EXPLANATORY NOTES

Justice and Security Act 2013

Chapter 18

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These notes refer to the Justice and Security Act 2013 (c. 18)
which received Royal Assent on 25 April 2013

JUSTICE AND SECURITY ACT

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Justice and Security Act 2013 which received Royal Assent on 25 April 2013. They have been prepared by the Cabinet Office and Home Office in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by Parliament.

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

SUMMARY

3. Part 1 of the Act creates a new Intelligence and Security Committee of Parliament (the "ISC"), to replace the Intelligence and Security Committee created by the Intelligence Services Act 1994. The statutory remit of the ISC is expanded 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 is given powers to require information from the Agencies subject only to a veto by the Secretary of State rather than, as was the case under the Intelligence Services Act 1994, Agency heads. Parliament is given a more substantial role in ISC appointments.

4. Part 1 of the Act also makes provision to expand the Intelligence Services Commissioner's remit beyond what the Commissioner and the Interception of Communications Commissioner have previously overseen, to include an ability to oversee, at the direction of the Prime Minister, any other aspect of Agency business.

5. Part 2 of the Act makes provision for closed material procedures in proceedings (other than those in a criminal cause or matter) before the High Court, the Court of Session, the Court of Appeal or the Supreme Court. It sets out a framework whereby the judge can allow elements of a case to be heard in closed, in addition to the open proceedings. The process broadly consists of two stages:

    - The Secretary of State or any party to the case may make an application to the court to make a declaration that the proceedings are ones in which a closed material application may be made. The court may grant a declaration following an application or of its own motion provided that certain conditions are met.

- Once the declaration has been made, a closed material application may then be made by a party to the proceedings not to disclose specific pieces or tranches of material, except to the court, a special advocate and the Secretary of State. An application will be granted where the disclosure of that material would be damaging to the interests of national security.

6. Part 2 also permits a closed material application to be made in certain circumstances where there is no declaration yet in place (for example, as part of the application for a declaration). This is to take account of the likely need to have a closed material procedure in order for the court to determine whether it should make a declaration that a closed material application may be made for the purposes of the main proceedings (the determination of the claim).

7. Part 2 makes further provision for the court to review and revoke a declaration.

8. Rules of court will set out in greater detail how closed material procedures will operate.

9. Part 2 of the Act 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.

10. In addition, Part 2 of the Act provides for an amendment to the Regulation of Investigatory Powers Act 2000 to permit use of intercept evidence in closed proceedings in employment cases before tribunals across the UK.

11. Finally, Part 2 of the Act also makes provision about the courts' residual disclosure jurisdiction, the classic example of which is known as the *Norwich Pharmacal* jurisdiction, to order a person involved (however innocently) in arguable 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 in this context, 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 the international relations of the United Kingdom. Any party to the proceedings may apply to the court to set aside a certificate issued by the Secretary of State and Part 2 provides automatically for a closed material procedure to consider any such application.

BACKGROUND

General

12. The provisions contained within the Act 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 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

13. Before the Act was passed, the system for independent oversight of government intelligence activity was 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.

14. That system of oversight had been built up over time. Where gaps had emerged in the system, they had been filled through non-statutory additions to the remits of existing oversight bodies. The Act modernises the oversight system, and ensures that it is flexible enough to cope with future changes.

Background on closed material procedures

15. The Green Paper noted an increase in the number and diversity of judicial proceedings which relate to 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. There have been occasional cases resolved by the use of a closed material procedure with the consent of both parties. However, the Supreme Court 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 to decide whether or not to make closed material procedures available in such proceedings.

16. The Green Paper considered that in cases involving sensitive material 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.

17. 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 regardless of their merits 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

18. 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 Government-held information, usually 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; the Customs and Excise Commissioners held information that would allow the identification of the importers but would not disclose it, claiming that they had no authority to give such information. The House of Lords held, in brief, that where a third party who had been mixed up in another's wrongdoing had information relating to that wrongdoing, the court could, in its discretion, 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.

19. 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 granting a *Norwich Pharmcal* order are generally recognised to be that (i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) the person against whom the order is sought must have been "mixed up" or involved in the wrongdoing, (iii) the information sought is necessary for the claimant to pursue redress or to rely on a defence in relation to proceedings concerning the wrongdoing and (iv) the court considers it should exercise its discretion in favour of granting the relief. Orders are commonly used to identify the proper defendant to an action or to obtain information to plead a claim.

20. 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 has been sensitive intelligence information shared by foreign partner governments on a confidential basis.

TERRITORAL EXTENT AND APPLICATION OF THE ACT

21. The provisions contained in the Act extend to the whole of the United Kingdom (with the exception of certain consequential amendments which have a more limited extent). The Act deals with reserved matters in Scotland 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.

