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Anti-terrorism laws: balancing national security and a fair hearing

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1. Introduction

Increasingly since 9/11, national security questions have arisen in civil litigation, in areas as diverse as immigration, family law and contractual disputes. This chapter considers the situation where security-sensitive information is withheld from a party or the public. The denial of access to such information, in circumstances where it would ordinarily be available, can impact deleteriously on a party's right to a fair hearing and the principle of open justice.

Taking a comparative approach involving Australia, Canada and the United Kingdom, this chapter assesses the extent to which these jurisdictions accommodate the right to a fair hearing where national security is at stake. While our focus is on civil proceedings, with particular reference to proceedings dealing with immigration and so-called 'control orders', the chapter also addresses some forms of criminal proceeding. We do not suggest that a robust response to the threat of terrorism inevitably corrodes the enjoyment of human rights and undermines democratic government. Nor do we believe that *any* encroachment on human rights generally, or the right to a fair hearing specifically, no matter how trivial the encroachment or how pressing the counter-terrorism imperative, is necessarily illegitimate. Instead, we argue that the proportionality principle should be applied more rigorously in this area, because we believe that this would better calibrate the law to take account of the nature and scope of the threat of terrorism while paying due regard to the protection of civil liberties.

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Section 2 of this chapter outlines the competing demands of a fair hearing and a nation's counter-terrorism response. Focusing on the constraints that national security places on open justice and procedural fairness, we propose that proportionality should be the guiding principle to accommodate these conflicting demands. Section 3 assesses the common law doctrine of public interest immunity, which has been the conventional means of preventing security-sensitive information from being adduced as evidence. Section 4 considers more recent statutory attempts, including by way of 'special advocates', to deal with such information in civil litigation.

2. The counter-terrorism imperative and the right to a fair hearing

A state that values 'open justice' must operate its courts and tribunals transparently and openly. As reflected in international law, a system of open justice requires at least the following two features. First, the machinery of justice must be subject to independent scrutiny by people who can verify whether the rule of law is being applied by the three arms of government. Second, procedural fairness must be accorded to all parties, such that they are aware of the evidence against them and given the opportunity to rebut such evidence. The denial of procedural fairness is anathema to the right to a fair hearing. In such a situation, individual parties to a dispute can be subjected to a Kafka-esque nightmare in which their ignorance of crucial material leaves them unable to argue their case effectively.

The right to a fair and public hearing by an independent and impartial tribunal – proclaimed in the Universal Declaration of Human Rights (UDHR),[1] the International Covenant on Civil and Political Rights (ICCPR)[2] and other more specific international instruments[3] – directly mandates a system of open justice. This system of open justice is applicable to civil and criminal proceedings, although its requirements are generally

[1] GA Res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/Res/217A (10 December 1948), art. 10.

[2] New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, art. 14(1).

[3] See, e.g., Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3, art. 40; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 UNTS 195, art. 5(a); Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, in force 3 May 2008, 189 UNTS 137, art. 13.

(but not always) more onerous in relation to criminal proceedings.[4] In addition, the recognition of many other rights is itself contingent on open legal proceedings. After all, how can one be confident that a jurisdiction respects the right to 'equal protection of the law'[5] unless its justice system transparently shows this to be the case? Moreover, where proceedings are held *in camera*, there is a greater likelihood that dissident or unpopular people will be denied a fair resolution of their dispute.[6]

Generally, modern liberal democracies understand the value of open justice and construct their dispute resolution systems in a way that preserves its fundamental tenets. However, under international law, open justice is not an absolute principle, and democracies routinely permit derogation from complete transparency in appropriate circumstances. Clearly, the need to protect national security generally, and to counter the threat of terrorism specifically, is felt keenly by all states, and especially those that have suffered terrorist attacks. International law requires states to take appropriate steps to counter the threat of terrorism,[7] but as the United Nations Security Council made clear, such steps must be in accordance with 'international human rights law, refugee law and humanitarian law'.[8]

There is an obvious tension between withholding security-sensitive information (which may obviously be damaging to national security if disclosed to a terrorism suspect or the public at large) and the right to a fair hearing. At one level, this is simply a manifestation of the dichotomy between liberty and security.[9] However, the search for an effective and principled basis to reconcile these competing imperatives must involve an understanding of the basis in law and policy for each of these competing demands, and the application of a well-reasoned formula for achieving reconciliation. The remainder of this section of the chapter addresses those issues.

[4] See, e.g., *Secretary of State for the Home Department* v. *MB and AF* [2008] 1 AC 440, [17] (Lord Bingham).

[5] See, e.g., UDHR, art. 7; ICCPR, art. 26.

[6] Sangeeta Shah, 'Administration of justice', in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.), *International Human Rights Law* (Oxford University Press, 2010), p. 323.

[7] See, e.g., United Nations Security Council, SC Res. 1373 (28 September 2001); United Nations Security Council, SC Res. 1566 (8 October 2004).

[8] United Nations Security Council, SC Res. 1624 (14 September 2005).

[9] See generally: Daniel Farber (ed.), *Security* v. *Liberty: Conflicts Between Civil Liberties and National Security in American History* (New York: Russell Sage, 2008); Martin Scheinin, 'Terrorism', in Moeckli, Shah and Sivakumaran, *International Human Rights Law*, p. 583.

A. *Procedural fairness*

The principle of procedural fairness – known also as natural justice and due process – has two main elements: the decision-maker should not exhibit bias and a person affected by a decision should be given a fair hearing in relation to the substance of the matter. It is the second of these requirements that is of central relevance for our purposes, because it is the source of the duty to disclose relevant information to an affected party, at least where that information is adverse to the party's interests.[10]

Procedural fairness is an important element of any system founded on the English common law, which has long protected the right to a fair hearing.[11] This is further reinforced by legislation. In the UK, the passing of the Human Rights Act has strengthened the legal foundations of procedural fairness, helping it to move beyond its common law roots and broadening its application.[12]

In Canada and Australia, procedural fairness is also protected by a combination of the common law, statute and the Constitution. For example, s. 7 of the Canadian Charter of Rights and Freedoms, which provides that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice', has been held to guarantee procedural fairness in legal proceedings.[13] In Australia, s. 75(v) of the Australian Constitution has been held to require anyone exercising the powers and duties of the federal government to accord procedural fairness to those affected by their actions.[14] This, in turn, requires that a decision-maker should give a person with standing to commence judicial review proceedings the opportunity to comment on adverse information that is 'credible, relevant and significant'.[15]

Such constitutional protections are neither absolute nor comprehensive in their coverage. For instance, the constitutional protection in Australia only applies to legal proceedings arising from disputes involving action

[10] On the centrality of the duty of disclosure, see, e.g., the Privy Council decision in *Kandu* v. *Government of Malaya* [1962] AC 322, 337 (Lord Denning).

[11] See, e.g., *R* v. *University of Cambridge* (1723) 1 Str 557.

[12] H. W. R. Wade and C. F. Forsyth, *Administrative Law* (Oxford University Press, 10th edn, 2009), 405. (This edition of the text was published after the death of Sir William Wade).

[13] *R* v. *Lyons* [1987] 2 SCR 309, 361 (per La Forest J for the majority).

[14] See *Plaintiff S157/2002* v. *Commonwealth* (2003) 211 CLR 476.

