SIAC would only be used in a handful of cases. Since that time, over the last 15 years, the use of closed proceedings in UK courts and tribunals has expanded considerably.

Q172 Mr Sharma: What test should Parliament apply to determine whether the proposals in the Green Paper are justified? Is it essentially the same test as that applied by the Supreme Court in *Al Rawi*?

John Wadham: I think, as I have already suggested, that this is a fundamental departure from our common law tradition. We could talk about the ins and outs of Article 6 and what that requires, but the basis of justice in this country for many, many years has been that it is cards on the table: that you have a dispute, you take it to an independent tribunal and everyone sees all of the evidence and everyone can question the evidence, they can cross-examine the witnesses. And the best evidence that can come out is then adjudicated on usually by judges, but sometimes, in some circumstances, by juries and others. It is a fundamental part of that and so this is a very significant exception and so we would say, I think, that when Parliament addresses this question, it should be looking at the common law traditions of this country over those years. I think they have been identified by the Supreme Court in that case; there is no doubt about that.

Q173 Lord Dubs: I wonder if I might ask this: there are some people who believe that the use of intercept evidence would be desirable as it would give people a chance to have a trial.

If that were the case, would you accept that the courts in which intercept evidence were to be heard might not be totally open?

John Wadham: We need to define "openness". At the moment, I am discussing openness between the parties. There is a secondary question about whether the court or tribunal should be open to the public or to the press, and you can well see arguments for there being circumstances where the court has to close to the outside world, but the parties are entitled to see the material. Obviously, we say in our evidence that the public interest immunity procedure, which sometimes does mean that evidence which would ordinarily go to the parties does not go to the parties where there is a question about its relevance and where there is a question about national security or other public interest disclosure issues, that might mean that not all of the evidence in all circumstances goes to all of the parties. That system works tolerably well.

Eric Metcalfe: If you look at the comparative experience of other common law jurisdictions who have similar civil and criminal proceedings as the United Kingdom—Canada, Australia, the United States, New Zealand, South Africa—these are all jurisdictions which use intercept evidence in open court. They use, essentially, PII procedures to keep the sensitive details of particular interception methods and the locations of observation posts and so forth secret. PII works extremely well in other common law countries with disclosure regimes which are very similar to that which we have under Article 6 of the European Convention on Human Rights. So I do not think that you need closed material procedures in order to allow for the admissibility of intercept.

Q174 Rehman Chishti: Mr Metcalfe, looking at the point on the need for change, the Independent Reviewer of Terrorism Legislation and the Bingham Centre for the Rule of Law both accept that there are likely to be some cases in which a fair trial of the claim cannot proceed because of the amount of material which cannot be disclosed on PII grounds. Does the commission agree that there will be cases in which the ordinary law of PII does not produce a fair trial?

Eric Metcalfe: In short answer, no. The view of the Independent Reviewer of Terrorism Legislation deserves some weight, but I note from the transcript of his evidence that he was not referring to having conducted any kind of review of closed material himself, nor had he been shown closed material indicating that there were cases of this kind. As I understand the evidence of David Anderson and also of Tom Hickman and Adam Tomkins from the Bingham Centre, it was rather the hypothetical possibility that you could, in principle, have a PII procedure that led to an unfair result. The question is what do you consider to be an unfair result? You can pose a hypothetical situation of a person with a just claim where the only evidence to support that claim would be material which, say, the police or the security service would say is covered by public interest immunity; it is too sensitive to be disclosed. Ultimately, the judge is faced with a balance. If, in our view, PII is applied correctly, it will be an exceedingly strong national security case which would outweigh the interests of justice in that case. The only instance that anyone has been able to point to a strikeout on so-called public interest grounds is *Carnduff v Rock*. This is a case where no one can really say whether the right outcome was reached or not, because none of us, I am assuming, have seen the closed material or the withheld material in that particular case. So I do not think you can look at *Carnduff v Rock* and draw that conclusion. I do not even think that you can point to a hypothetical case in which a strikeout would deliver an unfair result, because it is always going to be for a judge to decide if the interests of justice are outweighed by the

interests of national security. It will be a very reluctant judge who rules that a just case will be struck out on national security grounds.

An important point to bear in mind is that there are always other ways of protecting the sensitive information. A classic example is the identity of a source. Sometimes you rely on PII to protect a source from being identified, but there are always other ways of protecting sensitive information. You can, for example, use witness anonymity now in order to protect a witness's identity and allow them to give testimony without that person's identity being put at risk; or you may provide witness protection; you may provide the gist of the information. There are always other ways in which the national security interest can be protected, whereas, if that person's claim is just and that person's claim fails, then that is the end of it. I think, in those circumstances, I do not see a hypothetical situation in which the interests of justice in a justified case will be outweighed by national security.

John Wadham: We certainly would not want to see a whole edifice of a new structure which is, as we say, exceptional and does not comply with our fundamental common law values around the possibility of this occurring or it having happened in one case. That does not seem to be an evidence base to set up an alternative civil justice system.

Eric Metcalfe: You have had a *Wiley*-type balance in operation for something in the region of 30, 40 years almost. It would be striking if such a fundamental common law right was removed on the basis of a police informant in the West Midlands, his claim being struck out simply because he could not get evidence of his contract with the police. It seems to me the strength of the common law right identified by the Supreme Court in *Al Rawi* requires a great deal more compelling evidence than simply the hypothetical possibility. If there were such a possibility, you would have expected to see many more examples over the last 30 years or so.

Q175 Lord Dubs: On the same theme, I refer to the commission's evidence in which it says, "It can never be fairer to adopt a closed material procedure in order to determine a claim, even if the alternative is that the claim will be struck out." Is that the commission's view even if the claim in question is a claim in respect of a serious human rights violation?

John Wadham: In a PII case, the factors that the court would have to take into account in this balancing exercise will be difficult, but the first one is going to be the seriousness of the case itself. The more serious a human rights violation it was, the more likely it would be that the balance would be for disclosure or not for strikeout. The second question is going to be the relevance of the evidence and the merits of the case. So I think that, as Eric has said, the situation is it is going to be a very rare example. Although, theoretically, it has to be possible that that might happen, that is much, much less unfair than a situation where you create a process where regularly in the courts—and as we have already said, this is happening already—on the basis of arguments from Government and public bodies, people are denied the evidence that they need, the material that they need to pursue their cases. That is the much more dangerous and problematic threat to the fairness of our civil justice system than the possibility of one-off cases being decided in a way that perhaps is not fair.

Q176 Lord Dubs: So are you saying that a strikeout in such a case might put the state in breach of its obligation to ensure the availability of an effective remedy when we are talking about human rights?

John Wadham: I have done very significant numbers of national security PII cases in my career, including cases in the European Court of Human Rights, and I have lost some of those cases in the European Court of Human Rights. My experience is that the European Court of Human Rights is astute to the issues of the public interest in relation to national security. Although there are not that many cases that go there regularly from the United Kingdom, nevertheless I think that the Government would be justified, if these

proposals were rejected, in representing their case in Strasbourg to say, "The alternative was to set up an even more unfair system and the best we could do is here and here are the facts in this case". I would be very surprised if the UK lost those cases.

Q177 Lord Dubs: Another question is this: the commission accepts the possibility of a claimant preferring to have their claim determined using a closed material procedure rather than it being struck out altogether. Would its concerns about the proposals to make CMPs available in civil proceedings be met if the legislation made explicit that the use of such a procedure must be an exceptional measure of last resort when there is no other way of enabling a trial of the issue and only to be used after a full PII exercise?
Eric Metcalfe: No. The reason is because the very availability of a closed material procedure is likely to distort the PII analysis that the judge would be required to carry out as part of a right to a fair trial. It is an unfortunate feature of our system of justice that merely providing a power can encourage its use. A good example of this is the provision for witness anonymity, which did not exist, in essence, before the 1990s, but since it became available, it grew very rapidly so that, by the time the House of Lords came to consider its compatibility with fundamental rights in 2007, it was very concerned that a great many judges had decided to grant witness anonymity without there being an adequate basis in either legislation or the common law for that to be used. The reason is because the judges are concerned with reaching what they consider to be a fair result, and it is often very attractive for judges to consider that if they just look at the material by themselves in private, and maybe hear some submissions on it from one of the parties, they might be able to work out what the right result is. In this situation you have to bear in mind Lord Kerr's warning in the Supreme Court that it can seem superficially attractive for a judge just to look at the material in private and decide whether it makes out a person's case, but evidence which has been insulated from cross-examination is likely to mislead. That is the very essence of our civil justice system, the idea that the accuracy of evidence derives from its ability to be cross-examined, to be tested by adversarial confrontation, and if you do not have that, then you only have one part of the story. You only need to go back to Roman times, to Seneca, who said "A judge who decides a case without hearing both sides acts unjustly even if they reach the right result". The important thing to bear in mind is that you can reach a right result through a number of different means, but not all of those would be fair. You can flip a coin and 50% of the time you might reach a right result, but that will not make flipping a coin a fair procedure. The right result is one which involves respecting the standards of fairness.