COMMENTARY ON SECTIONS

Part 1: Oversight of intelligence and security activities

Section 1: The Intelligence and Security Committee of Parliament

22. *Subsections (1)* and *(2)* of section 1 state that the Intelligence and Security Committee of Parliament (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.

23. The new body replaces the Intelligence and Security Committee created by the Intelligence Services Act 1994. Its name reflects the Parliamentary nature of the Committee.

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

25. *Subsection*s *(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.

26. *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.

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

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

Schedule 1: The Intelligence and Security Committee

Tenure of office

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

30. 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.

31. Former members of the ISC may be reappointed.

32. *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.

33. *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

34. *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.

35. *Sub-paragraph (6)* states that the ISC may hear evidence on oath. The general provision in *paragraph 2(1)* of Schedule 1, permitting the ISC to determine its own procedure, allows the ISC itself to decide who should administer oaths on its behalf.

Funding and other resources

36. *Paragraph 3* provides a power for the Government to provide funding and resourcing to the ISC.

37. As a Committee of Parliament, primary responsibility for funding and resourcing the ISC falls to Parliament. *Paragraph 3* provides a power that would, in particular, permit the Government to supplement the funding and resourcing that Parliament provides to the ISC.

38. For example, the power could be used to provide top-up funding for a limited period where the ISC is facing an exceptional workload and its resource requirements have temporarily increased; or it could be used to provide specific resources, such as IT security or physical security, where the ISC's requirements, because of the nature of the work it does, are different, and more costly to fulfil, than are the requirements of departmental Select Committees.

Access to information

39. *Paragraph 4* contains provisions by which the ISC may obtain information from the Government and describes the circumstances in which information can be withheld from the ISC.

40. The duty to provide information requested by the ISC rests, for government departments, with the relevant Minister of the Crown (this may, but need not necessarily, be a Secretary of State) and, for the Agencies, with the Agency Heads. The memorandum of understanding, agreed between the ISC and the Prime Minister (see commentary on section 2 below), will identify the relevant Ministers of the Crown for these purposes and set out the means and manner in which information can be provided to the ISC.

41. With regard to withholding information, the ability to decide that information is to be withheld from the ISC rests solely with the Secretary of State (under the comparable provisions of the Intelligence Services Act 1994, 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 Secretary of State), were able to decline to disclose information because it was sensitive information which, in their opinion, should not be made available).

42. There are two grounds on which the Secretary of State may decide that information is not to be disclosed: that the information is sensitive information (as defined in *paragraph 5*) which for national security reasons should not be disclosed; or the information 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. In deciding whether it would be proper not to disclose on the basis of the second ground, the Minister must have regard to governmental guidance concerning the provision of evidence by civil servants to Select Committees. This would mean in particular that the Minister would have to have regard to the Cabinet Office Guidance, Departmental Evidence and Responses to Select Committees (http://www.cabinetoffice.gov.uk/resource-library/guidance-departmentalevidence-and-response-select-committees), known as the Osmotherly Rules.

Sensitive information

43. *Paragraph 5* defines "sensitive information" in the context of *paragraph 4*. The position under the Intelligence Services Act 1994 was that information was considered sensitive information if 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 was 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; or if it was information provided by, or by an agency of, the Government of a territory outside the United Kingdom where that Government did not consent to the disclosure of the information. *Paragraph 5* extends 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. Although the power to withhold

sensitive information is widely drawn, it is expected to be exercised sparingly in practice (as the equivalent power under the Intelligence Services Act 1994 was).

Publication of information received in private

44. The ISC (either as a committee of Parliament with a right to determine its own procedure, or simply by virtue of being a body of persons) may have a general (implied) power to publish information. Such a power sits alongside its express power to publish reports to Parliament as set out in section 3. Such a general power would undermine other safeguards for protection of sensitive information in the Act. *Paragraph 6* provides that the ISC may not publish material that it receives in private in connection with the exercise of its functions, other than through its reports, and may not disclose the information to any person if the ISC considers that there is a risk that the person will publish it.

45. These protections are subject to exceptions, contained in *sub-paragraph (3)*, permitting publication or disclosure of such material: if it has already been placed in the public domain; wherever publication is necessary to meet a legal requirement; and where both the Prime Minister and the Committee are satisfied that publication or disclosure would not prejudice the continued discharge of the functions of the Agencies or other government security and intelligence bodies. This last exception reflects the criterion on the basis of which the Prime Minister may require that the ISC exclude material from their reports to Parliament (see section 3(4)).

Protection for Witnesses

46. *Paragraph 7* protects evidence given by a person who is a witness before the ISC from being used in legal or disciplinary proceedings unless the evidence was given in bad faith.

47. *Paragraph 7* introduces two protections. *Paragraph 7(1)* prevents use of evidence given by a person who is a witness before the ISC in any civil or disciplinary proceedings. *Paragraph 7(2)* prevents the evidence of a witness before the ISC from being used against him or her in criminal proceedings. Both protections are subject to an exception where the evidence in question is given to the ISC in bad faith.