[15] See *Kioa* v. *West* (1985) 159 CLR 550, 638 (Brennan J); *Applicant VEAL of 2002* v. *Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88, 95–6 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

carried out by the federal government (and not by the state governments). Nor do such protections prescribe in precise detail what procedural fairness requires in the myriad circumstances that might arise. This, in turn, creates room for disagreement as to the precise scope of the protection that should be accorded where national security is at stake.

B. From deference to proportionality

Where the measures taken by a government to protect national security impinge on procedural fairness, thereby bringing collective security and individual liberty into conflict, there is inevitable debate as to where the balance should lie. Traditionally, the common law has prioritised national security considerations. The *GCHQ case* perhaps represents a high-water mark of judicial deference on questions of national security.[16] This case involved a judicial review challenge to the responsible Minister's decision to prevent employees of 'Government Communications Headquarters', which played an important espionage role for the UK in the Cold War, from joining a trade union. Here, national security was invoked as a justification for failing to afford affected employees procedural fairness in the Minister's decision. In accepting this argument, Lord Diplock said:

> National security is the responsibility of the executive arm of government; what action is needed to protect its interests is … a matter upon which those upon whom the responsibility rests, and not upon the courts of justice, must have the last word. It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.[17]

In Canada, in the specific context of security-sensitive information, Roach has observed that during the Cold War such information tended to be collected for the dominant purpose of being 'distributed within government to those with appropriate security clearances', and was rarely intended to be used in legal proceedings.[18] As a result, '[u]ntil 1982, Ministers were able to assert an essentially unreviewable discretion to prevent the disclosure of intelligence on ground of harms to national security'. However, with such information becoming an increasingly significant component

[16] *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] AC 374.
[17] Ibid., 391–2.
[18] Kent Roach, 'When secret intelligence becomes evidence: some implications of *Khadr* and *Charkaoui II*' (2009) 47 *Supreme Court Law Review* 147, 156.

of the evidence in legal proceedings, Roach went on to say that there has been a shift:

> In the post-September 11 environment, there are signs of change, including an increased skepticism to claims that the non-disclosure of intelligence is justified by concerns about the mosaic effect in which the disclosure of even innocuous intelligence can assist the enemy.[19]

We believe that the traditional approach, involving a high level of judicial deference to the executive on national security issues, ought properly to be discarded. Instead, we applaud and encourage what we see to be a new, emerging consensus in which the concept of proportionality helps to guide how far national security concerns can justify incursions into procedural fairness and the right to a fair hearing. As explained below, total judicial deference to the executive is inimical to a proportionality approach, and we urge that this approach become more explicit, more widespread and more sophisticated in its application.

'Proportionality' – both as a legal principle to be applied by the courts and a generally influential idea – is especially important in helping to reconcile the needs of national security with the right to a fair hearing. The concept of proportionality denotes the balancing of competing rights and interests, as well as the necessity of achieving legitimate public aims (here, to combat terrorism) in a manner that imposes the minimum deleterious impact necessary on human rights (viz., the right to a fair hearing). The origins of the proportionality principle are in European law,[20] and it has been enshrined by the European Convention on Human Rights jurisprudence. The Convention does not itself use the term 'proportionality', but the principle has been crucial in the operation of its limitation provisions. For example, the general right in art. 6(1) to 'a fair and public hearing' in both the civil and criminal contexts is limited as follows:

> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or *national security in a democratic society*, … or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[21]

[19] Ibid., 152.

[20] Ultimately, it can be traced back to Prussian law: see Jürgen Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1992), Chapter 5.

[21] European Convention on Human Rights, art. 6(1) (emphasis added).

Such limitations are the foundation for proportionality being applied by the European Court of Human Rights and the courts of some state parties to the Convention, including the UK. This leads to two important tests. First, a *balancing test* considers whether the means adopted to achieve the relevant objective disproportionately impinges on protected human rights. Second, a *necessity test* asks whether the objective could be achieved using an alternative means to that adopted by the government, and whether this alternative means is less harmful to the enjoyment of the protected rights.

Especially since the incorporation of the European Convention on Human Rights in the Human Rights Act, UK courts now require that, to the extent that the executive or legislative branches of government adopt national security measures that impinge on rights that are expressed in non-absolute terms, such impingement must not be disproportionate to the government's legitimate national security objective.[22] Article 6 of the Convention has been held to require that any measure that impinges on a fair and public hearing in civil proceedings must be subjected to a proportionality analysis.[23] The same approach applies to art. 14(1) of the ICCPR, which protects the right to a fair hearing in similar terms to the European Convention.[24]

The Canadian Charter imports the principle of proportionality in a way that also resembles the European Convention on Human Rights. That is, s. 1 provides that the Charter 'guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In *R* v. *Oakes*, the Supreme Court of Canada held that this required a proportionality analysis in respect of government limitations on protected rights.[25]

The necessity test noted above encourages the adoption of national security measures that involve any incursion on the right to a fair hearing to be the minimum necessary to achieve the competing legislative objective. In applying this test, a court can consider the approach taken in other jurisdictions to the same or a similar issue. As discussed later in this chapter, this is precisely what happened in *Chahal*, where the European Court of Human Rights compared the differing approaches taken in the

[22] *Secretary of State for the Department* v. *Rehman* [2001] 3 WLR 877.

[23] *Secretary of State for the Home Department* v. *MB and AF* [2008] 1 AC 440, [32] (Lord Bingham); *Jasper* v. *United Kingdom* (2000) 30 EHRR 441, [52].

[24] Shah, 'Administration of Justice', p. 323.

[25] *R* v. *Oakes* [1986] 1 SCR 103. See generally P. W. Hogg, 'Interpreting the charter of rights' (1990) 28 *Osgoode Hall Law Journal* 817.

UK and Canada in respect of withholding information for national security reasons, concluding that the Canadian approach struck a far superior balance.[26]

Technically, the influence of the proportionality principle should be only very slight in Australia. Australia's Constitution lacks a Bill of Rights; nor indeed is there a statutory Human Rights Act (akin to the UK Act) operating at the federal level,[27] and so there has been little perceived need to develop principles to determine the validity or effect of legislation said to infringe human rights. As Gleeson CJ, then Chief Justice of Australia, pointed out in the context of the Australian Constitution, only jurisdictions with human rights laws require 'both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right'.[28]

In practice, however, the Australian courts seem to be engaging in an increasingly similar analysis to jurisdictions that expressly require a proportionality approach. In the celebrated UK text, *Administrative Law*, the authors suggest that the demands of art. 6 of the European Convention on Human Rights (which protects procedural fairness) 'often mirror those of the common law'. However, they note that the Convention's 'uncompromising terms have encouraged the courts to enforce [procedural fairness] in many cases where the more tolerant common law would have allowed exceptions or qualifications'.[29] Martin CJ of the Western Australian Court of Appeal seems to support the belief that the traditional common law approach does not differ markedly from a human rights approach involving the proportionality principle. He observes that whether or not a jurisdiction has some kind of bill of rights has been a relatively minor factor in determining the approach taken by the jurisdiction's courts regarding the withholding of security-sensitive information.[30]

Two practices in particular allow Australian courts to use the common law to protect the right to a fair hearing in a manner similar to courts in jurisdictions that have a human rights statute. First, Australian judges routinely refer to human rights in the process of statutory interpretation,

[26] *Chahal* v. *United Kingdom* (1996) 23 EHRR 413, [131].