Q178 Mr Shepherd: Just on that, does this not apply also to the anonymity of witnesses now often granted by judges, because the very nature of who the witness is may be challengeable and the veracity of his evidence on the knowledge of who it is?
Eric Metcalfe: It was certainly the case that the House of Lords found that it was contrary to the common law. But Parliament debated emergency legislation and made provisions which fell within one of the exceptions under Article 6, and you will find that there are a great many safeguards to prevent witness anonymity being provided in a situation where it is necessary for a person to know the case against them.

Q179 Mr Shepherd: With the indulgence of the Committee, I had a meeting with a former Lord Chief Justice; when this became a matter of some controversy a year or so

back in the national press, I asked him, "How did this happen?" He said, on his watch, he was unaware that it was developing to the extent that it has developed.

John Wadham: That is exactly our point, in a sense: that there are always difficult circumstances where individuals need to be protected, or national security or the public interest need to be protected—

Q180 Mr Shepherd: But in civil cases?

John Wadham: In civil cases, and it is very difficult then, once you have a new procedure, to stop it being opened up to all kinds of other arguments and, not surprisingly, there are difficult questions to be asked. That is why I think we are concerned that the evidence on closed procedure material—I think, at least; and I was aware when this was being discussed in Government—was being designed for a very tiny purpose. It has expanded and now the Government has produced a Green Paper and said, "We would like it expanded very considerably and we want this to capture all of the theoretical cases that you might be able to design, the one case we know about". I do not think that is the way to make policy, where you are making exceptional derogations to something fundamental about the English common law tradition about how parties deal with the evidence.

Q181 Mr Sharma: Can you explain precisely why you believe the availability of a closed material procedure would in practice distort the PII process and how this belief sits with the view of the Supreme Court in *Al Rawi* that "the PII exercise cannot be avoided", even if a closed material procedure is available?

Eric Metcalfe: We certainly agree with the second part; the Supreme Court was absolutely right in *Al Rawi* to say that you cannot effectively carry out a closed material procedure, you cannot effectively decide whether a closed material procedure is justified, until you have undertaken the PII process. It makes no sense, as the Green Paper suggests, that you could have proceedings to discuss the justifiability of closed material proceedings until you have carried out the PII. So, logically, the closed material question must always arise after the PII exercise has been carried out; which greatly, by the way, undercuts the Government's case that it was making in *Al Rawi*: that PII was so very expensive and time consuming and that one of the main advantages of closed material procedures is that they would be cheaper. The Supreme Court said you would have to carry out the PII process in any event.

The problem with a closed material procedure being available at the end of the process is that, where a judge is deciding whether the disclosure of particular material is necessary in the interests of justice versus the interests of, say, national security, the process—the decision making process, the balancing process—is likely to be highly distorted by the knowledge that, if the judge decides in another way, then there will always be a second bite of the cherry by the Government, because they have a closed material proceeding. What the Supreme Court warned against in *Al Rawi* is the idea that this might be compatible with the common law right to a fair trial. It is unfortunate that judges are not immune from the attractiveness of viewing evidence by themselves and trying to assess for themselves whether it makes out a case. It is something that they are obliged to do in ex parte proceedings in a number of cases. And judges, unfortunately, may fall prey to the temptation of just deciding, rather than go through the whole PII exercise, we can hurry this whole thing along if it is going to be too complicated—let us jump to the end and have a closed material procedure instead.

Q182 Lord Morris of Handsworth: Can you explain why, in the commission's view, it is not possible to restrict the scope of the Green Paper's proposals to cases involving national security?

John Wadham: I will just start with that. Public interest immunity is, in a sense, not state immunity; it is public interest immunity. Therefore, there is the possibility in any case to say that there are good reasons why this material should not be disclosed, not because it is about national security, but because it is about the anonymity, the protection of a witness, the protection of an informer, the protection of somebody who made a complaint, etc, etc. Of course, at a theoretical level the legislation could be restricted to national security, but it is quite difficult to see why the national security provision should be paramount when there are other good public interest reasons why other material should not be restricted equally. Therefore, at the level of theory it is possible. However, the public interest is to protect national security, but the public interest is also to protect witnesses that may be under threat or other people.

Eric Metcalfe: There are some simple examples. The scope of national security has, in English law or UK law, an extremely broad definition and would include, for example, stop and search cases. There was the prospect of closed material being used in the *Gillan* case when protesters claimed that the Metropolitan police were stopping them unjustly. There was even discussion of appointing a special advocate in that case. There is the *Corner House* case, which I was involved in, which involved the Serious Fraud Office halting an investigation into alleged bribery allegedly on national security grounds, because the Saudi authorities had said, "If you proceed with this we will withdraw co-operation on national security grounds". So there are always such cases. At the outset, you think national security involves high-level terrorism plots and nuclear weapons and things like that, but the reality is that national security cuts across a great many more ordinary things, or things that are not as obvious.

As John has pointed out, there are very compelling public interest reasons to protect sources in other areas. I was involved in a House of Lords case in 2005 involving the use of special advocates for a Parole Board case; the issue there was the protection of a witness. We always talk in national security cases about source protection and how important it is to protect sources, but you also get those issues in serious organised crime cases and you can also get those issues, if the threat is serious enough, in an ordinary burglary case.

Q183 Lord Morris of Handsworth: There are two key principles here, are there not? There is the national security on the one hand, and on the other hand there are civil proceedings. You have answered the issues about the national security; can you then explain the reasons for the commission's view that it would not be possible to extend the use of closed material procedures in civil proceedings and yet restrict their use only to exceptional cases?

Eric Metcalfe: Again the question becomes what an exceptional case is and how you define that. It seems to me that you can make a very compelling case that the protection of a witness's life or an informant's life is always going to be exceptional. The protection of an individual life is important whether or not the case involves national security. It may just be a regular criminal or civil investigation; it may be a child protection issue. The exceptional nature of the case is not necessarily something tied with national security, and I do not see how you can sensibly restrict it to cases which would only fall into that very narrow area.

John Wadham: Just to add to that, as I say, I have done a number of national security cases for people, including people who have blown the whistle on MI5, MI6, GCHQ, etc, and there are many cases in which the material that I have seen would damage national security if it was released. But I am afraid there are also cases where the parties to the litigation, where the state is involved, have claimed national security, and when the material has been in fact disclosed to me or via the process of the court proceedings—this is criminal but also in civil

proceedings—it is clear that there was no real damage to national security as far as I can tell. Obviously people will say, "You do not know the full facts, you do not know the details", but as far as one can tell, the claim was overblown. There is a real danger in giving people an exception that they will take advantage of. Lawyers and those working for the security services are equally human as the rest of us.

Q184 Baroness Berridge: You believe that the US practice of granting security clearance directly to civilian counsel in proceedings before military commissions may hold some useful lessons for the UK. Is the commission or anyone else making information available to Parliament about how that system works in practice?
Eric Metcalfe: The commission made limited reference, I believe, in its evidence to the Committee and also, I think, in its response to the Green Paper. In 2009, I was the author of a report entitled *Secret Evidence*, which made reference to the comparative practice in a number of other jurisdictions. The origin of the special advocate system was, in fact, before the Security and Intelligence Review Committee in Canada. That was, like the US system before military commissions, a system of much more relaxed communication between a special advocate and the person whose interests they were appointed to represent. Strikingly, however, you do not need to go to the United States or even to Canada to find an example of this relaxed form of communication. I mentioned the case of *Roberts*, in the House of Lords in 2005. Between 1997 and 2004, there was a fully operational system under the Parole Board Rules of disclosing sensitive material, including material on national security grounds, to the barrister or solicitor appointed to represent the prisoner in a Parole Board case. That was undertaken without any supervision, without the strict prohibition you have on communication between the barrister and the person who they represent, and that was entirely unsupervised. The barrister or solicitor would be under a prohibition of discussing, either directly or indirectly, any of the closed material, but they could still hold a conversation with their client. As I have said, this system operated between 1997 and 2004. There is no reference to it in the Green Paper whatsoever, which suggests one of two possibilities: either the Government was not aware of it, or they were aware of it and they thought that it was not relevant. It seems to me striking that we are having this conversation; the Green Paper makes very strong arguments that you cannot relax communication between special advocates and those they represent, and yet they were operating a system very similar to the US one, without even security vetting, in the Parole Board procedures.

Q185 Baroness Berridge: From what you have just said, am I right in assuming that between 1997 and 2004 there were no examples where it was abused or there were any claims that counsel had released information they should not have released?
Eric Metcalfe: I was involved in the *Roberts* case in 2005 and there was no evidence put forward by the Secretary of State in those cases that it had been abused. That case involved the Secretary of State wanting to use a special advocate instead of the relaxed system, so you can assume from that that the Secretary of State was unhappy with the relaxed system. But there was never any evidence and, more importantly, never any debate. These procedures were established by way of rules of the Secretary of State, so they are secondary legislation. There was never any parliamentary debate over whether the previous Parole Board system was working ineffectively or whether there had been any security breaches. Certainly you would have expected the Government to have made that case, but that was not what was involved.

