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THE JOINT COMMITTEE ON HUMAN RIGHTS

THE JUSTICE AND SECURITY GREEN PAPER

TUESDAY 7 FEBRUARY 2012

Joshua Rozenberg and Ian Cobain

Jan Clements and Dr Lawrence McNamara

Evidence heard in Public Questions 100 - 139

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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. To some extent, I do not think that such reporting is the target. 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

that British individuals detained in Afghanistan should 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 a judgment 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 in 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 a 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 massive 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 will 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 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 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. Without 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 may 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. Our 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.