48. The purpose of these protections is to encourage witnesses before the ISC to be as full and frank as possible in the evidence they provide. The fuller the evidence is that the ISC receives (excepting evidence given in bad faith), the more effective the ISC is likely to be in supervising the work of the security and intelligence agencies and the other bodies falling within its oversight remit.

49. These protections mirror, to some extent, the protections that apply to witnesses appearing before Select Committees, by virtue of the application of Parliamentary privilege to Select Committee proceedings. However, the ISC is different from Select Committees in that it has something of a hybrid nature, being a statutory Committee of Parliament.

Section 2: Main functions of the ISC

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

51. *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 ISC created by the Intelligence Services Act 1994 did 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. The Government intends that, through the provisions in the memorandum of understanding from time to time, substantively all of central Government's intelligence and security activities will be subject to ISC oversight.

52. *Subsection (3)* provides three routes by which the ISC may consider particular operational matters. The first route is available where the ISC and the Prime Minister are satisfied that the particular operational matter is not part of any ongoing operation and is a matter of significant national interest (*subsection (3)(a)*).

53. The second route is where the Prime Minister asks the ISC to consider the particular operational matter (*subsection (3)(b)*).

54. The third route is where the ISC's consideration of a particular operational matter is limited to the consideration of information provided voluntarily to the ISC by the Agencies or a government department (*subsection (3)(c)*). Such information can be provided for these purposes in response to a request by the Committee as well as at the initiative of the relevant department.

55. For the first and second routes only, the ISC and the Prime Minister need, additionally, to be satisfied that the consideration of the particular operational matter is consistent with the Memorandum of Understanding agreed between them (*subsection (4)*).

56. The Committee's powers to require the Agencies or other government departments to provide it with information on operational matters (see *paragraph 4* of Schedule 1) are available for the first and the second route but not for the third route.

57. The ISC created by the Intelligence Services Act 1994 did 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 expects the new ISC to provide such oversight on a more regular basis.

58. *Subsections (5)* and *(6)* make further provision in relation to the memorandum of understanding: it may include other provisions about the ISC; it must be agreed between the Prime Minister and the ISC; it may be altered with the agreement of the Prime Minister and the ISC; it must be published by the ISC and laid before Parliament.

Section 3: Reports of the ISC

59. *Subsection*s *(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.

60. *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 section 2(2).

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

62. *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.

Section 5: Additional review functions of the Commissioner

63. This section 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 section (see *paragraph 4* of Schedule 2).

64. The section 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.

65. The purpose of this statutory extension of the Commissioner's remit is twofold: (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 Commissioner's previous statutory remit; and (ii) to enable an extension of that remit in the future. With regard to the former it is the intention 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 has previously been an extra-statutory function.

66. 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: Disclosure of sensitive material

Section 6: Declaration permitting closed material applications in proceedings

67. Section 6 enables certain courts hearing civil (but not criminal) proceedings, namely the High Court, the Court of Appeal, the Court of Session or the Supreme Court, to make a declaration that the case is one in which a closed material application may be made in relation to specific pieces of material.

68. The declaration is an 'in principle' decision made by the court about whether or not a closed material procedure (a "CMP") should be available in the case. It will normally be based on an application made by a party to the proceedings or the Secretary of State. However, a court may also make a declaration of its own motion. An application for a declaration will be supported by some (but not necessarily all) of the relevant sensitive material, and the Act provides (at section 11(4)) that these initial proceedings for a declaration (whether following an application or on the court's own motion) may themselves be held by way of a CMP, with special advocates appointed to represent the interests of any party excluded from the closed part of the hearings.

69. The court will first need to be satisfied that the Secretary of State has considered making or advising another person to make an application for public interest immunity for the material on which the application for a declaration is based. During the application process for a declaration, the person applying will need to persuade the court that there is relevant material the disclosure of which would damage national security and to put forward arguments as to why a CMP would be in the interests of

the fair and effective administration of justice - for example, the degree of relevance of sensitive material to the issues in the case. The court will consider the material provided in support of the application, and whether it meets the condition that it is relevant and its disclosure would damage national security. The sensitive material forming part of the application for a declaration is protected, because, as explained above, these preliminary proceedings may themselves be held in a CMP.

70. *Subsection (2)(a)* allows for an application for a declaration to be made by the Secretary of State (whether or not a party to the proceedings) or by any party to the proceedings. The application need not relate to material which the applicant themselves would be required to disclosed, and may relate to material required to be disclosed by another party to the proceedings (although this situation is less likely to arise in practice).

71. *Subsection (3)* provides that if the court considers the two conditions specified in *subsections (4)* and *(5)* are met, it may make a declaration that an application can be made in that case for material to be heard in a CMP.