[27] However, it is worth noting that two of Australia's provincial legislatures have enacted statutory Human Rights Acts: Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).

[28] *Roach* v. *Electoral Commission* (2007) 233 CLR 162, 178.

[29] Wade and Forsyth, *Administrative Law*, pp. 147–8. To similar effect, see *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 AC 109, 283 (Lord Goff).

[30] *Gypsy Jokers Motorcycle Club Inc* v. *Commissioner of Police* (2007) 33 WAR 245, [57].

applying the presumption that the courts will 'not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.'[31] Related to this is the common law presumption that courts should interpret ambiguous legislation in conformity with Australia's international law obligations.[32]

Second, there is a recognition that the precise contours of the procedural fairness requirement will depend on the circumstances of the case, and that the principle must wax and wane depending on other competing demands, such as national security.[33] This allows courts to seek the kind of pragmatic compromise between human rights and other interests which a proportionality approach facilitates. An example is a case involving a confidential letter provided to the Australian government which revealed information highly prejudicial to an asylum seeker's application for refugee status.[34] The High Court held that procedural fairness did not here require that the letter itself, or the identity of its author, be disclosed to the asylum seeker (as this could put the author at risk, and damage the state by discouraging others from providing useful information to the government for fear of reprisals when that information is revealed). Instead, the Court unanimously held that the government was required to protect its interests in a manner that was less harmful to the asylum seeker's right to a fair hearing, and that it ought to have informed the asylum seeker at least of the gist or 'substance' of the allegations made in the letter and given him the opportunity to respond to those allegations.[35]

In sum, restrictions on a fair hearing are already being subjected to a proportionality analysis, or something resembling that analysis. We endorse this development, and argue that it should be codified and regularised by way of further legislative guidance in relation to those mechanisms for withholding information in civil proceedings discussed in Sections 3 and 4 below.

[31] *Coco* v. *The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

[32] See, e.g., *Chu Kheng Lim* v. *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

[33] See, e.g., *Russell* v. *Duke of Norfolk* [1949] 1 All ER 109, 118; Wade and Forsyth, *Administrative Law*, pp. 420–1; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Sydney: Thomson Reuters, 4th edn, 2009), pp. 519–24.

[34] *Applicant VEAL of 2002* v. *Minister for Immigration and Multicultural Affairs* (2005) 225 CLR 88.

[35] Ibid., 100 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). A similar approach is taken by courts in the UK: see, e.g., *R (Roberts)* v. *Parole Board* [2005] UKHL 45.

3. Common law public interest immunity

This section considers the principle of public interest immunity (PII), particularly as it applies at common law in the UK and Australia. The reason for focusing on these two jurisdictions is because, in each, the common law rules relating to PII remain largely intact. In Canada, by contrast, the Evidence Act 1985 (Can) has modified these rules in a number of significant respects. Before continuing to a discussion of the substance of PII in the UK and Australia, two important points must be noted about the latter jurisdiction. First, PII exists both at common law and in statute in Australia. The common law rules have been incorporated into the Evidence Act 1995 (Aus) with minor amendment.[36] Second, the National Security Information (Criminal and Civil Proceedings) Act 2004 (Aus) (NSIA) now provides a parallel regime for dealing with national security information in court proceedings. The extent to which the NSIA and the Evidence Act 1985 (Can) deviate from the common law rules relating to PII, and address the problems that arise from PII claims, will be considered in Section 4 of this chapter.

A. Rules of public interest immunity

PII – known also as 'state interest immunity' and (misleadingly) as 'crown privilege' – has long been an effective means of preventing certain information, the revelation of which would be contrary to the public interest, from being adduced as evidence in legal proceedings. Where PII applies, it operates bluntly and completely to exclude certain evidence from being adduced. In this way, it differs from other methods of dealing with security-sensitive information, where the information might be considered by the court but withheld only from a particular party, or provided only to a party's legal representative, or where some of the information is obscured.[37]

National security represents an archetypal situation for the application of PII.[38] Traditionally, the courts, especially in the UK, were almost

[36] For the differences between the statutory and common law positions, see Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC Report No. 98, 2004), [8.165]–[8.166]. The most significant difference is that the Evidence Act does not apply to pre-trial proceedings, and so common law PII covers this in Australia.

[37] These methods are discussed in Section 4 below.

[38] Australian Law Reform Commission, *Keeping Secrets*, [8.192], [8.210].

entirely deferential to the executive government's claims of PII in the national security context, accepting ministerial certificates as conclusive evidence that it would be contrary to the public interest to reveal certain national security-related information.[39] Now, in the UK and Australia, ministerial certification is no longer an authoritative means of determining the public interest.[40] This position has even been accepted publicly by the UK's domestic intelligence and security agency, MI5.[41] If a party wishes to exclude information on PII grounds, then that party bears the onus of proving that the public interest lies in withholding the information.[42] However, where security sensitive information is at stake, a person seeking to withhold the information starts from an advantage, as courts accept as a general rule that it would be prejudicial to national security to reveal security intelligence.[43]

While conclusive ministerial certification has been abolished in the UK and Australia, the courts in those jurisdictions nevertheless attach considerable weight to the claim by a Minister or senior government officer that a PII order should be made on the ground of national security.[44] Given the still relatively deferential approach taken by the courts in relation to the views of the executive government in this context, it remains difficult for a party to repel a PII claim. However, the misuse of PII is especially pernicious because it could operate to prevent a party (government or otherwise) in civil proceedings from establishing their claim or defence.[45]

At common law, PII now operates as follows in civil proceedings:[46]

(1) At any point in the proceedings, but often at the interlocutory stage before the substantive hearing, any person may make a claim for the immunity.

[39] *Duncan* v. *Cammell, Laird & Co* [1942] AC 264, discussed in Jill Hunter, Camille Cameron and Terese Henning, *Litigation I: Civil Procedure* (Sydney: LexisNexis Butterworths, 7th edn., 2005), [8.103].

[40] In the UK, see, e.g., *Conway* v. *Rimmer* [1968] AC 910; *R (on the application of Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65. In Australia, see: *Sankey* v. *Whitlam* (1978) 142 CLR 1, 57 (Stephen J); *Alister* v. *R* (1984) 154 CLR 404, 435–6, (Wilson and Dawson JJ).

[41] MI5, *Evidence and Disclosure* (2009), available at www.mi5.gov.uk/output/evidence-and-disclosure.html. This fact was noted in Roach, 'When secret intelligence becomes evidence' 165.

[42] Australian Law Reform Commission, *Keeping Secrets*, [8.161].

[43] In Australia, see *Church of Scientology* v. *Woodward* (1982) 154 CLR 25, 59 (Mason J).

[44] J. D. Heydon, *Cross on Evidence* (Sydney: LexisNexis Butterworths, 7th edn, 2004), [27,065].

[45] Ibid., [27,015].

[46] See Australian Law Reform Commission, *Keeping Secrets*, [8.174]–[8.179].