Q186 Mike Crockart: I would like to turn now to the person who makes the decision to instigate closed material proceedings. You have expressed concerns about the degree of

control over disclosure that the Green Paper proposals would give to the Government, through the Secretary of State having the power to decide whether a closed material procedure was necessary. Do you think that a clearer statutory provision, that it is the court and not the Secretary of State's decision to order such a procedure, would meet your concerns on this?

John Wadham: If the procedure is created, then obviously the best and most significant protections would, in fact, require the court to make the decision. Obviously if the only test about that was on the judicial review basis, which seems to be being suggested, that is not a test of the merits of the question; that is a test that is at a much lower level of scrutiny by the judge. So I think that there are real issues if this process goes forward for us all—parliamentarians and others—to consider the details of how it might work in practice. One of the difficulties with this Green Paper is that there are a lot of very tricky, difficult, complex issues in it, not just about closed material but about the other issues of oversight, which I would like to say something about if there was time. I think that we need to review that process, and obviously the more you have the independent judge making the decisions the less likely it is to be unfair.

Eric Metcalfe: Just to follow on, I think this goes back to Lord Morris's question, which is: you will obviously need to take the decision at the end of the PII process as a matter of practicality. So the current procedure proposed by the Green Paper would be unworkable for the reasons identified by the Supreme Court in *Al Rawi*. The commission opposes the extension of closed material procedures, but if Parliament felt it was necessary to go down that route then it is abundantly clear that you need a judge to make the decision rather than the Secretary of State.

Q187 Mike Crockart: Can I just be clear though? Because I know that the Government will argue that in their proposals it is the court which is making the decision; it is merely the Secretary of State who is kicking off the process. So can you just be clear about the difference between those two aspects?

Eric Metcalfe: The Government is trying to have its cake and eat it, because it also says in the Green Paper that the judge will review the Secretary of State's decision applying the principles of judicial review. To lawyers, that means that the judge is not required to, as John said, assess the merits of the Secretary of State's decision. The judge is only making sure that the Secretary of State is acting within the law. Nowadays, following the Human Rights Act, you do have slightly more enhanced judicial review than you used to, but the judge is still crucially limited in the exercise that he or she undertakes. So I do not believe that, in the Green Paper, the Government is describing accurately its own proposals when it says that it will effectively be the judge's own decision.

John Wadham: I know we are running out of time, but the issue is: in the process of disclosure in a civil case what happens is that there is an assumption that all the material is disclosed, so somebody who holds the material has to initiate it, because they are the only ones who have the material and know that there might be national security considerations. So in one sense that is right, but as Eric says and as I outlined, having a judicial review test for the judge in relation to the decision by the Government, the state in this case, must assume that the first proper decision being made is not an application to the judge but a decision which is subject to review, and that seems a bizarre approach to this regardless of what the substance of the CMP procedure is.

Q188 Lord Morris of Handsworth: Would you like to comment on the evidence of the Independent Reviewer of Terrorism Legislation that respect for the control principle is vital to our national security and justifies the placing of proportionate limitations on the *Norwich Pharmacal* principle in the national security context?

Eric Metcalfe: No. We prefer the view expressed by the Lord Chief Justice in the *Binyam Mohamed* case that the control principle, while of great importance, can never be paramount in a democracy governed by the rule of law. Really it is important for our allies and those with whom we co-operate on security matters to understand that we will respect their confidences as best we can; but, as the Lord Chief Justice made clear, there will be some circumstances when an independent court will decide that it is necessary for certain information to be disclosed in order for fundamental rights to be respected. I do not agree with the Independent Reviewer's conclusions concerning *Norwich Pharmacal*. It is correct to say that *Norwich Pharmacal* was unusual, because it is the one instance of cases discussed in the Green Paper which the Government itself has no way of settling out of court at its own initiative. But I think it is a travesty of the very careful judgments of the Divisional Court and the Court of Appeal in the *Binyam Mohamed* case to suggest that the judges might, willy-nilly, disclose sensitive intelligence material. What we found was disclosed was, of course, not ultimately a *Norwich Pharmacal* decision in any event, and what was disclosed was already in the public domain for the United States. It is very clear from the courts' approach to the *Norwich Pharmacal* cases that they will be incredibly reluctant to ever disclose material which they consider would be operationally sensitive and, to my knowledge, it has not yet happened. So I do not think the theoretical problems that it has been suggested might exist in *Norwich Pharmacal* cases justify taking the extreme step that has been proposed.

John Wadham: Could I just have 30 seconds to talk about the rest of the Green Paper, Mr Chairman? Although this is a fascinating area for lawyers and for us to crawl over the detail, there is a bigger issue about the accountability of the security services in general, which this Green Paper picks up. I think that there are real problems both about the committee that oversees the agencies and the commissioners and the Investigatory Powers Tribunal. I think that there is a lot to be done to fix that to make sure our security services can do the job they need to do, but are in fact accountable to the law, and that people have an adequate and proper complaints system and that it is accountable to Parliament, and I am not sure that in each and every one of those the systems work very well and I think it is something that the Committee might want to look at outside of the more detailed assessment that you are making in relation to closed material.

Chair: Thank you very much for your evidence today. If you feel that there are points that we have not properly covered, and you hinted that towards the end, then we would be very pleased to receive a further memorandum from you. Thank you very much.

Examination of Witnesses

Witnesses: **Rt Hon Kenneth Clarke QC MP**, Lord Chancellor and Secretary of State for Justice, and **James Brokenshire**, Parliamentary Under-Secretary for Crime and Security, Home Office, examined.

Q189 Chair: Good afternoon and welcome to the Joint Committee on Human Rights. For the record could you both introduce yourselves, please?
Mr Clarke: Kenneth Clarke, Lord Chancellor and Secretary of State for Justice.
James Brokenshire: James Brokenshire and I am the Parliamentary Under-Secretary at the Home Office for Crime and Security.

Q190 Chair: Thank you very much. Could I begin by asking a question of both of you really about the fundamental significances of the changes that you are proposing? One of the constant themes we have noticed in the evidence we have received in relation to the Green Paper is that there seems to be an underestimation of the extent to which its proposals represent a radical departure from this country's constitutional tradition of open justice and fairness. Do you accept that the proposals in the Green Paper are such a radical departure and that there is, therefore, a heavy onus on you, as the Government, to demonstrate a compelling justification for them?
Mr Clarke: I do not, Chairman, and I think what has happened is we have gone out to consultation, genuine consultation; it could be that we have not expressed our proposals clearly enough in the Green Paper. The reaction has been very slow to it, but it has suddenly started mounting into ever more dramatic claims that we are bringing to an end this country's traditions of open justice and proposing to exclude the parties and the public from all kinds of extraordinary things, all of which I think is based on a complete misunderstanding. No one is more firmly committed to the principles of open justice than I am, and I think what we are really trying to address is a question of how we can see that justice is done in comparatively restricted, very difficult circumstances. We are talking about cases where relevant evidence could be given by the intelligence services, our spies, and that the relevant evidence is derived by the service using either sources or technological methods—covert surveillance or interception of various kinds—of which, of course, the parties are quite unaware. That does not often arise. It has arisen in recent cases that such evidence cannot be given in open court, and the result is that key evidence, very pertinent to the outcome of the civil claim in the proceedings, is either never put before the judge or cannot be taken into account by the judge in reaching his decision. I think that is extremely unsatisfactory. I think we have a reputational thing. I think our intelligence services, like everybody else, should be accountable so far as is practically possible, and there should be a position where they give evidence about these matters to a court if they are accused of malpractice of some kind. I, as a citizen, would like to know what the outcome is of the judge's decision on the arguments being made against the intelligence services or by the Government in favour of the intelligence services. But it plainly is not the case that in any democracy in the world you can have the country's spies appearing in court openly, giving evidence about their belief in the information, the sources of that information, the technology they have used, the methods by which they have infiltrated the security system of the terrorist organisation they are trying to shadow or whatever it may be. It is, in my opinion—in my usual unwise way I think I used the word "ridiculous"—quite extraordinary

to imagine that you can just go ahead with an ordinary open justice approach and have somebody called, give his name, say how long he has been in MI6 and go on to describe the kind of things he is going to be cross examined about. The result is that, in a civil action, the Government cannot give that kind of evidence; it tends to fold its tents, go away, say it is not going to contest liability any further and move on to a question of damages, which is the quantum of damages, which is what we did when we settled the case recently of the Guantanamo Bay detainees.

What we have put forward is closed material proceedings as a solution for that. Of course, it is not as good as open justice. If open justice was practical we would prefer that. But it is a way in which the judge can have all the relevant evidence placed before him or her, and special advocates can challenge it within, of course, the obvious limitations of the process. The alternative is nothing, and the alternative is an inquest that is adjourned—they have lots of adjourned inquests in Northern Ireland—or a case that was never fought so that, as I say, ordinary citizens, like you and me, in the end never know which side the judge came down on. So conspiracy theorists believe all the claims of the claimants, and more establishment people believe all the claims of the security services, and nobody ever knows. It is that narrow problem we were addressing, and in the last few days I have read ever more fanciful claims—that you would not be able to have inquests into friendly fire incidents and all kinds of things—which are miles away from the Government's intention, and I hope we have not so carelessly drafted the Green Paper as to give too much ground to all these fears[1].