72. *Subsection (4)* sets out the first condition: that a party to the proceedings would be required to disclose sensitive material in the course of the proceedings (or would be so required but for certain litigation rules, such as the continuing availability of PII). The court must ignore the exclusion of intercept material set out in RIPA, meaning that intercept evidence could be used to support an application for a declaration. It must also ignore any other enactment which would prevent the party from disclosing the material where that enactment would not prevent disclosure if the proceedings were closed.

73. *Subsection (5)* states that the second condition is that a declaration would be in the interests of the fair and effective administration of justice in the proceedings. The judge would consider this in the circumstances where open disclosure of relevant material would be damaging to the interests of national security. James Brokenshire (Home Office Minister for Crime and Security) indicated in Commons Committee that, "in examining that question [of whether a CMP would be fair and effective], the court will want to focus on what is necessary for resolving the issues in the case before it. In particular, it should focus on the relevance of the sensitive material to the issues in the case".

74. *Subsection (6)* sets out that the two conditions are met if the court considers them met in relation to any material that would be required to be disclosed and makes clear that an application for a CMP declaration need not be based on all the material.

75. *Subsection (7)* sets out that the court, before considering an application from the Secretary of State for a CMP declaration, must be satisfied that the Secretary of State has first considered whether to make, or advise another person to make, a claim for public interest immunity for the material on which the application is based. The court cannot order the Secretary of State to apply for PII, as it is the responsibility of a party in possession of sensitive material to do so. The court's consideration of the Secretary of State's consideration of PII is limited to the material on which the application for a

CMP declaration is based and does not require the Secretary of State to undertake a full PII exercise.

76. *Subsection (8)* states that a declaration must identify the party or parties who would be required to disclose sensitive material. Such persons are referred to as "a relevant person" for certain purposes such as an application for a closed material procedure under section 8(1)(a).

77. *Subsection (9)* allows rules of court to be made to:

(a) provide that any party, or the court itself, must notify the Secretary of State that a CMP may be needed, thereby affording him or her the opportunity to make an application for a declaration or be joined to any proceedings for an application for a declaration (see paragraph (c) below);

(b) allow the proceedings to be stayed while a person considers whether to make an application for a CMP;

(c) enable the Secretary of State to be joined as a party to proceedings for or about a declaration (for example, if the Secretary of State is not already a party to the proceedings for an application for a declaration). Rules made under this paragraph will also enable the Secretary of State to be joined to proceedings in relation to which there is a declaration in place (if he is not already a party to such proceedings). In essence, this would enable the Secretary of State (who has responsibility for national security), to be joined to the main action in appropriate cases, where the disclosure of material in the case would be damaging to national security.

78. *Subsection (10)* sets out that such rules of court must require a person to give notice to every other person entitled to make an application in relation to the case of his or her intention to make an application for a declaration. The rules must also require the applicant to inform every other such person of the result of the application.

79. *Subsection (11)* defines "closed material application" as an application of the kind mentioned in section 8(1)(a). It also defines "relevant civil proceedings" to establish the range of civil proceedings in which a declaration under section 6(1) may be made. "Relevant civil proceedings" are defined as proceedings in the High Court, the Court of Appeal, the Court of Session or the Supreme Court which are not criminal proceedings. This subsection also defines "sensitive material" as "material the disclosure of which would be damaging to the interests of national security".

Section 7: Review and revocation of declaration under section 6

80. This section makes explicit the judge's power - which can be exercised at any stage - to review, and in appropriate cases revoke, a declaration under section 6 and obliges the court to review its decision to grant a declaration after the pre-trial disclosure exercise.

81. *Subsection (2)* provides that the court must keep the declaration under review and may revoke it at any time if it considers that a declaration is no longer in the interest of the fair and effective administration of justice in the proceedings.

82. *Subsection (3)* obliges the court to conduct a formal review at the end of the pre-trial disclosure phase (or the fixing of a hearing to determine the merits of the proceedings in relation to proceedings before the Court of Session) of its decision to grant a declaration. The court must then revoke the declaration if the court considers it is no longer in the interest of the fair and effective administration of justice in the proceedings.

83. *Subsection (4)* provides that a court may revoke a declaration either of its own motion or following application from the Secretary of State or any party to the proceedings.

84. *Subsection (5)* provides that when the court is deciding whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court must consider all the information put before it in the course of proceedings, and not just the material on which its decision to grant the declaration was based.

85. *Subsection (6)* states that rules of court must set out at what point the pre-trial disclosure exercise is considered complete for the purposes of the formal review introduced in *subsection (3)*. Rules of court must also set out how such a review should then be conducted.

86. *Subsection (7)* sets out that the references to a 'pre-trial disclosure exercise' relate to a 'hearing to determine the merits of the proceedings' when applied to the Court of Session, for the purposes of this section, to take account of the different arrangements in Scotland.

