These notes refer to the Justice and Security Bill [HL]
as introduced in the House of Lords on 28th May 2012 [HL Bill 27]

JUSTICE AND SECURITY BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Justice and Security Bill [HL] as introduced in the House of Lords on 28th May 2012. They have been prepared by the Cabinet Office, Home Office and Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

SUMMARY

3. Part 1 of the Bill provides for strengthened oversight of the intelligence and security activities of the Government by expanding the statutory remit of the Intelligence and Security Committee (the "ISC") to include (i) a role in overseeing the wider Government intelligence community (beyond the three security and intelligence agencies (the "Agencies")) and (ii) retrospective oversight of the operational activities of the Agencies on matters of significant national interest. In addition, the ISC will have powers to require information from the Agencies subject only to a veto by the Secretary of State rather than, as now, Agency heads. Parliament will have a more substantial role in ISC appointments.

4. Part 1 of the Bill also makes provision to expand the Intelligence Services Commissioner's remit beyond what the Commissioner and the Interception of

Communications Commissioner currently oversee, to include an ability to oversee, at the direction of the Prime Minister, any other aspect of Agency business.

5. Part 2 of the Bill makes provision to enable the Secretary of State, after first considering whether to make a public interest immunity claim, to apply to the court for a closed material procedure in certain civil proceedings in the High Court, the Court of Session or the Court of Appeal. The Minister triggers the process by deciding that a closed material procedure is needed, and applying to the judge, who determines whether it goes ahead. The judge must grant the application if one of the parties to the proceedings would be required to disclose material in the proceedings and the disclosure would be damaging to national security. Damage to national security is the only public interest ground on which an application is to be granted. Rules of court are to set out details of the closed material procedure. In particular, those rules are to provide that the judge will decide whether any particular piece of relevant material may be considered only in the closed parts of the proceedings, and whether it is necessary for a summary of the evidence to be supplied to all parties. The Bill provides that nothing in the provisions concerning the closed material procedure is to be read as requiring a court to act inconsistently with Article 6 (right to a fair trial) of the European Convention on Human Rights.

6. Part 2 of the Bill also contains provisions extending the existing closed material procedure under the Special Immigration Appeals Commission Act 1997. The new provisions cover reviews of certain cases where the Secretary of State has decided to exclude a non-EEA national from the UK, or to refuse a certificate of naturalisation or an application for British citizenship, in reliance on information which the Secretary of State considers too sensitive to make public.

7. Finally Part 2 of the Bill also makes provision about courts' residual disclosure jurisdiction, generally known as its *Norwich Pharmacal* jurisdiction, to order a person involved (however innocently) in apparent wrongdoing by another person to disclose information about the wrongdoing. The provision removes that jurisdiction in certain circumstances if the information is sensitive. Sensitive information means, broadly, information which relates to, has come from or is held by the Agencies or defence intelligence units, or whose disclosure the Secretary of State has certified would damage the interests of national security or international relations.

BACKGROUND

General

8. The provisions contained within the Bill stem from the Government's *Justice and Security Green Paper* (Cm 8194) (the "Green Paper"), which set out proposals to (i) modernise judicial, independent and parliamentary scrutiny of the Agencies to improve public confidence that executive power is held fully to account; (ii) better

equip the courts to pass judgment in cases involving sensitive information; and (iii) protect UK national security by preventing damaging disclosures of genuinely national security-sensitive material. This document can be found on the Cabinet Office's website:

http://consultation.cabinetoffice.gov.uk/justiceandsecurity

Background on the oversight of intelligence and security activities

9. The system for independent oversight of government intelligence activity is principally contained in the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000. In particular, the Intelligence Services Act 1994 established the Intelligence and Security Committee, a body consisting of members of each House of Parliament, with the function of examining the expenditure, administration and policy of the Agencies. The Regulation of Investigatory Powers Act 2000 contains provisions on the oversight of certain investigatory powers, including provisions which establish two Commissioners: the Interception of Communications Commissioner and the Intelligence Services Commissioners.

10. The present system of oversight has been built up over time. Where gaps have emerged in the system, they have been filled through non-statutory additions to the remits of current oversight bodies. There is therefore a case to modernise the oversight system, and ensure that it is flexible enough to cope with future changes.

Background on closed material procedures

11. The Green Paper noted an increase in the number and diversity of judicial proceedings which examine national security-related actions. In many of these cases, the facts cannot be fully established without reference to sensitive material. However, this material cannot be used in open court proceedings without risking damage to national security. Difficulties arise both in cases in which individuals are alleging Government wrongdoing, and in cases in which executive actions or decisions taken by Government are challenged. Many of these cases were previously resolved by the use of a closed material procedure with the consent of both parties. However, the Supreme Court has ruled in *Al Rawi and others v Security Service and others* [2011] UKSC 34 that a court is not entitled to adopt a closed material procedure in an ordinary civil claim for damages. The court in *Al Rawi* held that it was for Parliament, not the courts, to decide whether or not to make closed material procedures available in civil proceedings.