(2) This claim is usually supported by affidavit evidence, often sworn by the responsible Minister or a senior public servant. Cross-examination and presentation of counter-evidence is generally not permitted lest the objective of the application thereby be defeated.
(3) The court will balance the competing public interests in favour and against disclosure.
(4) If the court believes that the affidavit evidence does not support the claim, it may seek further information, or in exceptional cases may examine the documents *in camera*. Ultimately, the court will rule on the claim.

B. Problems identified in the operation of public interest immunity

The deficiencies with PII (under both the common law and statute) as a means of protecting national security information from disclosure are demonstrated by the trial of Simon Lappas in Australia.[47] While this was a criminal prosecution, and so technically falls outside the scope of this chapter, it is nevertheless instructive given that courts are even *more* disposed towards accepting PII claims in civil proceedings.[48]

Lappas was charged in 2000 with four offences, including the offence of communicating to another person, for a purpose intended to be prejudicial to the safety or defence of Australia, two documents that were intended to be directly or indirectly useful to a foreign power.[49] The government opposed disclosure of these documents on national security grounds.

The first problem revealed by *Lappas* was that the potential PII issue was not raised as soon as possible – that is, before the committal proceedings. The PII claim was made on behalf of a Minister, and not the prosecuting authority, only when the defence sought to tender the two documents at trial.[50] In particular, there is no requirement at either common law or

[47] *R* v. *Lappas & Dowling* [2001] ACTSC 115. Comments to this effect were made by the then Australian Attorney-General and the Australian Law Reform Commission: Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29307 (Philip Ruddock); Australian Law Reform Commission, *Keeping Secrets*, [8.194].
[48] In Australia, see *Alister* v. *R* (1983) 154 CLR 404. In the UK, see *Conway* v. *Rimmer* [1960] AC 910, 942 (Lord Reid). However, note the more nuanced approach developing in the UK and European jurisprudence: see, e.g., *Secretary of State for the Home Department* v. *MB and AF* [2008] 1 AC 440, [17] (Lord Bingham).
[49] *Lappas* [2001] ACTSC 115, [1]. The offence provision was: *Crimes Act 1914* (Aus), s. 78(1)(b).
[50] *Lappas* [2001] ACTSC 115, [4].

under the Evidence Act 1995 (Aus) for a party who becomes aware of the potential disclosure of national security information to notify the other parties to the proceedings, the government or the court; closed hearings are not mandatory for determining claims for public interest immunity; and national security information is not protected from disclosure prior to the making of a court order.

In this case, Gray J exercised the discretion to order a closed hearing to determine the Minister's PII claim. At this hearing, the Minister provided Gray J with a general summary of the documents in question and then, later, the documents themselves 'with much of the contents blacked out'.[51] Affidavits were also filed in support. Gray J upheld the Minister's claim for PII, noting:

> I think that I must accept that any further disclosure of the contents other than what has been so far proposed will give rise to the apprehensions deposed to. If that is the view taken by the appropriate government representative, I have no reason to go behind it.[52]

However, the Minister's victory on the PII claim created problems for the prosecution. The prosecution case depended on inferences drawn from the content of the two documents. In the absence of being able to tender the full documents, the prosecution proposed to put 'empty shells' of the documents before the jury (that is, photocopies of the documents with only the headings 'Top Secret' and 'Not to be Copied' remaining) and to adduce evidence from a witness who would say that a certain construction could be placed on the text of the documents. However, Gray J held that upholding the PII claim rendered the evidence in question inadmissible, and on this basis stayed the prosecution in relation to the offence of communicating the two documents to a foreign power.[53] He further held that even if the evidence *were* admissible, it would violate the defendant's right to a fair trial for the prosecution to be able to adduce the evidence in the manner proposed:

> Presumably there could be no cross-examination on whether the interpretation accurately reflected the contents for that would expose their contents. Nor could a person seeking to challenge the interpretation give their own oral evidence of the contents for that would also expose those contents. The whole process is redolent with unfairness.[54]

[51] Ibid., [8]–[9]. [52] Ibid., [26].
[53] Ibid., [15]. He referred to Evidence Act 1995 (Cth), s. 134.
[54] *Lappas* [2001] ACTSC 115, [14].

The government strongly criticised the court's inability in *Lappas* to permit summaries or stipulations to be adduced in place of information covered by PII. A successful PII claim may result in a case being 'unable to proceed due to a lack of admissible evidence or because withholding information from a defendant may prevent them from mounting a full defence and receiving a fair trial'.[55] On the other hand, the government also noted that significant problems arose where a claim for PII is *rejected*. In such a case, the government

> may face the unpalatable decision of whether to risk disclosing sensitive information relating to national security or to protect this information by abandoning a prosecution, even where the alleged crimes could themselves have grave consequences for our national security.[56]

C. *Does the principle strike the right balance?*

There are perhaps two central criticisms of the PII principle. First, PII operates as a blunt instrument, in that it applies either to exclude or include evidence entirely. For this reason, PII cannot be deployed to achieve the sorts of compromises, in which information can be revealed in limited or partial ways, which are possible via the mechanisms discussed in the later sections of this chapter. This problem might be difficult to overcome, as this feature of PII has traditionally been viewed as inherent to its operation.

The second central criticism is that PII tilts the balance inordinately in favour of the government party seeking to withhold the evidence in question. As the UK law reform non-government organisation, JUSTICE, observed in 2009:

> By its very nature, the process of one party applying to withhold material on public interest grounds from the other party would require at least some *ex parte* submissions, and it would inevitably fall to the judge sitting alone *in camera* to determine the balance between the public interest in disclosure as against the public interest in nondisclosure.[57]

One might respond by pointing to cases such as *Lappas*, where the government party enjoyed only a Pyrrhic victory, given that the decision to

[55] Australian Government, Attorney-General's Department, National Security Information (Criminal and Civil Proceedings) Act 2004: Practitioners' Guide (June 2008), p. 6.

[56] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 2004, 29307 (Philip Ruddock).

[57] JUSTICE, *Secret Evidence* (2009), 129.

withhold the information in question led to a stay in the prosecution of at least some of the offences with which the defendant had been charged. However, this does not adequately address the criticism. As Mason J of the High Court of Australia noted, there will be many cases, involving the suppression of material that would otherwise be adducible as evidence, which will simply go ahead regardless:

> The fact that a successful claim to [PII] handicaps one of the parties to litigation is not a reason for saying that the court cannot or will not exercise its ordinary jurisdiction; it merely means that the court will arrive at the decision on something less than the entirety of the relevant materials.[58]

On the other hand, in applying the PII principle in the UK and Canada, the balancing of competing public interests has been altered, at least to a small degree, by the advent of human rights legislation, which expressly requires consideration of human rights, including the right to a fair hearing. The proportionality analysis mandated by the Human Rights Act and Canadian Charter provides something of a counter-balance to the often apparently overwhelming public interest in national security. This is a welcome development.

Given that PII turns on the weighing of competing public interests, the principle is well suited to the express application of a proportionality analysis. However, at present, the courts are not given any statutory guidance in how they should review the executive's assessment of the danger to national security if the information in question were adduced as evidence. Instead, courts should be provided with guidance that assists them in accommodating a fair hearing while protecting national security. In addition, there are no express evidentiary requirements governing how to prove that revealing the information in question would cause intolerable harm to national security. Given that the traditional disposition of courts is to be highly deferential on national security matters, the executive governments of the UK, Canada and Australia have probably been content with this state of affairs. However, faced with a judiciary that is starting to question such claims more closely, the absence of such evidentiary standards might lead to the courts unilaterally setting their own standards. This, in turn, could disadvantage the executive, where a court sets too high the bar for proving a risk to national security.