Section 8: Determination by court of applications in section 6 proceedings

87. Section 8 provides a power for rules of court to make provision specific to the second stage of the process, following the granting of a declaration under section 6, and sets out some of the things that must be included in the rules. So, for example, once a declaration has been made, a relevant person must make an application, if they wish for certain pieces or tranches of sensitive material to be heard in a CMP. In this application process, the court will consider whether it agrees with the assessment of the damage to national security that disclosure of the material in question would cause. If it agrees that disclosure would be damaging, the court must give permission for the material to be heard in closed. However, the court must consider whether a non-damaging summary of the material should be provided (in open proceedings) and, notwithstanding this requirement the court must always act in accordance with Article 6 of the European Convention on Human Rights.

88. In the process of applying for a CMP declaration under section 6, the person applying would need to demonstrate that there is relevant material the disclosure of which would damage national security. Therefore proceedings on the application for a declaration process are treated as "section 6 proceedings" (see section 11(4)). This

means that a CMP can take place at this stage in order to protect the material (likely to be a subset of material relevant to the case) supporting the application for a declaration. Otherwise the person would not be able to demonstrate the sensitivity and relevance of material to be covered in a CMP for the trial of the issues in the case, because such material could not be disclosed in open court without causing damage to national security.

89. If the judge grants a CMP declaration, he will therefore already have considered, in the course of the initial proceedings on the declaration, whether the material supporting the application meets the test set out in section 8 (i.e. that this material would be damaging to national security if disclosed). It will not be necessary for a further application to be made in the main proceedings in relation to that same material, given that the judge would have already considered whether the material meets the section 8 test.

90. *Subsection (1)* provides that rules of court must secure certain matters in relation to proceedings in which a declaration is in place ("section 6 proceedings"). These rules must ensure:

a) that a relevant person (as defined in section 6(8)) is able to apply for permission from the court not to disclose sensitive material other than 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 open legal representatives being present,

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.

91. *Subsections (2) and (3)* state that rules of court must provide for certain consequences where a 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. If the court considers that the material in question might undermine the relevant person's case or assist the case of another party to the proceedings, then the court must be authorised to direct that the relevant person:

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

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

Subsection (3)(b) provides that, in any other case (generally where the material is supportive to the person who would be disclosing it) the court must be authorised to ensure that the relevant person does not rely on the material.

Section 9: Appointment of special advocate

92. Section 9 deals with the appointment of a special advocate to represent the interests of an excluded party in closed material proceedings. This person would be a security cleared lawyer. This is in line with procedures adopted in respect of other closed material procedures such as those before the Special Immigration Appeals Commission (SIAC).

93. The section 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)*.

Section 10: Saving for normal disclosure rules

94. Section 10 states that, subject to sections 8, 9 and 11, rules of court must ensure that the normal rules of disclosure continue to apply to section 6 proceedings.

Section 11: General provision about section 6 proceedings

95. Section 11 sets out the general provisions to be included in the rules of court relating to section 6 proceedings.

96. *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.

97. *Subsection (2)* states that rules of court may be made about the mode of proof and evidence in 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 evidence heard in the CMP. These provisions follow the models adopted in other closed material procedures such as those before SIAC.

98. *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. Nor do they include the Secretary of State where the Secretary of State is not a relevant person but is a party to the proceedings (because the Secretary of State is not excluded from CMPs – see section 8(1)(a)(iii)).

99. *Subsection (4)* provides that the initial proceedings on whether a CMP declaration should be granted are to be treated as section 6 proceedings (meaning that sensitive material could be protected by a CMP at this preliminary stage). Similarly, it also provides that all proceedings relating to the revocation of a CMP declaration are treated as section 6 proceedings. This would include the circumstances in which the court has revoked a CMP declaration (following an application or of its own motion) and the Government is appealing this decision. It provides for such appeal proceedings to be treated as section 6 proceedings (and therefore for sensitive material in such proceedings to be protected by a CMP).

100. *Subsection (5)* defines who a "relevant person" is in relation to certain proceedings treated as section 6 proceedings. This is needed because *subsection (8)* of section 6 would not apply to these types of proceedings to determine the identity of the relevant person (because in these types of "deemed" section 6 proceedings, no declaration will have been granted under section 6).

Section 12: Reports on the use of closed material procedure

101. Section 12 introduces an obligation on the Secretary of State to lay a report before Parliament on an annual basis on the operation of the CMP provisions. The report would cover certain matters related to proceedings where there is a declaration under section 6 in place, and proceedings treated as section 6 proceedings (including proceedings relating to an application for a declaration or revocation of a declaration and the review of certification under section 17(3)(e)).