12. The Green Paper considered that in such cases the court may be prevented from reaching a fully informed judgment because it cannot hear all the evidence in the case. Under the current system, the only method available to the courts to protect material such as intelligence from disclosure in open court is through public interest immunity. A successful public interest immunity application results in the complete exclusion of

that material from the proceedings. Any judgment reached at the end of the case is not informed by that material, no matter how central or relevant it is to the proceedings.

13. The difficulty identified by the Green Paper was that the Government could be left with the choice of causing damage to national security by disclosing the material or summaries of it; or attempting to defend a case with often large amounts of relevant material excluded. If the material cannot safely be disclosed, the Government may be forced to concede or settle cases that could be unmeritorious, and pay compensation, or ask the court to strike out the case. Most significantly, claimants and the public may be left without clear findings where serious allegations are made because the court has not been able to consider all the evidence.

Background on "Norwich Pharmacal" and similar jurisdictions

14. Another recent development is that claimants have sought to use what is known as the *Norwich Pharmacal* jurisdiction to apply to the courts for disclosure of sensitive information to use in proceedings against third parties overseas. The jurisdiction takes its name from the case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. This case involved unlicensed importation into the United Kingdom of a chemical compound called furazolidone for which Norwich Pharmacal owned the patent. Norwich Pharmacal was unable to identify the importers, and the Customs and Excise Commissioners held information that would identify the importers but would not disclose it, claiming that they had no authority to give such information. The House of Lords held that where a third party who had been mixed up in another's wrongdoing had information relating to that wrongdoing, the court could compel the third party to assist the person suffering damage or otherwise affected by the wrongdoing by giving them that information. This is now known as a *Norwich Pharmacal* order.

15. Thus a *Norwich Pharmacal* order is a remedy developed by the courts in England and Wales, under their inherent jurisdiction, with an equivalent jurisdiction in Northern Ireland. There is no equivalent jurisdiction in Scotland. The requirements for a *Norwich Pharmacal* order have been summarised as being that "(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) the person against whom the order is sought must (a) be mixed up in so as to have facilitated the wrongdoing and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued"(see *Mitsui & Co v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), paragraph 21; other cases give slightly different summaries). The court will usually only order disclosure if it finds that the information is reasonably necessary for proceedings between the applicant and the wrongdoer and it considers it should exercise its discretion in favour of granting relief. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

16. In a more recent development (no fewer than nine times since 2008) *Norwich Pharmacal* applications have been made by individuals seeking to obtain disclosure of Government-held sensitive information. Often this is sensitive intelligence information shared by foreign partner governments on a confidential basis.

TERRITORAL EXTENT AND APPLICATION OF THE BILL

17. The provisions contained in the Bill extend to the whole of the United Kingdom (with the exception of certain consequential amendments which have a more limited extent). The Bill generally deals with reserved matters in Scotland (with one exception, discussed below) and excepted matters in Northern Ireland: the provisions primarily relate to national security, international relations, defence and immigration and nationality. There is no effect on the Welsh Ministers or the National Assembly and no other particular effect on Wales.

18. At Introduction this Bill contains provisions that may potentially trigger the Sewel Convention. The provisions relate to the power to amend the definition of "relevant civil proceedings" in clause 11 to add or remove a court or tribunal for the purposes of the closed material procedure regime established by clauses 6 to 11 (see clause 11(2) and (3)). The power could be used to add a court or tribunal where the rule-making authority for proceedings in such a court or tribunal is a Scottish Minister. These provisions therefore have the potential to lead to an indirect alteration of the executive competence of Scottish Ministers. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are any amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

COMMENTARY ON CLAUSES

Part 1: Oversight of intelligence and security activities

Clause 1: The Intelligence and Security Committee

19. *Subsections (1) and (2)* of clause 1 state that the Intelligence and Security Committee (the "ISC") is to consist of nine members who are drawn both from members of the House of Commons and members of the House of Lords.

20. *Subsection (3)* provides that each member of the ISC is appointed by the House of Parliament of which he or she is a member.

21. *Subsections (4)(a) and (5)* state that, although members of the ISC will be selected by the House of Parliament from which they are each drawn, a person is not eligible to be a member of the ISC unless nominated for membership by the Prime Minister after consultation with the Leader of the Opposition. ISC members have access to highly sensitive information the unauthorised disclosure of which could lead to damage to national security. The purpose of this provision is to ensure that the Government retains some control over those eligible to access this material.