[58] *Church of Scientology* v. *Woodward* (1982) 154 CLR 25, 61.

To the extent that PII continues to operate at common law, such problems are probably unavoidable, but it is worth noting that these problems also have not been addressed in relation to statutory PII. We believe that PII would operate more effectively and fairly if it were codified in a statute that sets out more precisely how it should operate. In particular, legislation should specifically mandate factors that should be taken into account in the weighing of the competing public interests; it should establish workable evidentiary standards for the court to be satisfied of an intolerable risk to national security, and rules governing how each party might be able to test public interest claims (including by the use of special advocates); and it should set out clear triggers for a court or a party to disclose to the executive government that a PII issue might arise. To some extent, this has been attempted in the UK, Canada and Australia. In Section 4, we assess whether these attempts strike the right balance. That is, we ask: where national security is invoked to justify impinging on the right to a fair hearing, does the system guarantee that the impingement is no greater than is proportionate in the circumstances?

4. Statutory alternatives to common law public interest immunity

This section examines some of the statutory procedures enacted in the UK, Canada and Australia which apply where security-sensitive information might be adduced in civil proceedings. These include the Canadian Evidence Act 1985 and the Australian NSIA, which establish comprehensive regimes for dealing with national security information in court proceedings, as well as the appointment of special advocates to represent individuals where they are excluded from closed hearings in the United Kingdom and Canada.[59] Part of the rationale of these procedures was to address the problems arising from the application of PII, especially at common law, and they aim to strike a more appropriate balance between the public interests for and against disclosure of national security information. However, whether this aim has been achieved is questionable.

In this section, we consider three aspects of the statutory procedures. First, to what extent are the courts (rather than the executive) able to

[59] See Helen Fenwick and Gavin Phillipson, Chapter 19 this volume, for a detailed discussion of the UK case law relating to the use of special advocates in control order proceedings. See also Kent Roach, Chapter 20 this volume, who discusses how special advocates were able to exclude evidence from the Canadian Federal Court that was likely obtained through torture.

classify information as open or closed? That is, to what extent are they able to decide whether information that the Crown wishes to rely upon should be disclosed to the parties (open information), or should be restricted to the Crown and the court (closed information)? Second, is there an irreducible minimum (or 'core') of information that must be provided to the parties in civil proceedings? And, finally, how effective are special advocates in protecting the right to a fair hearing?

A. Classification of information

The ability of the courts to classify information as open or closed is essential to ensuring that an appropriate balance is struck between the need to protect national security and the right to a fair hearing. This is because there is an understandable inclination on the part of members of the executive, in whose hands the responsibility for protecting the security of the nation rests, to over-classify information as closed. In *Secretary of State for the Home Department* v. *MB and AF*,[60] Baroness Hale stated that there was 'ample evidence … of a tendency to overclaim the need for secrecy in terrorism cases'.[61]

The Canadian Evidence Act 1985 and the NSIA deal with the general problem that arose in *Lappas*, namely, that the potential disclosure of national security information was not dealt with at the earliest possible stage, by requiring the parties to identify such issues and notify them to the Attorney-General (being the relevant government Minister in Australia and Canada) as soon as possible. The Attorney-General may thereafter make an application to the court for an order that the information should not be disclosed or should be disclosed in a particular form. The types of orders that the courts may make are dealt with in more detail below.

As under the common law of PII, it is ultimately for the Canadian and Australian courts to classify information as open or closed and to decide whether to order disclosure. However, there is one major difference between these statutory regimes and common law PII: in deciding whether to uphold a PII claim, the court decides at common law what weight should be given to the public interest for and against disclosure; that is, the individual's right to a fair hearing is weighed against the apparently conflicting need to protect national security. By contrast, the statutory regimes in Canada and Australia now appear to have weighted the

[60] [2008] 1 AC 440 (*MB and AF*). [61] Ibid., [66].

scales heavily *against* disclosure of national security information. This is particularly significant because of the broad definition of 'national security' in both jurisdictions. In Australia, for example, this term is defined to mean 'Australia's defence, security, international relations or law enforcement interests'.[62] In turn, 'international relations' means 'political, military and economic relations with foreign governments and international organisations'[63] and 'security' has the same meaning as in the Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act),[64] which includes the protection of Australians from 'politically motivated violence' or the 'promotion of communal violence'.[65]

The NSIA requires Australian courts to 'give greatest weight' to 'the risk of prejudice to national security' by the disclosure of the information in deciding what orders to make. Any 'substantial adverse effect on the defendant's right to receive a fair trial, including in particular on the conduct of his or her defence' is a subsidiary consideration.[66] While the constitutionality of this provision has been upheld by the New South Wales Court of Criminal Appeal,[67] former justice of the High Court, the Hon Michael McHugh AC QC, has condemned it as 'a legislative attempt to usurp the judicial power of the Commonwealth'. He went on:

> It is no doubt true that in theory the *National Security Information (Criminal and Civil Proceedings) Act 2004* does not direct the court to make the order which the Attorney-General wants. But it goes as close to it as it thinks it can. It weights the exercise of the discretion in favour of the Attorney-General and in a practical sense directs the outcome of the closed hearing. How can a court make an order in favour of a fair trial when in exercising its discretion, it must give the issue of fair trial less weight than the Attorney-General's certificate. Imagine the appellate fate of a custody order where the trial judge has said I give custody to the father although his claim has less weight than that of the mother.[68]

[62] National Security Information (Civil and Criminal Proceedings) Act 2004 (Cth), s. 8. The Bill originally included 'national interests' in the definition of 'national security' but this was subsequently deleted.

[63] Ibid., s. 10.

[64] Ibid., s. 9.

[65] Australian Security Intelligence Organisation Act 1979 (Cth), s. 4.

[66] National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s. 31(8).

[67] *Lodhi* v. *The Queen* (2007) 179 A Crim R 470. See also George Williams, Chapter 21 this volume.

[68] Michael McHugh, 'Terrorism legislation and the Constitution' (2006) 28 *Australian Bar Review* 117. See also Anthony Gray, 'Alert and alarmed: the *National Security Information Act* (Cth) (2004)' (2005) 24(2) *University of Tasmania Law Review* 1.