102. *Subsection (1)* provides that the Secretary of State must prepare a report on the factual matters detailed in *subsection (2)* a year after section 6 comes into force and every year thereafter; and that this report and subsequent reports must be laid before Parliament

103. *Subsection (2)* lists the matters which must be included in the report. These are:

a) the number of applications made for a CMP declaration during the reporting period, broken down according to who made the application: the Secretary of State or other persons;

b) the number of declarations made by the court and the number of revocations of declarations made by the court during the reporting period according to who made the application or identifying where the court has court granted or revoked a declaration of its own motion;

c) the number of final judgments given in section 6 proceedings (this would include judgments made on the substantive trial and judgments made regarding the outcome of the application for a CMP declaration) which are closed judgments; and

d) the number of final judgments given in section 6 proceedings which are open judgments.

104. *Subsection (3)* allows for the Secretary of State to include further matters in the report that he considers appropriate in addition to those specified in *subsection (2)*.

105. *Subsection (4)* sets out that the report should be prepared and laid before Parliament as soon as reasonably practicable after the end of the twelve month period to which it relates.

106. *Subsection (5)* sets out definitions used in this section. A 'closed judgment' refers to one that is not made available of fully available to the public. A 'final judgment' in relation to section 6 proceedings refers to a final judgment to determine the proceedings.

Section 13: Review of sections 6 to 11

107. Section 13 obliges a review to be carried out on the operation of the CMP provisions and sets out the framework for the appointment of the reviewer and the production and timing of his report to be laid before Parliament. The scope of the review would cover proceedings whether there is a declaration in place (i.e. where a closed material application may be made), and proceedings 'treated' as section 6 proceedings, including the review of certification under section 17(3)(e) and proceedings relating to the declaration or revocation of the declaration.

108. *Subsection (1)* requires the Secretary of State to appoint a person (referred to as 'the reviewer') to review the operation of sections 6 to 11.

109. *Subsection (2)* requires the reviewer to carry out a review of the operation of closed material procedures covered by sections 6 to 11 during the period of five years beginning once section 6 has come into force.

110. *Subsection (3)* requires the review to be completed as soon as reasonably practicable after the end of the five year period.

111. *Subsection (4)* requires the reviewer to send the Secretary of State a report on the outcome of the review as soon as reasonably practicable after completing a review.

112. *Subsection (5)* requires the Secretary of State to lay a copy of the report before Parliament on receiving a report under *subsection (4)*.

113. *Subsection (6)* allows the Secretary of State, after consulting the reviewer, to exclude material from the report that would, in the opinion of the Secretary of State, be damaging to the interests of national security (or in relation to CMPs dealing with reviews of certification (see section 18(5)(b)) national security or the international relations of the UK) if it were included in the copy laid before Parliament.

114. *Subsection (7)* allows for the reviewer to be paid appropriate allowances and reimbursed for the costs of carrying out his duties.

Section 14: Sections 6 to 13: interpretation

115. Section 14 provides for the interpretation of certain expressions used in sections 6 to 13, see *subsection (1)*.

116. *Subsection (2)* states that nothing in sections 6 to 13 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.

Section 15: Certain exclusion, naturalisation and citizenship decisions

117. Section 15 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).

118. *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.

119. 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.

Section 16: Use of intercept evidence in employment cases involving national security

120. Section 16 provides for an amendment to section 18 of the Regulation of Investigatory Powers Act 2000. Intercept material is generally excluded from legal proceedings under section 17 of that Act, but exceptions apply in limited circumstances by virtue of section 18.

121. The effect of the amendment is to permit the use of intercept evidence in closed material proceedings before an employment tribunal or (in Northern Ireland) an industrial tribunal. It also provides for intercept evidence to be admissible in the context of employment cases in the Fair Employment Tribunal in Northern Ireland where there is an appeal against a certificate issued on national security grounds by the Secretary of State and there are closed proceedings in that appeal.

Section 17: Disclosure proceedings

122. Section 17 prevents the court in certain circumstances from exercising its residual disclosure jurisdiction (the classic example of which is known as the *Norwich Pharmacal* jurisdiction) so as to order the disclosure of specified types of sensitive Government-held information. Even though there is no equivalent of the *Norwich Pharmacal* jurisdiction in Scotland, the section extends there to prevent such a form of relief arising there in the future in relation to these types of sensitive information.

123. *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.

124. *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" (as defined in *subsection (6)*) to order disclosure of sensitive information, whether the disclosure would be to the claimant or to another person on whose behalf the information is sought (the claimant's spouse, for example).

125. *Subsection (3)* defines what is meant by "sensitive information" for these purposes. This includes 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. "Sensitive information" is also defined as information specified

or described in a certificate issued by the Secretary of State for the purposes of the proceedings.

126. *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 the international relations of the United Kingdom 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").

127. *Subsection (6)* defines various terms used in section 17. 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.

128. 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 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 section 17. Neither, similarly, is the jurisdiction to order disclosure covered by the Civil Procedure Rules.

129. *Subsection (7)* clarifies that section 17 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.

130. The restrictions on disclosure in section 17 apply only in relation to "sensitive information" as defined in that section. The courts' jurisdiction to order disclosure of non-sensitive 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 section 18), 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.