Chair: With respect, Lord Chancellor, thank you for that, you are anticipating lots of our questions, so could I ask you to be—

Mr Clarke: I hope I have answered them all already.

Chair: We enjoy listening to you, but we also enjoy asking questions.

James Brokenshire: Dr Francis, I wonder if I could just add briefly to the comments that the Lord Chancellor has raised in highlighting that this is about presenting evidence to court to ensure that we get outcomes from cases that properly consider all of the evidence. As the Lord Chancellor has highlighted, of course the preference is always to be as open as possible, and I hope during the consideration in this session that we will be able to explain the separation, contrasting closed material, that element that is not able to be disclosed in open court, with so much of the case that is open, that is public.

It is also, in terms of the issues that we are seeking to be addressed, worth highlighting that it is not just about damages, as important as that is. It is also about judicial review cases where a decision may have been taken by the Home Secretary to exclude someone from this country on national security grounds, the appeal to which is judicial review, and if the basis upon that assessment cannot then be considered it is a significant issue that we need to address to ensure that that appeal right can properly consider all of the information that is relevant.

Q191 Mr Raab: Secretary of State, you said it is a very narrow problem; can I just ask you what specific evidence in terms of cases or investigations the Government is relying on to

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[1] *Note by Witness*: Since the hearing the Secretary of State for Justice has clarified for the Committee that the Ministry of Justice plans to publish a summary of the consultation responses received, in line with the Code of Practice on Consultation. This may also be accompanied by an announcement of the Government's policy conclusions following the public consultation and the JCHR's own report into these issues. The precise format is still under discussion within Government.

demonstrate that the current legal regime is inadequate and exposing the Government to the liability that you have described?

Mr Clarke: The plainest which presented itself to us when we were fairly new in office were the claims made by the Guantanamo Bay detainees. They were claiming damages for ill treatment to which they said the British Government had been complicit. That ran straight into this problem, and the British Government decided that it could not possibly call the evidence that we had—it would have seriously compromised our intelligence activities—with the result that we ceased to defend the action and we settled the amount of damages. I am told there are 27 cases in the pipeline—I have not seen all these cases—where this could be raised. It is becoming more common. I think, in the way these things happen, having had one case like that, we are going to have quite a lot of other cases where people are going to start making claims of one kind or another about the British intelligence services and about, no doubt, other agencies of Government, including police intelligence sometimes, where it is going to be difficult to defend it.

In the case of ones where national safety and security will be compromised by giving it, we either have no evidence or we have some admittedly second-best way of presenting it. That is what we want a genuine consultation on, at the end of which this Committee's conclusions, I hope, will be one of the things that will feed into the eventual drafting of a White Paper, and eventually a Bill.

Q192 Mr Raab: Can I ask just one very focused follow-up on that? You mentioned the 27 cases additional to the Guantanamo cases; can you give us a number for how many have been settled solely because of fear of disclosure of security sources rather than the claimant also, or separately, having an arguable substantive case?

Mr Clarke: No, no, they are not ones that have been settled; the number I gave is the one that comes to mind about those we think are in the pipeline—I do not know if they will all be settled or not—where we could have a situation where sensitive information of relevance to the safety of the public and the state, as it were, could become relevant in these civil proceedings.

Q193 Mr Raab: In relation to the cases that have been settled, how many were exclusively because of fear of disclosure of security sources rather than an additional element of the substantive claim?

Mr Clarke: I do not have a figure for that. All I know is the one which I was tangentially involved in, the Guantanamo Bay case; I did not take a leading part, but I was involved in the mediation and settlement of it. That was what it was all about. We could not continue. We had no defence without the evidence; whether the defence would have succeeded or not, which I would quite like to have known, we will never know because it could not be put in, could not be tested, could not be asserted. All we did was negotiate with the representatives of the detainees for the amount of money they would take on the basis their claim was established.

James Brokenshire: It is fair to add that there are a small number of cases that we are talking about here where the significance of disclosure is that great that our judgment is that this process is required. So whilst I recognise the desire to focus on the numbers, to look at the numbers that indeed we put in the Green Paper itself, the impact of disclosure in even a small number of those cases could be quite significant.

Q194 Baroness Berridge: Can you outline for us why in *Al Rawi* all the witnesses have said that PII was not exhausted in that case? Can you help us with cases where you are saying that PII reached the end of what it can do and therefore you now need this process?
James Brokenshire: I suppose, in essence, PII is designed to exclude evidence, to take evidence out so that it is not considered by the court. Therefore, the approach that we are seeking to take through the closed material procedure route is to put evidence before the court to enable and to allow that to be considered, so that the court is then able to reach its fullest consideration based on all of the evidence, whether closed or open, whereas the emphasis on PII is very much about taking evidence out and therefore not allowing the court to consider it.
Mr Clarke: We do not have to replace PII. PII works in different ways, as James says, quite correctly. PII is an assertion of immunity and, if accepted by the judge, means that that evidence plays no part favouring one party or the other in the judgment. In some cases, it is possible to have a claim for public interest immunity, but it is what can only be called an iterative process, where you discuss the gist of the evidence and you put that in. There have been some cases where that has been done, but it tends to be cases where there is no particular difficulty. There is a hard core of cases where you are not going to get that kind of discussion, compromise and understanding. We avoided all this—or Lady Justice Hallett did—in the 7 July inquest, but that was because of, firstly, her skill and the reasonableness of everybody involved. But without casting aspersions on anybody, the only people represented were the families of the victims of the bomb. The bombers' families were excluded from representation, as I recall. PII and an iterative process might not have made the same progress if you had had the bombers' families represented, I think.

Q195 Baroness Berridge: We understand, or we are led to believe, that the Americans in particular are concerned that our courts do not respect the control principle. Can you confirm that the courts in *Binyam Mohamed* did not order the disclosure of anything that was not already in the public domain in the United States, and could you identify for us cases in which our courts have ordered the disclosure of material that the Americans and our other partners wished to remain secret?
Mr Clarke: I am not going to enter into the controversy about *Binyam Mohamed*. Those who defend the decision point to the court as having given as its reason that this was already in the public domain in the United States. My understanding—and I have had no direct contact with the CIA about it—is the Americans do not agree with that. All I can say is that case has given rise to difficulty. The question is: are we saying that we should be able to disclose, or a judge should be able to disclose, the contents of intelligence that we have received in confidence from the Americans or any other allies who shared it with us? The risk is—and it is a real risk—that, if that possibility occurs, our allies will not share the intelligence with us. They do not share intelligence with us taking a chance that it might be revealed outside. We cannot control them. No Minister can get the Americans to come off that, and if we start exposing our confidentiality to the risk—just the risk—that it might be disclosed to a British court, I personally have been persuaded that we really run the risk of a reduced level of co-operation with Americans and others, who will just simply not give us the material.
Binyam Mohamed has unsettled them. It is too late to go back on the merits of that case; that is all water under the bridge, but since the *Binyam Mohamed* case, there is real concern about whether we are going to have the full-hearted co-operation with the Americans we do need to provide proper security to our population and to our interests.

Q196 Baroness Berridge: Can I ask you, Secretary of State, whether by that you are meaning that the control principle is absolute and not subject to the rule of law? Because

the Lord Chief Justice spoke about this in the *Binyam Mohamed* case, and it is understood that the Americans do not have that situation. They agree that the rule of law goes over the control principle. Is what you are saying that the control principle trumps the rule of law?
Mr Clarke: I do not agree with your description of the American situation. What happens in America is that the Government asserts State Secrets Privilege and that is an end of it. It is much more blunt than ours. American intelligence material would not go into American proceedings once they have asserted State Secrets Privilege, capital S, capital S, capital P. They just say, "No". So it is rather difficult to persuade Americans that, if it comes over here, we have to go into the extremely interesting discussions of PII and the balancing judgment of the judge and all the rest of it as to whether or not their intelligence material might suddenly be shared with the wider world. I am afraid I cannot command the American intelligence people to stop being so worried and that our judges have only annoyed them once and all the rest of it, which is the present situation. I would like—or not me, because I am not directly involved—but those who protect this country's safety would like to be able to tell the Americans that they can be absolutely assured that this material would not get into the public domain by either judicial process or any other process.

Q197 Mr Raab: Going back, or focusing in on PII, Secretary of State, is this a question in terms of the adequacy of PII of looking to the future and seeing what is coming down the track, or is there specific evidence from past or existing cases that demonstrate that the PII is incapable of protecting the security sources or that it leads to unfairness in practice? Is it a mixture of both or one or the other?
Mr Clarke: PII, strictly speaking, means you claim public interest immunity and that is it. As I have said, in practice, my understanding is the parties and their legal representatives respond to that by reaching an understanding, with the help of the judge, about what can be produced and what cannot and how they are going to proceed in the action. However, if our only weapon as Ministers is to assert public interest immunity, unless there is some reasonable understanding amongst the parties in the proceedings, the consequence is that evidence plays no part in the final decision. That means the final decision is far from perfect as far as third parties or the public are concerned.
James Brokenshire: If I could just give a further example to that, on an exclusion case where the Secretary of State determines that someone should be excluded from the UK on national security grounds, the challenge to that is judicial review. If the Secretary of State has relied on sensitive material, then you would then be potentially utilising PII to exclude that material even though it may be at the heart of the appeal consideration in relation to judicial review. So I think the additional complexities that sit alongside the damages issue and the sensitivities that attach to the evidence are equally relevant to the consideration here of why, when we look at what has been taking place around this *Norwich Pharmacal* type of case that has developed over the years on the disclosure of third party information, we are seeing more of those cases coming through—that is a changing environment—and, indeed, whether there is some sort of forum shopping that may be taking place around this. It is for these reasons that we look at this emerging picture and determine that we do need to take some form of action to guard against that.