The Australian Law Reform Commission also expressed concern about this aspect of the Bill, noting that its alternative scheme, being the adoption of a balancing exercise such as that which applies to PII claims, 'acknowledges that possible prejudice to national security ought to be given great weight, but formally would leave the court with more discretion to ensure that the interests of justice are served in the case before it'.[69]

The Anti-Terrorism Act 2001 (Can) (ATA) amended two parallel regimes in the Evidence Act 1985 (Can), making it significantly easier for the Crown to prevent the disclosure of information in court proceedings on the basis that disclosure could injure international relations, national defence or national security.[70]

First, under s. 37(1) of the Canadian Evidence Act, the Attorney General may apply to the Court for an order preventing the disclosure of information. While the Court is ostensibly required to weigh the public interests for and against disclosure,[71] in reality, the scales are heavily weighted against disclosure. In *Singh (JB)* v. *Canada (Attorney General)*,[72] the Federal Court noted that 'the public interest served by maintaining security in the national security context is weighty. In the balancing of public interests here at play, that interest would only be outweighed in a clear and compelling case for disclosure'.[73] More generally, in *Canada* v. *Ribic*,[74] it was held that the Attorney General's submissions 'should be given considerable weight' and '[i]f his assessment … is reasonable, the judge should accept it'.[75]

Second, even if the court makes an order for the disclosure of information, the Attorney-General may issue a certificate under s. 38.13 that prohibits such disclosure for the purpose of protecting, among other things, national defence or national security. As originally enacted, there was no opportunity for a party to appeal against the issue of a prohibition certificate. The regime has since been modified to provide for a right to appeal to a single judge of the Federal Court, who may confirm, vary or cancel the certificate.[76] However, two aspects of the regime remain of particular

[69] Australian Law Reform Commission, *Keeping Secrets*, p. 41. See also John von Doussa, 'Reconciling human rights and counter-terrorism: a crucial challenge' (2006) 13 *James Cook University Law Review* 104, 119.

[70] See Peter Rosenthal, 'Disclosure to the defence after September 11: sections 37 and 38 of the *Canada Evidence Act*' (2003) 48 *Criminal Law Quarterly* 186, 190.

[71] See Evidence Act 1985, RSC 1985, c. 5, ss. 37(1.1),(2). [72] 2000 FCJ No. 1007.

[73] Ibid., [32]. [74] 2003 FCA 246. [75] Ibid., [19].

[76] Evidence Act 1985, RSC 1985, c. 5, ss. 38.13 and 38.131.

concern.[77] First, a certificate operates for fifteen years and may be reissued.[78] Second, when considering a prohibition certificate, the Federal Court is not required to balance the public interests for and against disclosure. Instead, an appellant is required to establish that the information does not 'relate to' national defence or national security.[79] This means that the Attorney-General would only be required to establish a minor (and possibly innocuous) connection between the information and national defence or national security to sustain the certificate.

Unquestionably, it is important that national security should be given great weight in court proceedings. However, as John von Doussa, former President of the Australian Human Rights and Equal Opportunity Commission, notes, 'it is also important that courts retain a flexible discretion to consider the circumstances of each particular case'.[80] Such discretion is undermined by the principles set out in the Canadian and Australian legislation discussed above. The proportionality principle requires any measures adopted to be 'strictly required' by the exigencies of the situation. Where the scales are weighted against disclosure, as they are in the Canadian and Australian legislation, the courts are clearly less able to restrict the orders they make to what is necessary to protect national security.

B. A minimum core of information?

The common law rules of evidence are based on the general (but not absolute) rule that any information upon which one party seeks to rely must be provided to all other parties. Thus, if the Crown successfully objects to the disclosure of information on the ground of PII, it will no longer be permitted to rely upon that information. Statutory procedures introduced in the UK, Canada and Australia aim to remedy the rigidity of this 'all or nothing' approach. They establish mechanisms whereby, for example, the Crown may rely upon the whole of a document but only disclose to other parties such part as would not injure national security.

The key advantage of this approach lies in its flexibility. However, with flexibility comes the potential for confusion and for the individual's right

[77] These two concerns are discussed in more detail in: Senate of Canada, Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-Terrorism Act* (2007), pp. 64–8.

[78] Evidence Act 1985, RSC 1985, c. 5, ss. 38.13(9).

[79] Evidence Act 1985, RSC 1985, c. 5, s. 38.131.

[80] von Doussa, 'Reconciling human rights and counter-terrorism', 118–19.

to a fair hearing to be whittled down. The latter is particularly concerning when the new hybrid civil/criminal proceedings developed in response to 9/11 are considered. For example, in both the UK and Australia, 'control orders' may now be issued against persons deemed to present an unacceptable threat of terrorism.[81] Whilst the court proceedings relating to such orders are ostensibly civil in nature, the consequences for the subject of a control order may be as severe as those attaching to a finding of criminal guilt. These include: restrictions on movement, limits on the ability to contact other persons, curfews and even house arrest. As the Canadian Supreme Court has stated, the content of the right to a fair hearing 'does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life'.[82] The severe consequences stemming from the issue of a control order reinforce the necessity that the right to a fair hearing be protected.

In Canada and Australia, the relevant statutory regimes spell out the minimum level of disclosure permitted if the Crown is to rely upon information. The Evidence Act 1985 (Can) and the NSIA both provide that the courts may authorise disclosure of all the information, a part or summary of the information or a written statement of facts relating to the information.[83] There are no equivalent statutory provisions in the UK. The question whether there is an irreducible minimum (or 'core') of information that must be provided to the parties is left entirely to the UK courts to determine. Even in Canada and Australia, there is little detail contained in the statutory regimes and it remains necessary for the courts in these countries to ask similar questions to those in the UK. What is meant by a 'summary' or a 'statement of facts'? Is there a core of information that must be contained in these documents in order for a party to receive a fair hearing?

The most thorough discussion of the question whether there is a core of information that must be provided to the parties emerges from UK control order cases. In *Secretary of State for the Home Department* v. *AF*,[84] the

[81] See George Williams, Chapter 21, this volume and Helen Fenwick and Gavin Phillipson, Chapter 19, this volume, for a discussion of the control order regimes and its interpretation in each jurisidction.

[82] *Charkaoui* v. *Canada (Citizenship and Immigration)* [2008] 2 SCR 326, [53].

[83] Evidence Act 1985, RSC 1985, c. 5, s. 38.06(2); National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s. 38L.

[84] [2009] UKHL 28 (*AF*).

House of Lords concluded that a person seeking review of a control order 'must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to these allegations'.[85] It will not be necessary for him to be given details of the evidence forming the basis of the allegations or the sources of that evidence. However, if 'the open material consists purely of general assertions and the case against the controllee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be'.[86] This was where the balance was struck by the European Court earlier in 2009 in *A* v. *United Kingdom*,[87] and the House of Lords (with considerable regret expressed by Lord Hoffman)[88] felt bound to follow. The European Court recognised that a person involved in civil proceedings could not always be given all the information concerning them. Furthermore, the person's legal representative could not always be given all the information concerning their client. Extenuating circumstances, such as where disclosure posed a risk to national security, may prevent this. However, the proportionality principle requires that any limitation on the right to a fair hearing must be sufficiently counter-balanced by the procedures followed by the judicial authorities.

C. *Special advocates*

Lord Hoffmann was not the only member of the House of Lords to change his approach in *AF*. Just two years earlier in *MB and AF*, a majority of the House of Lords found that the right to a fair hearing did not mandate that a party be provided with a minimum level of information. In making this finding, the House of Lords placed its faith in the UK's special advocates regime. In the words of Baroness Hale:

> I do not think we can be confident that Strasbourg would hold that *every* control order hearing in which the special advocate procedure had been used … would be sufficient to comply with Article 6. However, with strenuous efforts from all, difficult and time consuming through it will

[85] Ibid., [59]. [86] Ibid.

[87] *Application 3455/05* [2009] ECHR 301 (19 February 2009).