22. *Subsection (4)(b)* states that a Minister of the Crown is not eligible to be a member of the ISC. This is to ensure that, in line with the general practice for select committees, members are drawn from the backbenches.

23. *Subsection (6)* requires the Chair of the ISC to be chosen by its members.

24. *Subsection (7)* introduces Schedule 1, which makes further provision about the ISC.

Schedule 1: The Intelligence and Security Committee

Tenure of office

25. Paragraph 1 of Schedule 1 contains provisions regulating the tenure of office for ISC members.

26. The ISC is dissolved when Parliament is dissolved. Otherwise someone ceases to be an ISC member if they resign; if they become a Minister; if they cease to be a member of the relevant House of Parliament; or if they are removed from office by a resolution of the relevant House of Parliament.

27. Former members of the ISC may be reappointed.

28. Sub-paragraph (5) of paragraph 1 ensures that (provided that the ISC remains quorate) a vacancy in its membership will not prevent it from carrying out its functions.

29. Sub-paragraphs (6) and (7) provide for continuity in the ISC’s activities between Parliaments. For example, the memorandum of understanding (discussed below) agreed between the Prime Minister and the ISC in one Parliament will continue in force, and bind the ISC, in the next Parliament (unless or until it is amended).

Procedure

30. Paragraph 2 of Schedule 1 states that the ISC may determine its own procedure, subject to the following: the Chair has a casting vote if on a matter there is an equality of voting; the Chair may appoint another member of the ISC to chair proceedings in that person’s absence; the quorum of the ISC is 3.

Access to information

31. Paragraph 3 contains provisions for sharing information with the ISC and the circumstances in which information can be withheld from the ISC. The position for the present ISC is that the Director-General of the Security Service, the Chief of the Intelligence Service or the Director of the Government Communications Headquarters (as well as the relevant Secretary of State), is able to decline to disclose information because it is sensitive information which, in their opinion, should not be made available. Paragraph 3 removes this ability for the Agency heads to withhold information. The ability to decide that information is to be withheld will instead rest (solely) with the relevant Secretary of State (for the Agencies) or Minister of the Crown (for other government departments), who may decide it is not to be disclosed on the basis that: the information is sensitive information (as defined in paragraph 4) which for national security reasons should not be disclosed; or it is of such a nature that, if the Minister were requested to produce it before a Departmental Select Committee of the House of Commons, the Minister would consider (on grounds which were not limited to national security) it proper not to do so.

Sensitive information

32. Paragraph 4 defines "sensitive information" in the context of paragraph 3. This is a different definition from that which applies when redactions from the ISC's reports are being considered under clause 3(4). The position for the present ISC is that information is considered sensitive information, if (among other reasons) it might lead to the identification of, or provide details of, sources of information, other assistance or operational methods available to the Agencies; or if it is information about particular operations which had been, were being or were proposed to be undertaken in pursuance of any of the functions of the Agencies. Paragraph 4 extends these parts of the definition of sensitive information beyond the Agencies to cover also equivalent information relating to any part of a Government department, or any part of Her Majesty's forces, which is engaged in intelligence or security activities. As with the present ISC, although the power to withhold sensitive information is widely drawn, it is expected to be exercised sparingly in practice.

Clause 2: Main functions of the ISC

33. *Subsection (1)* gives the ISC the power to examine or otherwise oversee the expenditure, administration, policy and operations of the Agencies.

34. *Subsection (2)* states that the ISC may examine or otherwise oversee such other activities of the Government in intelligence and security matters as are set out in a memorandum of understanding. The Government's intelligence and security work goes wider than the Agencies' and is undertaken in parts of other Government bodies. These include the Joint Intelligence Organisation in Cabinet Office, the Office for Security and Counter-Terrorism in the Home Office and Defence Intelligence in the Ministry of Defence. This provision enables the ISC to provide oversight of the intelligence and security community beyond the Agencies. Intelligence and security

functions, and the parts of Government departments that undertake those functions, may change over time. Describing those functions in a memorandum of understanding enables changes to be made to the ISC's remit, in response to changes to the structure and work of the wider intelligence community, by the agreement of the ISC and the Government. The present ISC does in practice hear evidence from, and make recommendations in relation to, bodies other than the Agencies. These provisions formalise the position so far as the new ISC is concerned.

35. *Subsection (3)* states that the ISC may consider any operational matter provided the ISC and the Prime Minister are satisfied that: it is not part of any ongoing operation; and it is a matter of significant national interest. Consideration of such matters must be in accordance with the memorandum of understanding. The present ISC does on occasion hear evidence, and report on operational matters, for instance, in its *Report into the London Terrorist Attacks on 7 July 2005*. With the formalisation of a role in oversight of operational matters, the Government would expect the new ISC to provide such oversight on a more regular basis.