Section 18: Review of certification

131. Section 18(1) provides that a party to the proceedings in which the Secretary of State has issued a certificate under section 17(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, 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 if the court took the view that the *Norwich Pharmacal* criteria were met.

132. *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 the international relations of the United Kingdom.

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

134. *Subsections (4)* and *(5)* have the effect that proceedings on a review of the certificate may take place within a CMP: the proceedings are "treated as section 6 proceedings" which means that a person may make an application for a CMP under section 8(1)(a). Proceedings arising from this section are therefore also included in the scope of sections 12 and 13 regarding reporting and review of the operation of CMP provisions.

135. *Subsection (5)* provides that, in these "deemed" section 6 proceedings, the Secretary of State is to be treated as the 'relevant person' and also that the references to the interests of national security in sections 8, 11 and 13 should be treated as references to the interests of national security or the international relations of the United Kingdom. This means that, unlike for most section 6 proceedings, a closed material application under section 8 may be made on the basis that the disclosure of the material would be damaging to the international relations of the United Kingdom (as such material may be included in a certificate). It also means that for the purposes of section 13 (review of sections 6 to 11), where the reviewer's report discusses closed material proceedings relating to a *Norwich Pharmacal* certification, the Secretary of State can exclude material from the reviewer's report that he considers damaging to either national security or the international relations of the United Kingdom

Part 3: General

Section 19: Consequential and transitional etc provision

136. This section 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: Oversight of intelligence and security activities

137. This Part of Schedule 2 makes consequential provision concerning the oversight of intelligence and security activities. It repeals the provisions in the Intelligence Services Act 1994 relating to the existing ISC (*paragraph 1*) and makes consequential amendments to the Northern Ireland Act 1998 (*paragraph 3*) and the Equality Act 2006 (*paragraph 6*). Those Acts previously referred to the definition of "sensitive information" in the Intelligence Services Act 1994.

138. The Data Protection Act 1998 (the "DPA") applies to Parliament as it applies generally, save that: where the purpose for which, and manner in which, data is processed is determined by, or on behalf of, either House, then the data controller (the person upon whom most of the obligations under DPA fall) is the corporate officer of the relevant House (s. 63A DPA).

139. Since the ISC will be composed of MPs and Peers (see section 1(2)) who are appointed by each House of Parliament (section 1(3)), and it will be a statutory Committee of Parliament, the DPA could be interpreted as applying to the ISC as it applies to Parliament, with the data controller for the Committee being the corporate officer of the relevant House of Parliament (s. 63A DPA). This would not be appropriate. The sensitivity of much of the data handled by the ISC means that the corporate officers will not be entitled to have access to it, making it impossible for them to ensure that the requirements of DPA are followed. *Paragraph 2* therefore amends the DPA to disapply s. 63A DPA, so far as the ISC is concerned.

140. Both the House of Commons and the House of Lords are subject to the Freedom of Information Act 2000 ("FOIA") (they are each listed in Schedule 1 to FOIA). For the reasons explained above in relation to the DPA, it is arguable that the ISC would be subject to FOIA. *Paragraph 5* avoids this consequence by amending references to the House of Commons and House of Lords in Schedule 1 to FOIA to make clear that they are not subject to that Act as regards information held by the ISC. This amendment preserves the status quo, in that FOIA did not apply to information held by the ISC created by the Intelligence Services Act 1994 either.

141. *Paragraph 5* also adds the ISC to the list of the bodies in section 23 of FOIA. The result of this is that ISC information (information which has been supplied to or by the ISC, whether directly or indirectly, or which relates to it) in the hands of another public authority subject to FOIA (the Foreign and Commonwealth Office or the Home Office, for example) will be exempt information for FOIA purposes. Section 23 is an

absolute exemption, i.e. any information falling within the terms of the exemption can be withheld, without having to consider the public interest balance (s. 2 FOIA).

Part 2: Closed material procedure

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

143. *Paragraph 8* 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 7* makes corresponding provision for Northern Ireland.

144. *Paragraph 9* inserts a new section 6A into the Special Immigration Appeals Commission Act 1997 in order to apply sections 5 and 6 of that Act to the new sections 2C and 2D inserted by section 15. 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.

145. *Paragraph 11* provides for an amendment to section 18 of RIPA to permit intercepted material etc to be adduced or disclosed within any section 6 proceedings. This mirrors the position for the proceedings already listed in section 18(1) of RIPA (such as SIAC proceedings or proceedings about terrorism prevention and investigation measures) for which there remain specific statutory closed material procedures. This paragraph also makes amendments to section 18 consequential upon the amendments to the Special Immigration Appeals Commission Act 1997 made by section 15.

Schedule 3: Transitional provision

Part 1: Oversight of intelligence and security activities

146. The transitional provisions in this Part provide that:

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

- the new ISC may have access to the documents or other information owned by, or provided to, its predecessor (the ISC created by the Intelligence Services Act 1994).