[88] Lord Hoffmann would have preferred to ask 'whether in all the circumstances it would really be unfair not to tell the applicant or accused' rather than adopting the rigid rule espoused by the European Court. His Lordship stated: 'I think that the decision of the ECtHR was wrong and … it may well destroy the system of control orders which is a significant part of this country's defence against terrorism': [2009] UKHL 28, [70], [72].

> be, it should usually be possible to accord the controlled person 'a substantial measure of procedural justice'.[89]

Two years later, however, Baroness Hale stated: 'I was far too sanguine about the possibilities of conducting a fair hearing under the special advocate procedure'.[90] Similarly, Lord Hope (who had reached the same conclusion in *MB and AF*) stated that 'this was an optimistic assessment. It assumed that the disadvantages that the use of closed material gives rise to could be overcome by looking at the proceedings in the round'.[91] The main reason for this change in attitude (apart, of course, from the decision of the European Court in *A*) appears to have been the increasing recognition by the House of Lords of the deficiencies in the system of special advocates. In particular, they recognised the system's inability to compensate for the failure to provide information to a party.

i. The introduction of special advocates in the UK

The special advocates regime in the UK was enacted partly in response to the decision of the European Court of Human Rights in *Chahal* v. *United Kingdom*.[92] The European Court held that the issuing of a deportation certificate for Karamjit Singh Chahal, an Indian national residing in the UK, by the Secretary of State for Home Affairs on the ground of national security violated the European Convention on Human Rights. This was because the review panel, colloquially known as the 'Three Wise Men', was not a 'court': Chahal was not entitled to legal representation before the panel, he was only given an outline of the grounds forming the basis for the certificate on the ground of PII, and the panel's advice to the Home Secretary was not binding.[93] The European Court concluded:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.[94]

In response to the European Court's decision, the Special Immigration Appeals Commission Act 1997 (UK) (SIAC Act) was enacted. This replaced the 'Three Wise Men' with an independent quasi-judicial tribunal (SIAC) before which foreign nationals could appeal against a deportation order made by the Secretary of State. SIAC's jurisdiction

[89] *Secretary of State for the Home Department* v. *MB and AF* [2008] 1 AC 440, [66].
[90] [2009] UKHL 28, [101]. [91] Ibid., [79]. [92] (1996) 23 EHRR 413.
[93] Ibid., [130]–[133]. [94] Ibid., [131].

was later expanded to include appeals against revocation of citizenship[95] and, under the Anti-Terrorism Crime and Security Act 2001, to review the detention of foreign nationals who had been designated by the Secretary of State as 'suspected international terrorists'.[96] This 2001 Act was repealed in 2005.[97]

In finding that the pre-1997 UK regime violated the European Convention on Human Rights, the European Court emphasised that there were alternative mechanisms that were less intrusive in their impact on the right to a fair hearing. The Court noted in particular the use of special advocates before the Canadian Security Intelligence Review Committee (SIRC) under the now-repealed Immigration Act 1976 (Can).[98] In large part, the SIRC system of special advocates was incorporated into the SIAC Act. In contrast to the usual approach to procedural fairness whereby a person is entitled to all the information against him or her, SIAC is permitted to withhold material from the appellant and the appellant's legal representative and to hold closed proceedings in the absence of the appellant and the appellant's legal representative. In these circumstances, a special advocate may be – but, in practice, always is – appointed by SIAC to represent the interests of the appellant. The special advocate's role is to challenge the Secretary of State's designation of material as closed (the disclosure function),[99] and to appear before SIAC on the appeal if closed material continues to be relied on (the substantive function).[100]

ii. Restrictions on communication

There is one critical difference between the SIRC and SIAC systems. Ip notes that SIRC special advocates were allowed to communicate with

[95] Nationality, Immigration and Asylum Act 2002 (UK).

[96] Anti-Terrorism, Crime and Security Act 2001 (UK), s. 23.

[97] The Act was repealed after the decision of the House of Lords in the *Belmarsh Detainees* case: [2005] 2 AC 68. The House of Lords held that the Act was incompatible with the Human Rights Act 1998 (UK) because the detention provision was disproportionate (in the sense that it was not strictly required by the emergency) and discriminatory.

[98] Ibid. The functions of special advocates before SIRC are discussed in *Charkaoui* v. *Canada (Citizenship and Immigration)* [2007] 1 SCR 350, [71]–[76].

[99] For a discussion of the similarities and differences between the disclosure function of special advocates and the approach devised by the courts to deal with PII, see: House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates (Volume 1)*, Seventh Report of Session 2004–5, HC 323–1, p. 24.

[100] Joint Committee on Human Rights, United Kingdom Parliament, *Counter-Terrorism Policy and Human Rights: 28 days, Intercept and Post Charge Questioning*, Nineteenth Report of Session 2006–7, HL Paper 157, HC 394, 50.

the affected person even after they had viewed the closed material.[101] By contrast, under the SIAC Act, special advocates are generally only permitted to communicate with an appellant *before* they have viewed the closed material.[102] The rationale for this is that, after viewing the closed material, the special advocate may inadvertently reveal the content of that material to the appellant.[103]

While there are some exceptions to this prohibition on communication, these are extremely limited and do little to mitigate the unfairness caused to the appellant. First, an appellant is allowed, on his or her own initiative, to contact the special advocate.[104] Any information provided by an appellant is likely to be of limited assistance to the special advocate given that, in many instances, the nature of the case against the appellant is only revealed by the closed material. Second, with the permission of the Secretary of State, SIAC may grant the special advocate permission to ask specific questions of the appellant.[105] However, it has been noted by special advocates that such a system is rarely (if ever) used.[106] This is because there is a belief among special advocates that the Secretary of State is unlikely to grant permission, and also because it may reveal to the Secretary of State a strategy that the special advocate intends to adopt.[107]

The prohibition on communication places considerable hurdles in the way of a fair trial, as it makes it virtually impossible for the appellant to give effective instructions regarding the conduct of his or her case. Lord Bingham, in *Roberts* v. *Parole Board*,[108] said that a special advocate deprived of effective instructions is inevitably 'taking blind shots at a hidden target'.[109] Even Lord Carlile, the UK Independent Reviewer of Terrorism Legislation and a well-known supporter of the special advocates regime, has noted that 'there should be available to special advocates an easier and closer relationship with the individuals whose interests they represent'.[110]

[101] John Ip, 'The rise and spread of the special advocate' [2008] *Public Law* 717, 720.
[102] Ibid., 721; Special Immigration Appeals Commission (Procedure) Rules 2003, rule 26(2).
[103] This rationale simply does not wash when it is considered that government lawyers and agency members with knowledge of the closed material are permitted to communicate with the appellant.
[104] Special Immigration Appeals Commission (Procedure) Rules 2003, rule 36(6).
[105] Special Immigration Appeals Commission (Procedure) Rules 2003, rules 36(4)–(5).
[106] Joint Committee on Human Rights, Nineteenth Report of Session 2006–2007, [201].
[107] Lani Inverarity, 'Immigration Bill 2007: special advocates and the right to be heard' (2009) 40 *Victoria University of Wellington Law Review* 471, 481.
[108] [2005] 2 AC 738 (*Roberts*). [109] Ibid., [18] (in dissent).
[110] Lord Carlile of Berriew QC, *Anti-Terrorism, Crime and Security Act 2001: Part IV Section 28 – Review 2004* (2004), [78].