36. *Subsection (4)* further provides that the memorandum of understanding may include other provisions about the ISC, must be agreed between the Prime Minister and the ISC and may be altered with the agreement of the Prime Minister and the ISC.

Clause 3: Reports of the ISC

37. *Subsections (1) and (2)* require the ISC to make an annual report to Parliament on the discharge of its functions and enable it to make such other reports as it considers appropriate concerning any aspect of its functions. The present ISC makes its reports only to the Prime Minister.

38. *Subsection (4)* requires the ISC to exclude any matter from a report to Parliament if the Prime Minister, after consultation with the ISC, considers that the matter would be prejudicial to the continued discharge of the functions of the Agencies or the functions of any of the other bodies whose activities the ISC oversees by virtue of clause 2(2).

39. *Subsection (5)* states the report must contain a statement as to whether any matter has been excluded from the report.

40. *Subsection (7)* states that the ISC may report to the Prime Minister in relation to matters which would be excluded by virtue of subsection (4) if the report were made to Parliament.

Clause 5: Additional review functions of the Commissioner

41. This clause adds to the functions of the Intelligence Services Commissioner (the "Commissioner") set out in section 59 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). Section 59 provides for the appointment of a Commissioner who will

provide oversight of a number of key investigatory techniques employed by the Agencies, and by members of Her Majesty's forces and Ministry of Defence personnel outside Northern Ireland. Under section 60 of RIPA all relevant persons are required to disclose or provide to the Commissioner all such documents or information as might be required for the purpose of enabling the Commissioner to carry out the Commissioner's functions under section 59. This power to require documents and information is to apply also to the new functions of the Intelligence Services Commissioner under this clause.

42. The clause inserts a new section 59A into RIPA. *Subsections (1), (2) and (3*) of that new section add to the Commissioner's existing functions by enabling the Prime Minister to issue a direction to the Commissioner, either of the Prime Minister's own motion or on the recommendation of the Commissioner, to keep under review other aspects of the functions of the Agencies or any part of Her Majesty's forces or the Ministry of Defence engaged in intelligence activities. *Subsection (4)* provides an example of the type of activity which the Commissioner may be directed to provide oversight of, by reference to the policies which govern the manner in which the Agencies carry out their functions.

43. The purpose of this statutory extension of the Commissioner's remit is two-fold: (i) to provide a clear statutory basis for the duties which the Commissioner has occasionally agreed, at the request of the Prime Minister, to take on outside the statutory remit, and (ii) to enable an extension of that remit in the future. With regard to the former it is the intention, if the Bill is passed, that the Prime Minister will give a direction to the Commissioner to monitor compliance with the *Consolidated Guidance on Detention and Interviewing of Detainees by Intelligence Officers and Military Personnel* in relation to detainees held overseas, which is currently an extra-statutory function. A draft direction to give effect to this has been published alongside the Bill, as an example of how the power of direction is intended to be used.

44. Under *subsection (5),* a direction given by the Prime Minister to the Commissioner should be brought to the attention of the public in such manner as the Prime Minister considers appropriate (except in some cases where doing so would be detrimental, for example because it would prejudice national security). In practice, it is envisaged that the Prime Minister will write to the Commissioner and a copy of that letter will be placed in the House of Commons library.

Part 2: Restrictions on disclosure of sensitive material

Clause 6: Proceedings in which court permits closed material applications

45. Clause 6 enables the Secretary of State to apply to a court hearing a civil case for a declaration that the case is one in which closed material procedure may be used. Closed material procedure involves the non-Government parties leaving the court

room whilst sensitive material is heard. The interests of such parties are represented by security cleared lawyers called special advocates.

46. *Subsection (2)* states that the court must allow closed material procedure to take place if it considers that one of the parties to the proceedings would be required to disclose material during the proceedings and that the disclosure would be damaging to the interests of national security.

47. *Subsection (3)* states that when making this decision, the court must ignore the fact that there would be no need to disclose this material if it was withheld on public interest immunity grounds or the person chose not to rely on it. It also states that the exclusion of intercept material set out in RIPA should be ignored.

48. *Subsection (4)* states that any declaration under this section must identify which person's disclosures would be damaging to national security. This person is then known as the "relevant person" in clauses 6 to 11.

49. *Subsection (5)* sets out a condition which the Secretary of State must fulfil before making an application for a declaration that closed material procedure may be used: in relation to the material on which the application would be based, the Secretary of State must first consider whether to make a claim for public interest immunity or whether to advise another to do so.

50. *Subsection (6)* allows rules of court to be made to:

(a) provide that any party to any civil case or any court covered by this legislation is to notify the Secretary of State that a closed material procedure may be needed, thereby inviting him or her to make an application;

(b) allow the proceedings to be stayed while the Secretary of State considers whether to make an application for a closed material procedure;

(c) allow the Secretary of State to be joined as a party to the proceedings if he or she is not a party already.