Q198 Mr Raab: If I may, very briefly, you have described the problems with PII in terms of what you feel will happen as a result, but—I do not mind either one, but perhaps the Secretary of State as it is a justice issue—what precisely is it that is wrong with the procedure? Because you described the parties and you relied on their good will, but you

have a security cleared judge there. Is it that you are failing or there are elements within the Government that do not trust the judge to make the right decision? If it is not that, what is it? What is the aspect of it, given that judicial supervision?

Mr Clarke: PII excludes it from the judge, as it were, although the judge has to be satisfied, so the judge, ironically, reads it and the judge then makes his balancing judgment. If he upholds the Secretary of State's application, then it is out. Of course, once it is in it is shared with the other parties and the whole point of seeking PII, the only basis upon which the Minister should be seeking public interest immunity, is this is sensitive information that cannot be shared with the other parties, their lawyers or with the wider public. That is why it is a blunderbuss: if you win your PII claim, you withdraw the evidence into total secrecy so far as everybody, but the judge himself who has read it, is concerned, but the judge is expressly not to take it into account, not to give it any weight in the decision in the case.

Q199 Mr Shepherd: Lord Chancellor, you and I will well remember the *Matrix Churchill* case, of course, and how the law on PII at that time was an absolute assertion, accepted by and large by judges. We develop this now further. The judge is a sort of balancing act, i.e. a check on the claims of the Executive in the pursuit of these prosecutions. That seems somehow at least an independent element as opposed to the perceived interests of the Executive. Our system of justice has always wanted to counter the power of presentation and argument of the state in relationship to a citizen or those accused in a witness box. We know a great injustice was done in *Matrix Churchill* in a parallel case of people who were also supplying material to the then Iraq government. They were convicted because the judge accepted the Minister's attestation, which is a personal one, as the Secretary of State well knows. That is what worries a lot of people: that this is essentially an assertion by the power of the state. What is therefore the counterbalance in this?

Mr Clarke: I well remember *Matrix Churchill*: I was involved in it. We have moved on since then. That was all exposed and it showed what the dangers were. I quite accept that just an assertion by the Secretary of State cannot be allowed to be absolute. People have got the impression from my Green Paper that that is what we are asserting. I share your view about that: my PIIs survived the inquiry into that; mine were okay. Other departments were putting in PII to avoid embarrassment, to cover up the fact they had made a pig's ear. It was the classic case of misuse of legal assertion by Ministers behaving innocently; if they had thought for five minutes, they would have realised they should not have been doing this. There we are.

What we therefore have to do—and we have canvassed the way in which we think it could be done in the Green Paper—is give the judge a role in this. I would not expect someone—you, Mr Shepherd, or a very large number of people who are interested in this field—to just accept that the certificate of the Secretary of State full stop means the judge and everyone else can have nothing to do with it. What we have suggested is that although he certifies, the judge does have the right to decide whether this is reasonable using the ordinary test of judicial review. That should go on: once the evidence has been called, the final decision about what evidence should be closed and what will not will be left with the judge. It is difficult to get the role of the Secretary of State right. Only the Secretary of State can set it off, because only the Secretary of State and his advisers have sufficient all round information to know whether there is a case for asserting risk to the national safety or not; but only the judge, in the end, can check that as a reasonable decision; and only the judge, in the end, can make the decision about what goes in now. We have consulted on it, and we are anxious to get that right. I hope that the reaction to it will enable us to put it in the right way that satisfies those with a keen interest in justice and at the same time does not jeopardise national safety. It is not the case that we are saying the power of the state is to order the judge to go away; the judge must have a role in deciding—

Chair: Lord Chancellor, we must make progress. You will be pleased to know that you have anticipated at least one question.

Q200 Mike Crockart: You will be returning to that decision in a second. I do not want to labour the point of the 27 cases that we have touched on already, although it was the Government that included them in the appendix to the Green Paper, but it is key in judging whether these proposals are proportionate to understand the scale of the problem. The Independent Reviewer of Terrorism Legislation, David Anderson QC, in his evidence to us argued that he has sought unsuccessfully to ascertain how many of those 27 current cases concerning sensitive information could only be fairly resolved by means of closed material procedure. I just want to act on his behalf and say can you help us on that, and if not can you write to us with a figure and an explanation of that?

James Brokenshire: It might be worth me adding, in relation to the Independent Reviewer David Anderson, that Mr Anderson is being given further access and details in relation to those 27 cases to be able to examine them and look at that for himself. The 27 cases are live cases; they are obviously still continuing, and therefore it is difficult for us to comment on them in detail as a consequence of that. I do go back to my original point that it only needs a small number of significant cases of information being disclosed or taken out either for there to be a national security issue or for the judge in that case not to be able to form a complete judgment based on all the information that is there. It is both of those elements that we are seeking to address through the proposals in the Green Paper, and obviously we are continuing to reflect on the representations that have been made in response to the Green Paper itself. It is with that intent and aim that we are approaching this.

Mr Clarke: It only needs one case to go wrong. If you suddenly alert some Al-Qaeda cell in such a way they guess who it is you have turned and where your information is coming from, or they suddenly realise you have a technique that enables you to intercept things that they did not realise you were capable of intercepting, then you have done some very considerable damage. We think there are 27 such cases, but in the worst scenario one case blowing up our intelligence penetration of a very dangerous group of people would be very, very bad from a national point of view.

Q201 Lord Dubs: Lord Chancellor, in the foreword to the Green Paper the emphasis is very much on protecting national security, enabling the security and intelligence agencies to do their job, and indeed, you made that point in answer to an earlier question. On the other hand, there are some concerns that the proposals in the Green Paper go wider than that: they apply to any disclosure of sensitive information which may harm the public interest. Is that the case? In other words, what evidence does the Government rely on to demonstrate that there is a wider problem than simply the security considerations?

Mr Clarke: We are addressing that. It probably is not set out with the greatest clarity in the Green Paper, because you have to dot about in the Green Paper. Doing that, some people have started expressing perfectly sincere fears that we are giving some Secretary of State the power to start asserting that it is not in the public interest to put things in. That is not what we intended. We do believe what we are describing is going to apply to a small number of cases in practice: perhaps not all the 27 we are talking about. We are not thinking of withdrawing all kinds of things where it would be kind of better from the point of view of the authorities if we did not have this cross-examination in public of witnesses. What I had better say—the Government as a whole is going to have to consider this—is we are now addressing that. My colleagues have been using all the examples I have been given—

based on spies, national safety, terrorist suspects—as the examples all the way through the discussions we have had. That has been uppermost in our mind and we will guard against bringing in all kinds of other things where the enforcement of the Litter Acts, or something, is going to be compromised if you have it in open court. I deliberately give an extremely silly and fanciful example, but some of the fears being expressed are going to be quite easily rebutted.

Q202 Lord Dubs: Lord Chancellor, in an earlier comment—and in fact in the *Daily Mail*—you said that "the final decision on whether individual pieces of evidence must be disclosed will rest with the judge". That seems to be a bit of a change from the way the Green Paper is currently phrased.
Mr Clarke: It is not meant to be.
James Brokenshire: No, and we talk about closed material proceedings, and that is the way in which those proceedings move forward: that there is a clear assessment by the judge of the relevant material to determine whether it should be open, and therefore public, or closed. It is a key part of the consideration in these closed material proceedings to strike that balance. The emphasis is always on seeking to disclose where possible, and only reserving those issues where there is an implication in terms of national security or otherwise.

Q203 Lord Dubs: Is the safeguard in the courts' role to review the Secretary of State's decision on disclosure on judicial review principles? Is that the extent of it?
James Brokenshire: There are two stages here—
Mr Clarke: I will allow James to speak.
James Brokenshire: In essence there is the decision that is made by the Secretary of State as to whether a closed material proceeding should apply, based on the harm that might be caused if it were to continue in completely open session. It is that decision that is then capable of review using the judicial review principles by the judge, but then the separate part of that, if that decision is upheld, is then the consideration of each of those items or classes of evidence to determine whether it does fall into the closed element; and, if it does fall into the closed element, what gisting, what summary of that information can be provided in respect of even that closed material. A judgment will be made as to whether that gisting of itself will be harmful to the national security interests.