Options that may go some way towards achieving this could involve the establishment of detailed protocols regarding communications between special advocates and appellants to minimise the possibility of inadvertent disclosure, or the presence of a person from the Special Advocates Support Office during any such communications.[111] While either of these options would obviously fall short of the freedom generally attaching to the lawyer–client relationship, they would come much closer to striking a balance between the interests of national security and the appellant's right to a fair hearing.

The special advocate regime has subsequently been adopted in Canada for PII issues following the Supreme Court decision in *Charkaoui* v. *Minister of Citizenship and Immigration*.[112] Unfortunately, instead of following the SIRC procedure with its more permissive approach to communication between the special advocate and his or her client, the Canadian Parliament chose to adopt the UK approach.[113] Notably, the Canadian Senate Special Committee has since supported allowing more communication, suggesting that the special advocate 'might communicate with the client in the company of another person, likewise sworn to secrecy, so that there can be close monitoring of what is discussed and inadvertent errors of disclosure prevented'.[114]

iii. Function creep

In *Chahal*, the European Court noted that the SIRC system of special advocates 'accommodate[s] legitimate security concerns about the nature and sources of intelligence information and yet accord[s] the individual a substantial measure of procedural fairness'.[115] However, this conclusion has been strongly criticised. In *Roberts*, Lord Steyn said that the 'special advocate procedure strikes at the root of the prisoner's fundamental right to a basically fair procedure':[116]

> It is important not to pussyfoot around such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.[117]

[111] Joint Committee on Human Rights, Nineteenth Report of Session 2006–7, pp. 53–4.
[112] [2007] 1 SCR 350. For a detailed discussion of this case, see Roach, 'When secret intelligence becomes evidence', 147.
[113] An Act to amend the Immigration and Refugee Protection Act, SC 2008, c. 3.
[114] Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times*, p. 36.
[115] Ibid. [116] *Roberts* v. *Parole Board* [2005] UKHL 45, [93].
[117] Ibid., [88].

In this chapter, we have only addressed one of the concerns in relation to the ability of special advocates to represent the interests of their clients. Others include: the small pool of special advocates; inability of clients to choose their own special advocate from a list; lack of resources and assistance for special advocates; reliance upon the government to disclose all relevant material; inability to call expert witnesses; and, most significantly, the fact that a special advocate is required to 'represent the interests' of his or her client but is not 'responsible' to him or her.[118] Despite these deficiencies, most commentators, special advocates and judges seem to accept that the special advocates regime represents an important safeguard of the individual's right to a fair hearing in the face of a need to protect the security of the nation and its citizens. In *M* v. *Secretary of State for the Home Department*,[119] the UK Court of Appeal stated:

> Individuals who appeal to SIAC are undoubtedly under a grave disadvantage. So far as it is possible this disadvantage should be avoided or, if it cannot be avoided, minimised. However, the unfairness involved can be necessary because of the interests of national security. The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him.[120]

Similarly, Roach stated:

> [S]pecial advocates constitute one example of an approach that is a more proportionate response to reconciling the need to keep some information secret and the need to ensure as much fairness and adversarial challenge as possible.[121]

We agree that there is an important role to be played by special advocates in proceedings such as those before SIAC and control order proceedings. However, as noted by the House of Lords in *AF*, the special advocates system is not of itself sufficient to protect the individual's right to a fair hearing. The doctrine of proportionality requires that measures restricting fundamental rights be the least intrusive available. The current special advocates regime does not satisfy this test. It is only when combined with other protections that any special advocates regime can strike an

[118] For a discussion of the various problems relating to the use of special advocates, see House of Commons Constitutional Affairs Committee, Seventh Report of Session 2004–5, pp. 30–9.

[119] [2004] EWCA Civ 324. [120] Ibid., [13].

[121] Kent Roach, 'Ten ways to improve Canadian anti-terrorism law' (2006) 51 *Criminal Law Quarterly* 102, 120.

appropriate balance between national security and the right to a fair trial. As *AF* sets out, one of these protections is a requirement that individuals be provided with sufficient details of the allegations against them to provide effective instructions. This should be complemented by an amendment of the regulatory arrangements to enable special advocates to communicate with their clients even after they have viewed the closed information. In these circumstances, special advocates assist in ensuring 'that the judge has been exposed to the whole factual picture'[122] rather than simply the picture that the Crown wishes to present.

The starting point in all proceedings – civil and criminal – must be that the Crown is required to disclose all information it relies upon to the person affected. This includes not only the allegations made against that person, but also the evidence upon which those allegations are based and the sources of that evidence. The alternative system, as epitomised by the proceedings before SIAC, is not and should not be allowed to become the norm. It is only in cases where there are exceptional grounds for so doing that information may be withheld, and the appointment of a special advocate will be both proportionate and necessary. It is therefore concerning that the use of special advocates, in the UK in particular, has spread far beyond the counter-terrorism context.[123] While it is beyond the scope of this chapter to assess the appropriateness of appointing a special advocate in each of these cases, we would adopt the test set out by Lord Bingham in *R* v. *H and C*.[124] In the context of discussing whether it was appropriate to appoint a special advocate for a criminal defendant, Lord Bingham stated:

> Such an appointment will always be exceptional, never automatic, a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.[125]

5. Conclusion

In combating terrorism, we have started from the position that the right to a fair hearing must cede, at least to a certain degree, to legitimate national

[122] *Charkaoui* v. *Canada (Citizenship and Immigration)* [2007] 1 SCR 350, [51].

[123] See House of Commons Constitutional Affairs Committee, Seventh Report of Session 2004–5, pp. 21–2. The spread of special advocates in the UK and across jurisdictions is also discussed in Ip, 'The rise and spread of the special advocate'.

[124] [2004] UKHL 3. [125] Ibid., [22].

security concerns. However, we argue for a more sophisticated approach to the withholding of security-sensitive information in civil litigation. We applaud the approach of courts in the UK to be less deferential to the assertion of national security exigencies by the executive arm of government. However, courts in Canada, and particularly in Australia, have been less successful in this regard. We argue for these courts to assume a more significant role in testing such executive claims.

We argue that the concept of proportionality should become more overtly the guiding principle in determining how far national security concerns can justify incursions into procedural fairness and the right to a fair hearing. In particular, we believe that the PII principle should be codified in legislation in a manner that better permits the courts to accommodate the right to a fair hearing while responding to the demands of national security. The articulation of clearer duties on parties, and the court, in testing claims for PII would better allow the court to carry out its duty of weighing the competing public interests.

Significant progress has been made by the UK, Canadian and Australian parliaments to deal with the challenges posed by the potential disclosure of national security information in civil proceedings. However, a failure on the part of these legislatures to give adequate consideration to the proportionality principle has resulted in legislation that does not properly accommodate the fundamental right to a fair hearing. Some of these deficiencies have been rectified by the courts; for example, with the UK House of Lords (now Supreme Court) recognising that a person must always be provided with sufficient information so they can provide effective instructions to the special advocate acting on their behalf. Nevertheless, there is still considerable room for improvement. But that improvement requires the legislature to provide the appropriate tools to the judiciary, so that in individual cases in which security sensitive information is at issue, any impingement on the right to a fair hearing will be no more than is absolutely necessary.