51. *Subsection (7)* defines "relevant civil proceedings". This sets the range of civil proceedings in which a declaration under *subsection (1)* may be made. "Relevant civil proceedings" are defined as proceedings in the High Court, the Court of Appeal or the Court of Session which are not criminal proceedings.

Clause 7: Determination by court of applications in section 6 proceedings

52. Clause 7 concerns the rules of court for those proceedings in which a declaration under clause 6 has been made ("section 6 proceedings"). These rules must ensure:

a) that the relevant person (see clause 6(4)) is able to apply for permission from the court only to disclose material to the court, a person appointed as a special advocate and, where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State,

b) that this application is always considered without any other party to the proceedings or their legal representatives being present, unless the court gives them permission to attend,

c) that the court must give permission for material not to be disclosed if to do so would damage national security,

d) that if the court does give this permission it must consider requiring the person withholding it to provide a summary of it to other parties to the proceedings and their legal representatives,

e) that the court is required to ensure that this summary does not damage national security.

53. *Subsections (2) and (3)* state that rules of court must ensure that, where the relevant person does not receive permission from the court to withhold material but decides not to disclose it, or is required to provide a summary but chooses not to provide this summary, and the material might undermine the relevant person's case or assist the case of another party to the proceedings, then the court may direct that the relevant person:

a) must not rely on these points in that person's case, or

b) must make any concessions or other steps set out by the court.

54. In any other case where the person withholds the material without permission or chooses not to provide a summary that has been required, the rules of court must ensure that the court may direct the relevant person not to rely on the material.

Clause 8: Appointment of special advocate

55. Clause 8 deals with the appointment of a special advocate, who is a security cleared lawyer who represents the interests of an excluded party in closed material proceedings.

56. The clause states that special advocates are, depending on the jurisdiction concerned, to be appointed by the Attorney General, the Advocate General for Scotland or the Advocate General for Northern Ireland. The special advocate is not responsible to the

person whose interests they represent. A person may only be appointed as a special advocate if they have the qualifications set out at *subsection (5)*.

Clause 9: Saving for normal disclosure rules

57. Clause 9 states that, subject to clauses 7, 8 and 10, rules of court must ensure that the normal rules of disclosure applying to a particular set of proceedings in which closed material applications are permitted continue to apply.

Clause 10: General provision about section 6 proceedings

58. Clause 10 sets out the general provisions to be included in the rules of court relating to section 6 proceedings. *Subsection (1)* states that a person making the rules must have regard to the need to secure that disclosures of information are not made where they would be damaging to national security.

59. *Subsection (2)* states that rules of court may be made on the type of proof and evidence that can be accepted during the proceedings; to enable or require proceedings to be determined without a hearing; and about the legal representation in the proceedings. This subsection also provides that the rules of court may restrict the particulars required to be given of reasons for decisions in the proceedings, and may enable a hearing to take place in the absence of any person. It also states that the rules may provide detail about the functions of special advocates, and enable the court to give a party to the proceedings a summary of the evidence that is heard in the closed material procedure.

60. *Subsection (3)* states that the references to a person in subsection (2) do not include a relevant person because they will not be excluded from the proceedings during a closed material procedure.

Clause 11: Sections 6 to 10: interpretation

61. Clause 11 provides for the interpretation of certain expressions used in clauses 6 to 10. *Subsection (2)* provides the Secretary of State with a power to amend the definition of "relevant civil proceedings" to which clauses 6 to 11 apply by order. *Subsection (3)* provides that this power may, in particular, be exercised so as to add or remove a court or tribunal. The power is subject to the affirmative procedure, which means that the statutory instrument containing the order is not to be made unless a draft has been laid before and approved by each House of Parliament.

62. Subsection (3) and *subsection (4)* allow consequential provision (including provision amending legislation) to be made if the definition of "relevant civil proceedings" is changed. In particular, if a tribunal is added clauses 6 and 11 may be adapted for use in relation to the tribunal, including so as to alter the composition of the tribunal.

63. *Subsection (5)* states that nothing in clauses 6 to 11 or in any future provision made by virtue of them:

a) restricts the power to make rules of court or the matters that are usually taken into account when doing so;

b) affects the common law rules on public interest immunity;

c) is to be read as requiring a court or tribunal to act inconsistently with Article 6 of the European Convention on Human Rights.