Q204 Mr Raab: Very briefly, that is quite useful in some sense to take us a bit further towards reassurance in the judicial element. Does that not then get you back into the problem of the US control principle, because the more you give the judge the last word, the more uncertain and unsettled our American colleagues and partners will be? Does it create a knock-on effect in relation to your fear of intelligence being cut off?
Mr Clarke: We have a dilemma. What I would like us to do with our final decisions, which will be subject to the consultation, including this Committee's bidding, is to satisfy you, Mr Raab, that the judicial element has been brought in to the maximum possible extent, consistent with the purpose of the whole thing. At the same time I would like to satisfy the Americans that, if they give us material in confidence, then even by that process we will not break their confidence. The problem with just explaining to the Americans that our courts work in this way so your material might come out in the United Kingdom is they will not share the material to the fullest extent that they are used to doing. That weakens our ability to defend the country. We will try to be as receptive as possible to the argument that the judge has got to have a proper and sensible role in all this; you cannot just have the unfettered decision of a Secretary of State. On the other hand, we have to uphold the

control principle, and it may well be that intelligence given to us in confidence by third party countries, as our allies, should not be capable of emerging by our process.

Q205 Mr Shepherd: In the world of WikiLeaks this is very difficult, is it not, because we have had released into the public domain huge quantities of very sensitive information, directly affecting diplomats in post and all the rest of it? I wish the Americans well in their quest there, but we are concerned here about the integrity of our own legal processes, and the fairness of court actions. You will have read, I am sure, and seen the special advocates almost universally have declaimed and spoken against this as almost an assault on our common law principles. That may be hyperbole in some eyes, but it is right at the heart of the issue. First of all, I have to ask you, do you accept the special advocates' position? Do you give it credibility?

Mr Clarke: Of all the responses we have received to our Green Paper, the evidence of the special advocates most unsettled me. It did surprise me, and I was very startled by their strong reaction. I met two of them; we are engaging with them, and it is obviously important that we take on board their very strong strictures. Anything we can do to address the process by which they take instructions or impart information to their clients in order to do their job properly, that can sensibly and properly be done, we should obviously try to do. I have to say that others involved in the process say the special advocates underestimate their own impact on cases. They are advocates, and I think the advocacy they put forward in their witness statement is extremely strongly critical—it is root and branch at times—of the process in which they all take part. I understand the very great constraints under which they operate, and anything that can sensibly be done without compromising security we must carefully consider, and we are doing so. Taking what they can report back to their clients afterwards—gisting and so on—I am not quite sure why they are so doubtful about seeking the courts' permission; the court would wish to give them permission to do that, in my opinion. The judge wants to be able to do justice in the case. That kind of thing has to be tested with them. They say they cannot call witnesses: there is no reason why they cannot call witnesses; they can call expert witnesses if they have expert witnesses. I do not think you should just take it baldly as a rejection, but we must engage with them and, wherever it is possible to do so without compromising safety, try to meet their points and improve the process.

James Brokenshire: If I might say, Mr Shepherd, it is important to state that the courts have upheld the principle of closed material proceedings providing fair trial within the framework of the European Convention. On the concept of, "Does this provide a proper judicial mechanism?", yes, we think that it does. It comes down to some of the principles on seeking to put information into a court and allowing full consideration of all of the information, which is the key part here. I had a very constructive meeting with the special advocates to talk through some of the practical challenges that they have identified in their submission, talking through the Chinese wall provisions that we have suggested, mechanisms by which we may assist them through further training and support, to support the I think very good job that they did. I was very struck by the evidence that Lord Carlile gave to you, which was very much in keeping with everything that we see in Government. It is just how good they are at the job they do in making the case for their clients, getting evidence into open rather than closed session and through other means as well. I think special advocates are doing a very effective job in that way.

Q206 Mr Shepherd: I will stick with the Lord Chancellor's exegesis if I may; your concerns, Sir, are clear. And special advocates, of course, sum it up as "inherently unfair"; that is a phrase that has repeated itself through our sayings. On the question of the judges that you have just introduced, Lord Kerr—I never know how to pronounce his surname; we had a colleague, Michael Ancram and he is a "Kerr" or a "Karr", and I can never remember which—who is a respected judge you will agree, said in court, "[to] be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead." That is at the heart of our concerns.
Mr Clarke: Those assertions are all made. As I said at the start of the process, of course open justice is perfect justice. In an ideal world you would want every case to be conducted in a perfectly open way, full instructions taken, full cross-examination, publicity if necessary, the public there sitting listening to it. Once that cannot be done, and it obviously cannot be done in the kind of cases we have been talking about today, you are talking about a second best. But nevertheless, you can challenge; it is just a question of making sure that the special advocates are in the position to provide adequate challenge, which some people assert they do, and so—Lord Kerr, I keep calling him, I do not know—on Lord Kerr's point, it is challenged by the special advocates. The special advocates say, "Well, it is difficult to challenge because we can only get written instruction from our clients once we have got the sensitive material". They can seek permission from the court to take further instructions. We must work at that. I do not dismiss the special advocates—
Q207 Chair: Lord Chancellor we have to suspend the session for 10 minutes because there is a vote in the Lords. I apologise for that.

Sitting suspended for a Division in the House.

On resuming—
Q208 Mr Shepherd: Having taken the trouble to quote Lord Kerr, I wanted to ask whether you agree with him. I will do the quote again: "[to] be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead." Do you agree with Lord Kerr?
Mr Clarke: I think the ideal for any system of justice is that evidence is given openly and is challenged. If there are circumstances where that cannot be done, then you have to obviously, in listening to the evidence or considering the evidence, bear in mind the limitations under which it has been challenged. I reassure myself by saying that the judges in these cases are perfectly capable of assessing the weight they can give to evidence. The judge in the British situation is almost certainly someone who has been an advocate himself or herself in his or her career; they will know that they have to bear in mind, at the back of their mind, that the special advocate has done his or her best but there is a limit to how far they can challenge compared with a perfectly open system. I still think that is preferable to nothing; that is preferable to not having the evidence considered; that is preferable to the public never knowing which way the judge came down, having considered everything they had before them to the best of his or her ability.

Q209 Mr Shepherd: You will see where, as I said before, it is the integrity of our own legal system that worries us, or the admirableness of it. The propositions that we are putting are obviously a corruption of the ideal of that system for the reasons that you are giving. That is the thing that we have to confront as a Committee and as a society: the propositions that you are putting in front of us. It is very, very worrying to some of us; that of course is true.
Mr Clarke: It would worry me. I haven't changed my views, as you know Mr Shepherd; I haven't over the years. That is why, in the exceptional circumstances that public safety is

definitely going to be put at risk if you subject this material to ordinary open cross-examination, then you have to do the best you can that still gets the most just conclusion you are going to get of the actual case. With the professional skill and judgment of the special advocates and the judge who is trying the case, you will get a better outcome if all this evidence is considered than you will get if it all just has to vanish into a black hole because it cannot play any part in the outcome of proceedings.

Q210 Baroness Berridge: Secretary of State and Minister, we are dealing with an unusual situation here where we are considering a form of judicial process. Have you had representations from the judiciary in relation to the proposals in the Green Paper, and if so what representations have been made?
Mr Clarke: I have discussed it with the judiciary, with the Lord Chief and the two High Court judges who he asked to consider this matter and discuss it with me. One thing we are absolutely clear about is judges do not advise Ministers on matters of policy. Judges will discuss the broad issues involved, will discuss their experience of these cases, will certainly offer points about procedure, process and how they would best like to do their job, but in the end separation of powers is such that the judges have to reach a point where they retreat and say, "That is a matter for Parliament, that is a matter for you Minister, a matter for whether Parliament is going to agree with you; I cannot advise you on that".

Q211 Mr Shepherd: And the Law Officer?
Mr Clarke: The law have contact with the judiciary, and certainly the Attorney and the Solicitor have regular contact, and I have had meetings on this subject with judges, but you can only take it so far. They want to know what we are contemplating, and I want to know what their view and process are, but we are all very clear that they cannot give advice on policy to the Government of the day.

Q212 Baroness Berridge: I just want to follow that up. I know they can only go so far, but Parliament is involved in this scrutiny process now and when the legislation is put forward. Will Parliament have the opportunity of hearing those representations that the judiciary have made?
Mr Clarke: We are proceeding on the basis that we will publish the responses we have had to the consultation—the written ones, that is—if the consultees agree, and most we have released. I do not think the judges have put in any written evidence, and I can only say that, if the Select Committee want to hear from judges, have a go at the Lord Chief Justice, but I am not sure he will agree to come. He would want all kinds of reassurances about what kinds of questions he will be asked, and no judge will appear here and give an opinion on our Green Paper and the merits of it. Not only do I think they would be most unwise to do so; I think they do not need my opinion. You would not have the faintest chance of persuading them to do that. Nor do they express their view to me either: "Yes, we agree with that; no, we do not agree with that". They discuss in general terms the process they are used to. If the Committee can persuade a judge to come here and talk to you—[2]

[2] *Note by Witness*: Since the hearing the Secretary of State for Justice has clarified for the Committee that consultation responses have been received from the Investigatory Powers Tribunal (a section in the tribunal's

Q213 Baroness Berridge: Do you appreciate, though, our concern that a limited amount of representation has been given of the judicial view to the Executive and to the Lord Chancellor, which will not then be given to Parliament?
Mr Clarke: I cannot compel judges to respond to a consultation process, nor can I compel judges to appear before Parliament. The judges are right to be highly sensitive to the circumstances in which they might do that, but they do sometimes come and appear before Select Committees. I assure you, I have not debated with any judge the merits or otherwise of any part of this by way of a discussion on policy. I have had general discussions. The judges are quite scrupulous, and they are not going to start getting drawn into whether or not they agree with a Minister on an item of policy. They will not do that even when they are talking in private to a Minister.