Part 2: Closed material procedure

147. *Paragraph 2* applies sections 6 to 14 and *paragraphs 7*, *8* and *11* 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 section 6 (in addition to proceedings begun on or after section 6 comes into force).

148. *Paragraph 3* provides that, except in relation to proceedings before the Supreme Court, the first time after the passing of the Act, 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 sections 6 to 14 may be made by the Lord

Chancellor instead of by the person who would otherwise make them. Such rules are subject to the affirmative procedure. They must be laid before Parliament (after being made) and will cease to have effect if not approved by a resolution of each House before the end of a forty day period. If the rules cease to have effect, this does not affect anything done in previous reliance on the rules and the rule making procedure starts afresh.

149. *Paragraph 4* makes provision about an aspect of the order-making power to make transitional provision in section 19(2). The paragraph concerns decisions or directions falling within new section 2C(1) or 2D(1) of the Special Immigration Appeals Commission Act 1997 (inserted by section 15) which were made before section 15 comes into force. *Paragraph 4(2)* enables transitional provision to be made to allow the Secretary of State to certify such decisions with the result that any pending judicial review proceedings (or appeals from such proceedings) are terminated. The decision or direction can then be heard afresh in the Special Immigration Appeals Commission under the procedure introduced by section 15.

Part 3: "Norwich Pharmacal" and similar jurisdictions

150. *Paragraph 5* applies sections 17 and 18 (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 section 17 (in addition to proceedings begun on or after section 17 comes into force).

Section 20: Commencement, extent and short title

151. This section provides that the Act extends to the United Kingdom (with the exception of certain consequential amendments which have a more limited extent).

152. Sections 19(2) (the power to make transitional, transitory or saving provision) and 20 (concerning commencement, extent and the short title) and *paragraph 4* of Schedule 3 (transitional etc provision about cases going to SIAC) come into force on Royal Assent. Otherwise, the Act will come into force by way of commencement order.

153. *Subsection (5)* permits Her Majesty by Order in Council to provide for section 15 and *paragraph 9* of Schedule 2 (which contain amendments to the Special Immigration Appeals Commission Act 1997) to extend, with or without modifications, to any of the Channel Islands or to the Isle of Man. *Subsection (6)* enables such an Order to include, with or without modification, transitional provisions along the lines of *paragraph 4* of Schedule 3.

KEY DOCUMENTS

Justice and Security Green Paper:
http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2011/greenpaper.pdf

Versions of the Bill:

As introduced in the Lords, HL Bill 27:
http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0027/13027.pdf

As amended on Lords Report, HL Bill 56
http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0056/130056.pdf

As left the Lords, Bill 99:
http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0099/20130099.pdf

As amended in Public Bill Committee, Bill 134
http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0134/2013134.pdf

HANSARD REFERENCES

154. The following table sets out the dates and *Hansard* references for each stage of this Act's passage through Parliament.

STAGE	DATE	HANSARD REFERENCE
House of Lords		
Introduction	28 May 2012	Column 971
Second Reading	19 June 2012	Vol. 737 Cols 1659 – 1697 and 1709 - 1758
Committee	9 July 2012	Vol. 738 Cols. 910 – 977 and 995 – 1018
	11 July 2012	Vol. 738 Cols. 1161 – 1208 and 1223 – 1242
	17 July 2012	Vol. 739 Cols. 119 – 180 and 200 – 222
	23 July 2012	Vol. 739 Cols. 488 – 562 and 579 - 592

STAGE	DATE	HANSARD REFERENCE
Report	19 November 2012 21 November 2012	Vol. 740 Cols. 1626 - 1688 and 1690 - 1706 Vol. 740 Cols. 1811 - 1874 and 1885 - 1928
Third Reading	28 November 2012	Vol. 741 Col. 196
House of Commons		
Introduction	28 November 2012	Votes and Proceedings: No 75
Second Reading	18 December 2012	Vol. 555 Cols 713 - 805
Committee PBC (Bill 099) 2012 - 2013	29 January 2013	1st Sitting Cols. 1 - 38, 2nd Sitting: Cols 39 - 80
	31 January 2013	3rd Sitting Cols. 81-106 4th Sitting: Cols 107-156
	5 February 2013	5th Sitting Cols. 157-200 6th Sitting Cols. 201-248
	7 February 2013	7th Sitting 249-276 8th Sitting Cols. 277-298
Report and Third Reading	4 and 7 March 2013	Vol. 559 Cols. 685 - 789 Vol. 559 Cols. 1159 - 1230
House of Lords		
Lords Consideration of Commons Amendments	26 March 2013	Vol. 744 Cols. 1008 - 1072
Royal Assent	25 April 2013	Lords: Vol. 744 Col. 1563 Commons: Vol. 561. Col. 1068.

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