Clause 12: Certain exclusion, naturalisation and citizenship decisions

64. Clause 12 inserts new sections 2C and 2D into the Special Immigration Appeals Commission Act 1997 to provide for a right of review on judicial review principles by the Special Immigration Appeals Commission ("SIAC") in respect of the following categories of executive action by the Secretary of State:

- A direction regarding the exclusion of a non-EEA national from the United Kingdom which is made by the Secretary of State wholly or partly on the ground that the exclusion of that national from the United Kingdom is conducive to the public good, where (a) there is no right of appeal under Part 5 of the Nationality, Immigration and Asylum Act 2002 and (b) the direction is personally certified by the Secretary of State as one that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public in the interests of national security, the relationship between the United Kingdom and another country or otherwise in the public interest (new section 2C).

- A decision to refuse to issue a certificate of naturalisation under section 6 of the British Nationality Act 1981 or a refusal to grant an application of the kind mentioned in section 41A of that Act (such as an application to register an adult or young person as a British citizen) where the decision is certified by the Secretary of State as one that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public in the interests of national security, the relationship between the United Kingdom and another country or otherwise in the public interest (new section 2D).

65. *Subsection (2)* of both new sections 2C and 2D provides that a person subject to any of the executive actions described above can apply to SIAC for the decision to be set aside. When considering the application, SIAC is to apply the same principles as would be applied in judicial review proceedings and may grant the same relief given in judicial review proceedings.

66. The effect of these provisions is that a closed material procedure is available under the Special Immigration Appeals Commission Act 1997 for the hearings before SIAC, whereas such a procedure would not be available if the decisions continued to be subject to ordinary judicial review.

Clause 13: Disclosure proceedings

67. Clause 13 prevents the court in certain circumstances from exercising what is generally referred to as the *Norwich Pharmacal* jurisdiction so as to order the disclosure of sensitive information. Even though there is no equivalent of the *Norwich Pharmacal* jurisdiction in Scotland, the clause extends there to prevent such a form of relief arising in the future.

68. *Subsection (1)* describes the situation in which a *Norwich Pharmacal* order may be sought, reflecting recent case law. This case law is discussed in the background section above.

69. *Subsection (2)* restricts the ability to make such an order in cases where sensitive information is in issue, by providing that the court may not exercise its "residual disclosure jurisdiction" (see subsection (6)) in this context to order disclosure of sensitive information, whether the disclosure would be to the applicant or to another person on whose behalf the information is sought (the applicant's spouse, for example).

70. *Subsection (3)* defines what is meant by "sensitive information". This is principally any information, or alleged information, that is held by or for, or obtained from, an "intelligence service" (as defined in *subsection (6)*), or which is derived from such information or relates to an intelligence service (collectively referred to in these explanatory notes as "intelligence service information"). Information may be obtained from, or held on behalf of, an intelligence service where, for example, reporting from an intelligence service's covert human intelligence source has been shared with the Home Office to enable that department to prepare a deportation case. Information may be derived from information obtained from, or held on behalf of, an intelligence service where, for example, an all-source intelligence assessment, produced by a government department, has been compiled using intelligence shared by a foreign intelligence partner with one of the intelligence services. And information relating to an intelligence service may include, for example, the fact of an intelligence sharing relationship with another country's intelligence service.

71. "Sensitive information" also includes any other information referred to in a certificate issued by the Secretary of State under subsection (3)(e).

72. *Subsections (4) and (5)* set out the grounds upon which the Secretary of State may issue such a certificate. The Secretary of State may issue a certificate only if the Secretary of State considers it would be contrary to the interests of national security or

international relations to disclose the information, whether the information exists, or whether the person said to hold the information is in fact in possession of the information. The person said to hold the information may be the Secretary of State or may be another person (see subsection (7)(a)). The reference in subsection (4) to whether the information exists or whether the person from whom the information is sought has it is to deal with a situation where not only disclosure of the information but also confirmation or otherwise of the existence or possession of that information would be contrary to the interests of national security or international relations (this is known as the principle of "neither confirm nor deny").

73. *Subsection (6)* defines various terms used in clause 13. The definition of "intelligence service" comprises the Agencies and those parts of Her Majesty's forces or Ministry of Defence ("MoD") which engage in intelligence activities. The main parts of the MoD and Her Majesty's forces which engage in such activities are the Special Forces and those parts of the MoD and Her Majesty's forces which are collectively referred to as Defence Intelligence or which otherwise come under the authority of the holder of the MoD post of Chief of Defence Intelligence. The role of Defence Intelligence is the collection, assessment and management of intelligence as part of the national intelligence capability in both defence and wider government.

74. The definition of the "residual disclosure jurisdiction" in subsection (6) encompasses any jurisdiction to order the disclosure of information which is not conferred on the court by or under an enactment as such a jurisdiction, that is to say, as a jurisdiction to order the disclosure of information. For example, the jurisdiction to order pre-action or third-party disclosure under sections 33 and 34 of the Senior Courts Act 1981 is a jurisdiction to order disclosure which is specifically conferred as such a jurisdiction by the 1981 Act, and so that jurisdiction is not within the residual disclosure jurisdiction and not affected by clause 13. Neither, similarly, is the jurisdiction to order disclosure covered by the Civil Procedure Rules.