Q214 Lord Morris of Handsworth: Lord Chancellor, can I perhaps take you to a less high profile end of the judicial system, which is Inquest? Do you accept Inquest's evidence that, under the current inquest system, coroners can—and do—cope with even the most sensitive and highly classified material without the need for closed material procedures? If not, what examples can you give where coroners have not been able to overcome the problems posed by sensitive materials?
Mr Clarke: It usually is the case that they do. In some of the most difficult cases, for example, involving service personnel and families, it is normally possible to establish a perfectly good process by which the rights of everybody are respected, a proper inquest is held, but, again, military intelligence or secure information is not compromised. The 7 July bomb inquest we had recently: I have already spoken and praised everybody who took part in that. To others we cannot guarantee that. Sooner or later there will be a case that tests this, because the parties, out of their political conviction or for some other reason, are extremely hostile to the authorities, the Government, there are great issues at stake, and the Government is not prepared to compromise itself by disclosing everything to them. Again, I speak in ignorance, so do not give great weight to this evidence. My understanding is that, in Northern Ireland, there are quite a lot of inquests that have been adjourned for many years. Again, I am being very cautious about what I say, because once you get into Irish politics, the conduct of inquests in Northern Ireland is a very, very fraught subject. I do not know if anybody here has been in the Irish Office, but they have had this difficulty. We have to consider whether or not we are going to anticipate whether a case might arise sooner or later where we have the same difficulty.

Q215 Lord Morris of Handsworth: Can I ask whether the coroners have been consulted outside of the Green Paper?
Mr Clarke: I have not directly consulted with them[3].
James Brokenshire: I am not aware that that is the case, but what I would say to you, Lord Morris, is that we recognise that this is a very sensitive issue, reflecting on the rights of the

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annual report), the Intelligence Services Commissioner (a retired judge), the President of the Employment Tribunals, the Senators of the College of Justice, the Lord Chief Justice of Northern Ireland and the Interception of Communications Commissioner (a retired judge). These responses have been published by the Cabinet Office.

[3] *Note by Witness*: Since the hearing the Secretary of State for Justice has clarified for the Committee that a consultation response has been received from the Coroners' Society of England and Wales. This has been published by the Cabinet Office.

family to have access to this process. When you look at the Green Paper and the way in which it is phrased, we recognise that there are no easy solutions to addressing this particular challenge. The question that we genuinely sought public views on is the extent to which we should be examining and considering the possibility that the Lord Chancellor has been alluding to as to where there is sensitive information that could not be disclosed to the coroner in the some way. Yes of course there are other mechanisms that could be available, perhaps some sort of inquiry, but they tend to be very long, they tend to be quite complex in their nature, so you may not see that regularly used. That is why we feel it is right to ask the question that we have asked and why we are considering this with very great sensitivity.

Q216 Lord Morris of Handsworth: But you do accept the principle of the right for families to know?
Mr Clarke: That is true, but the families would be in the same position as parties in civil cases, knowing nothing if information is just withheld because it cannot be disclosed. James is quite right to stress that we are proposing this with very, very great care, but in the 7/7 case the Government in fact applied for a closed hearing because we wanted to put in material about the work of the intelligence service: one issue was whether or not they could possibly have averted the bomb on the London Underground as part of their intelligence work. The judge quite rightly held that the Coroners Rules did not enable her to hold a closed session. We were then in a bit of a crisis. We could have tried to proceed by amending the Coroners Rules. That would have been one obvious next step, but we might still have found it going through the courts and being argued about. In the end, common sense prevailed: the parties between themselves produced an agreement on the way in which they could proceed, and I quite agree that is optimal in every case. The Government was satisfied that national security was not going to be compromised; all the parties involved were able to have a proper hearing of sufficient of the issues for everybody to feel it had been handled properly. But you cannot guarantee that in every case because, as I say, the only families involved were families of innocent victims of people travelling on the Underground when the bomb went off.

Q217 Mr Shepherd: Baroness Manningham-Buller has spoken about the events and some of the matters that were considered very, very sensitive as to the effectiveness of the security services, and in fact identifying the 7/7 plot and things they could do. I think she did that—was it in the Dimbleby or Reith lectures that she gave last year?
Mr Clarke: I am afraid I did not hear it. Do you mean she gave details about the intelligence operation?

Q218 Mr Shepherd: No, about the concerns that arose around it: had the security services missed sensitive and important information that meant they could have anticipated? It was engaging with a wider public than—
Mr Clarke: The judge in the inquest accepted that it was a valid issue for the inquest: had the intelligence services covered every eventuality and had they perhaps failed to take adequate action to prevent the risk? They managed to handle it to everybody's satisfaction. It required great skill and some reasonable give and take and understanding on all sides that they all desired to have it properly heard—
Chair: We need to progress, and please, I ask my colleagues not to make any further interventions unless you do it through the Chair.

Q219 Mr Sharma: Do you accept the proposals in the Green Paper will have an effect on media freedom? What is the Government's justification for such a serious interference with this fundamental democratic right?
Mr Clarke: I defend the freedom of the media as vigorously as anybody else, but we do not allow the media to print unedited intelligence material at the moment, because it would compromise national safety. Nor do I know any sensible journalist who believes that MI5, MI6, for example, should freely start giving press releases about what it is doing. Open justice I firmly believe in, and I do not think that justice should ever take place behind closed doors unless there is an extremely compelling reason. National security can sometimes be one of those reasons.
James Brokenshire: It is worth highlighting, Mr Sharma, that on our closed material proceedings in relation to, as was, control orders and TPIMs, there are open judgments that are reported in relation to those and that those have been actively reported on by the press and elsewhere. When a judgment is given, yes, there is a closed judgment, but there is also an open judgment and the judge will always seek to put as much into the open judgment as he or she is able, to facilitate subsequent reporting and to facilitate the press in their review of a particular case.
Mr Clarke: There is no inhibition on allegations being made. I read in the last two days one or two journalists suggesting that somehow we are stopping people from making allegations. They are perfectly free to make whatever allegations they like. *Binyam Mohamed*: no inhibition was placed on his allegations, or anybody else involved. It is the counter to them that we are talking about.

Q220 Baroness Berridge: We had evidence from Joshua Rozenberg who pointed out that the current trend throughout the court system is towards greater openness and transparency, so if you look at the family courts, the Court of Protection, inquests and the Supreme Court. The Green Paper is going directly at odds with that trend. Are you concerned about that? Also, the evidence from journalists was that under the new procedure they would not have learnt of the information through disclosure that substantiated the claims that were made in the *Al Rawi* case and *Binyam Mohamed*. Can you assure the tribunal that that would still be the case today, after the changes you outlined, or would that have happened under a closed procedure?
Mr Clarke: I am all in favour of increased openness and transparency and I am proposing to allow television cameras into more courts than at the moment, but I am not proposing to allow televised evidence given by spies on national intelligence material. It is a balance in these things. Some of the claims that have been made about what our new process would effect I find puzzling. I have just said to Mr Sharma that no-one is proposing to inhibit allegations at all. They would be given in open court if the proceedings are underway and would be challenged by whoever is appearing on behalf of the Government. It is certain aspects of the Government's response that cannot be given in open court. That is all.

Q221 Baroness Berridge: To give you a specific, the allegation about which Ian Cobain gave evidence to us he said that he made back in 2005, about our involvement in serious human rights abuses, and he was told, "That's a conspiracy theory". It was then through the disclosure process in court proceedings that he learnt that that was not the case. In that situation, open justice was very important. It is not just the allegation: it is the substantiation of an allegation. Would that still be the case under the new proposals, or would they not learn that ever at all?
Mr Clarke: It is more likely to be under the new proposals, although it will be less than perfect. Let me go back to the most obvious example, because it is the most recent, it is the one I was somewhat involved in: Guantanamo Bay detainees. I am sorry to go back to it yet

again. I would have liked those cases to have been heard through to a judgment. I am inclined to believe the defence put forward. Indeed, I do believe the defence put forward, but I would feel more reassured as a citizen if a judge had given a judgment and pronounced in favour. Do not take that as casting any doubt on the intelligence services, because I have no reason to doubt them at all, but I think citizens would have felt doubly reassured if it had been properly heard and the allegations had been dismissed and judgments had been given for the Government with costs and all the rest of it. But we were not able to do that. Because we could not give the evidence in closed proceedings, the defendants just withdrew, and the Government said, "We are not defending ourselves, we still deny the allegation, could we settle on how much you will take by way of compensation on the basis your claims are going to be unchallenged?" It is precisely the need to get these allegations dismissed and accept the risks in some occasions—I hope in rare ones they might even be upheld—that we are trying to bring in a process to enable us to meet.