75. *Subsection (7)* clarifies that clause 13 applies whether the information is being sought from the Secretary of State or from another. So the Secretary of State may issue a certificate in relation to information the disclosure of which would be damaging to national security or international relations, whether that information is being sought from him or her or, for example, from the police. Subsection (7) also provides that the Secretary of State retains all and any other rights or privileges that may be claimed to resist an application for disclosure of information – for example, public interest immunity.

76. The restrictions on disclosure in clause 13 apply only in relation to "sensitive information" as defined. The courts' jurisdiction to order disclosure of other information under *Norwich Pharmacal* relief remains unaffected. So if, for example, a person sought various pieces of information from the Secretary of State in the context of a *Norwich Pharmacal* application, some of which was intelligence service

information, some of which was other "sensitive information" and some of which was not sensitive, the following might happen. The Secretary of State may issue a certificate in relation to the sensitive information that was not intelligence service information. Unless that certificate was set aside (see clause 14), the court could not order the disclosure of the intelligence service information or the information covered by the certificate, but it could order the disclosure of the other (non-sensitive) information provided the *Norwich Pharmacal* criteria were met.

Clause 14: Review of certification

77. Clause 14(1) provides that a party to the proceedings in which the Secretary of State has issued a certificate under clause 13(3)(e) (that is, a certificate in relation to sensitive material other than intelligence service information), may apply to the court for the certificate to be set aside. If such an application is successful (including on any appeal), the prohibition on the court ordering disclosure of the information referred to in the certificate would not apply and disclosure could therefore be ordered under the court's usual residual disclosure jurisdiction.

78. *Subsection (2)* provides that the application to set aside the certificate may only be made on the ground that the Secretary of State was wrong to determine that disclosure of the information (or its existence or the fact of it being held) would be damaging to the interests of national security or international relations.

79. *Subsection (3)* provides that in determining whether the certificate should be set aside, the court is to apply judicial review principles.

80. *Subsections (4)* and *(5)* have the effect that a review of the certificate will take place within closed material proceedings (see clauses 7 to 11).

Part 3: General

Clause 15: Consequential and transitional etc provision

81. This clause introduces Schedules 2 and 3, which make consequential and transitional provision, and provides an order-making power for the Secretary of State to make transitional, transitory or saving provision.

Schedule 2: Consequential Provision

Part 1: Consequential provision

Oversight of intelligence and security activities

82. This Part of Schedule 2 makes consequential provision concerning the oversight of intelligence and security activities. In particular, it repeals the provisions in the Intelligence Services Act 1994 relating to the existing ISC and makes consequential amendments to the Northern Ireland Act 1998 and the Equality Act 2006. Those Acts presently refer to the definition of "sensitive information" in the Intelligence Services Act 1994.

Part 2: Closed material procedure

83. This Part of Schedule 2 contains consequential provision concerning closed material procedures. The key provisions are as follows.

84. Paragraph 6 amends the Senior Courts Act 1981 to increase judicial discretion by allowing the court to refuse an application for a jury where the case would involve section 6 proceedings, or to dismiss a jury in cases where one is being used but where section 6 proceedings are required. Paragraph 5 makes corresponding provision for Northern Ireland.

85. Paragraph 7 inserts a new section 6A into the Special Immigration Appeals Act 1997 in order to apply sections 5 and 6 of that Act to the new sections 2C and 2D inserted by clause 12. The purpose of this provision is to apply the statutory closed material procedure in that Act concerning the proceedings mentioned in new sections 2C and 2D.

86. Paragraph 9 provides for an amendment to section 18 of RIPA to permit intercepted material etc to be adduced or disclosed within any section 6 proceedings.

Schedule 3: Transitional provision

Part 1: Oversight of intelligence and security activities

87. The transitional provisions in this Part provide that:

- if clause 1 is commenced during a Parliament, then the members and Chair of the existing ISC will automatically become the members and Chair of the new ISC;

- the new ISC will have the power to request access to the documents or other information owned by, or provided to, its predecessor.

Part 2: Closed material procedure

88. Paragraph 2 applies clauses 6 to 11 and paragraphs 6 and 8 of Schedule 2 (that is, the provisions relating to the general closed material procedure) to proceedings begun but not finally determined before the coming into force of clause 6 (in addition to proceedings begun on or after clause 6 comes into force).

89. Paragraph 3 provides that the first time after the passing of the Bill, in relation to proceedings in England and Wales or in Northern Ireland before a court of a particular description, rules of court made in exercise of powers under clauses 6 to 11 may be made by the Lord Chancellor instead of by the person who would otherwise make them.