James Brokenshire: It comes back to our principal aim of seeking to allow information to be provided to the court, and for the judge to determine what should be open and what should be closed. That is why those protections are very much afforded in the structure that is contemplated within the Green Paper.

Q222 Mike Crockart: My question returns to Mr Shepherd's point from earlier. In your foreword to the Green Paper, you say that "the prize is improved executive accountability", but in light of the strength of reaction the Green Paper has provoked, does it remain your view that the proposals will enhance rather than reduce Executive accountability, and increase rather than undermine public confidence?

Mr Clarke: My last answer was a rephrasing of that. We have got to counter the extreme reaction. What has happened is we have taken rather a long time since we produced the Green Paper; it is getting near the time when we should produce a clear response. There are doubts, criticisms and questions. People seemed in the last week or two to be feeding each others' interpretation of the Green Paper and attributing to us a desire to go into secret justice, which was not in the mind of anybody who put that Green Paper together in the first place. We have to claw our way back and I hope persuade this Committee that we can put in place a process that improves Executive accountability—even if it falls short of perfection, which would be open justice—and will enable proper hearings and decisions to be reached by judges using all the evidence available in the best possible way it can be made available to them, given all the restrictions.

James Brokenshire: I do not think the public would see it as right that Government has to settle claims where it believes that it has a strong case to defend but is unable to put that evidence before the court, or equally, for the decisions that are made that may be subsequently reviewed through judicial review, that they are not able to put before that court, and therefore scrutinise properly, the actions of the Executive in making that decision. It is at the heart of this Green Paper that we take those factors into consideration. I agree with the Justice Secretary in saying that there has been a lot of speculation as to the broad remit that perhaps some have interpreted in relation to the Green Paper itself. It is that fundamental aspect that we have at our core, and our intentions are in seeking to support and promote justice and support the scrutiny of the Executive's actions, rather than to in some way inhibit that.

Q223 Mike Crockart: I take your point about wanting to make sure that, where you want to take cases the full way to judgment, you manage to do that, but I do not accept that

that is actually the public's perception. The public perception is quite the opposite, and there is a deep mistrust about the motives behind this Green Paper. You need to do something to deal with that, otherwise do you accept that the damage that will be done to public trust is a necessary cost to taking this through?

James Brokenshire: I hope in many ways that the answers we have given to this Committee have been very clear that the nature of closed material proceedings and the nature of the issues that Government is seeking to protect are very much about justice, protecting the public and the security issues allied to that. It is with that emphasis that we are seeking to give in relation to the Green Paper that we judge that simply taking no action does not advance the interests of those issues I have highlighted in response to you, Mr Crockart. Therefore our judgment is that action is required to protect national security and also to allow that examination of the decisions of Government through the court process. That is at the heart of what we are seeking to do here.

Q224 Baroness Berridge: We are now onto *Norwich Pharmacal*: a slight change of tack. The Green Paper says that there are seven cases in which difficulties have been raised under the *Norwich Pharmacal* jurisdiction. Can you help the Committee with how many of these have been since the decision in *Binyam Mohamed*?

James Brokenshire: All seven is my understanding. The seven further cases have been since the *Binyam Mohamed* case in terms of seeking further disclosure, if that may assist.

Q225 Baroness Berridge: Can you identify for us any case in which applying the *Norwich Pharmacal* principle has ordered the disclosure of material that the Americans have wanted to make secret?

Mr Clarke: I do not think you have ever had a case where American material has been—I am not aware of one. *Binyam Mohamed* stands as an isolated case, but no-one knows of another case.

James Brokenshire: The point is that since the *Binyam Mohamed* case, we have seen the seven further cases. Therefore the focus is on what was initially developed as a concept through an intellectual property case, which has now been applied from a national security context. Therefore, it is against that—the impact we have seen in relation to our relations with our partners on the provision of intelligence information—that we judge it is appropriate to consult, as we have done, on taking action to address those concerns.

Q226 Baroness Berridge: Could you just confirm that there is no suggestion of what we have heard from other witnesses: that the issue with the Americans is leading to intelligence that has risk to life being withheld? Is that your understanding?

Mr Clarke: There is no question…?

Baroness Berridge: There is no question that intelligence that poses a risk to life is being withheld from us?

Mr Clarke: I certainly cannot give an answer "yes it has" or anything of that kind. Collaboration between intelligence services means you disclose information to each other with good will, seeking to collaborate. It is only when you put it all together that you begin to realise quite what you are doing, all the people who are involved. We do not collaborate with the Americans on trivial matters. They rely on us co-operating with them as well, but it makes an enormous difference if we can have access to American and other material: they are not the only intelligence service, not at all the only intelligence service, with which we collaborate. Other intelligence services will not start giving us material we would like to have if they think the British legal process might disclose it. Hardly anybody else has an equivalent to *Norwich Pharmacal*; it is very, very unusual, and it is just possible after *Binyam Mohamed* that people have been intrigued by the idea that you can get hold of American

intelligence by going through this rather obscure process in the British courts, which, as James said, was not intended to cover these sorts of cases at all.

Q227 Mr Sharma: Do you accept the criticism of David Anderson QC about the Green Paper proposals, and is the Government actively considering his suggested alternative of judicially reviewable ministerial certificates?
Mr Clarke: It is very important evidence, but he does not dismiss root and branch what we are saying. He does not say that PII is a perfectly adequate alternative, and I have already said we would like to reassure everybody that the judge is not being excluded from the process of judging that material should be kept in closed proceedings. The judge has to have a role in deciding whether or not the Secretary of State's certificate is reasonable, it is a reasonable decision to give the certificate, and he has to have a role in deciding what material remains closed as the closed hearing goes on. I have read, and have here, some of Mr Anderson's evidence; he is someone we very much want to reassure and have onside, but he is not root and branch opposed to what we are proposing.
James Brokenshire: David Anderson has underlined the nature of the problem and, certainly from my reading of the evidence he has given to you, recognises that seeking to provide protections in respect of issues relating to national security is something that is regarded as important, from all of his discussions. We are of course reflecting on all of the submissions we have received in respect of the Green Paper. We have put out two suggestions that we are consulting on in respect of how to best address the *Norwich Pharmacal* issue, and clearly we will give consideration to the submissions that have been received.
Mr Clarke: I can give you select quotations, if you like: I have Mr Anderson's evidence before me. He is by no means rejecting what we have put forward.

Q228 Lord Dubs: Lord Chancellor, just a question about the process of getting the Green Paper drafted: how much of a role did the security and intelligence services have in drafting the Green Paper?
James Brokenshire: There have been some discussions prior to the publication of the Green Paper in terms of the proposals that have been set out for consultation, but it is that engagement. If the question is seeking to ask whether there are formal submissions that have been received from the security and intelligence agencies that have yet been published, the answer to that is no. The discussions were very much in the earlier stages.
Mr Clarke: They had an input, but so did quite a few other branches of Government. In the end, the Green Paper was a ministerial paper—drafted by officials, largely, but approved by Ministers.

Q229 Lord Dubs: Although you have withheld some of the submissions.
James Brokenshire: Again, this is on the basis that the Lord Chancellor wrote to the Committee about this, explaining the fact that various people had not given their consent to disclose. We have been working through, as you will be aware, securing those permissions so that those submissions can be published. That is still, to my knowledge, work in progress.
Mr Clarke: I repeat: the intelligence services have not made a written submission. MI5 and MI6 do not feature amongst those where they have not given consent.

Q230 Lord Morris of Handsworth: Are you saying that every submission where consent has been given has been published?

Mr Clarke: Yes.
James Brokenshire: To my knowledge, yes.

Q231 Chair: Lord Chancellor, final question: you mentioned right at the very beginning the White Paper. Could you give us an indication of the intended timetable of the White Paper?
Mr Clarke: Soon, I think. I would very much like to get the White Paper out and so would my colleagues, because we are getting concerned about the ever widening nature of the debate in the last few days. So we would quite like to get a White Paper out. I cannot guarantee when it will be, but we are all anxious to get it out. Then of course it will require legislation; the actual drafting of the legislation is the next key point in response to the understandable points raised by this Committee[4].

Q232 Chair: I take it that "soon" means before the Queen's Speech?
Mr Clarke: Yes, I would hope so.
James Brokenshire: Dr Francis, we have said to you that we would wish to take account as best as we are able of the considerations of this Committee, and therefore if a decision is taken to legislate, that will not be before the commencement of the second session to enable publication of your report and some consideration of that.
Mr Clarke: So long as you do not hold the report up for too long, but I assume you are thinking your report will come out before the Queen's Speech as well.
Chair: Could I thank you on behalf of the Committee for answering our questions? Your answers were not always in the order we anticipated, but we did get there in the end. Thank you very much.

[4] *Note by Witness*: Since the hearing the Secretary of State for Justice has clarified for the Committee that the Ministry of Justice plans to publish a summary of the consultation responses received, in line with the Code of Practice on Consultation. This may be accompanied by an announcement of the Government's policy conclusions following the public consultation and the JCHR's own report into these issues. The precise format is still under discussion within Government.