Part 3: "Norwich Pharmacal" and similar jurisdictions

90. Paragraph 4 applies clauses 13 and 14 (preventing the courts from ordering disclosure of sensitive information in *Norwich Pharmacal* and similar proceedings) to proceedings begun but not finally determined before the coming into force of clause 13 (in addition to proceedings begun on or after clause 13 comes into force).

Clause 16: Commencement, extent and short title

91. This clause provides that the Bill extends to the United Kingdom (with the exception of certain consequential amendments which have a more limited extent). Parts 1 and 2 and clause 15(1) (and their related schedules) will come into force by commencement order. Part 3 of the Bill (except clause 15(1) and Schedules 2 and 3) will come into force on Royal Assent.

FINANCIAL EFFECTS

92. The provisions of the Bill related to the oversight of the Agencies are not anticipated to have a substantial effect on public expenditure beyond the costs of manpower. These costs are estimated at around £1.2 million per annum and are subject to various assumptions about general resource requirements.

93. Financial assessment indicates that the Bill's provisions about restricting the disclosure of sensitive material are likely to be a neutral to slightly positive impact on public expenditure. Introducing a closed material procedure for civil cases and diversion of some cases to SIAC may lead to new costs on the justice system. However, these are expected to be directly offset by savings from reduced use of the

existing public interest immunity certification application process. There may also be financial savings to the public purse from the potential reduced need to settle cases out of court, although the extent of the saving is difficult to estimate. *Norwich Pharmacal* proposals are likely to lead to legal and administrative savings of less than £0.5 million per annum.

PUBLIC SERVICE MANPOWER

94. The Bill may have impacts on public service manpower as set out in paragraph 92.

SUMMARY OF THE IMPACT ASSESSMENTS

95. The Impact Assessments focus on identifying the relevant economic costs and benefits of the Bill to the UK, beyond the purely financial impacts on Government.

96. In relation to proposals concerning the oversight of the intelligence agencies, the assessment is that the net economic impact on society, though uncertain, is likely to be slightly negative. The new proposals would lead to costs associated with an increase in the burden on the oversight bodies and the intelligence agencies complying with their requests. However, the assessment has also identified benefits which are difficult to quantify. These include greater accountability to Parliament; more coherent intelligence oversight; and increased transparency. The overall impact would depend on how the monetised costs are balanced against the non-monetised benefits.

97. The assessment in relation to the provisions restricting the disclosure of sensitive material indicates that the net economic impact on society would be neutral to slightly positive. The provisions would lead to economic costs associated with the introduction of closed material procedures in civil cases (for example, judicial and legal aid costs). However, these may be offset by a reduction in public interest immunity certificate applications before the courts, which would lead to savings for the judiciary, non-State litigants and special advocate representation. The precise balance would depend on various assumptions on likely case volumes.

98. The assessment has also identified that there would be other positive and negative impacts which are difficult to monetise, such as the impact from availability of greater information during proceedings; reputational costs and benefits; possible adverse impacts on media reporting; and effects on international cooperation as well as the wider benefits in protecting national security interests.

99. In terms of equality impacts, many of the recent court cases which have raised issues about the use of sensitive information have involved claimants who are men from particular racial groups (Asian, Middle Eastern, North African) and who practice

Islam. There is therefore some limited evidence that proposals which affect the use of sensitive material may have a differential impact on the basis of sex, race and religion or belief. It is difficult, however, to predict whether the make-up of claimants in which these issues have previously arisen will be the same in the future. To the extent that there may be a differential impact, the Government considers that it is justified on national security grounds.

100. The impact assessments are being placed in the Printed Paper Office. They are also being published on the Cabinet Office's website:

http://consultation.cabinetoffice.gov.uk/justiceandsecurity

COMPATABILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

101. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

102. The Lord Wallace of Tankerness, the Advocate-General for Scotland, has made the following statement of compatibility in accordance with section 19:

> "In my view the provisions of the Justice and Security Bill are compatible with the Convention rights."

103. A memorandum on the Convention rights issues raised by the Bill has been prepared and is being published on the Cabinet Office's website:

http://consultation.cabinetoffice.gov.uk/justiceandsecurity

COMMENCEMENT

104. Clauses 15(2) (the power to make transitional, transitory or saving provision) and 16 (concerning commencement, extent and the short title) come into force on Royal Assent. Otherwise, the Bill will come into force by way of commencement order.

JUSTICE AND SECURITY BILL [HL]

EXPLANATORY NOTES

These notes refer to the Justice and Security Bill [HL]
as introduced in the House of Lords on 28th May 2012
[HL Bill 27]

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