



**Justice and Security Bill (Part 2):  
Closed Material Procedures**

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**JUSTICE considers that the Government’s proposal to introduce closed material procedures (CMP) into all civil proceedings is unfair, unnecessary and unjustified. That one party will present his case unchallenged to the judge in the absence of the other party and his lawyers is inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Introducing CMP into the ordinary civil justice “toolkit” of our judiciary could undermine their credibility irreparably and damage public confidence in the civil justice system.**

**Taken together, these proposals represent a knee-jerk and disproportionate reaction to a limited number of cases involving UK security and intelligence services in allegations of complicity in some of the most serious allegations of human rights abuse, through torture, inhuman and degrading treatment in the context of the so-called “war on terror”. Changes to the measures for parliamentary oversight of the intelligence services in Part 1 of the Bill must not be seen as a trade-off for the proposed limits on access to effective judicial remedies.**

**The Supreme Court in *Al-Rawi* refused to expand CMP, concluding that such a fundamental change would require “compelling evidence”. JUSTICE considers that Parliamentarians should ask for no less. In our view, the Government has failed to meet this test. The case for reform is not supported by evidence and the arguments in favour of change do not stand up to close scrutiny.**

**In the absence of compelling justification for the expansion of secret evidence, JUSTICE urges Members to support the amendments which delete Clauses 6 - 12 from the Bill.**

**Amendment alone cannot address the serious implications of Clauses 6 - 12 for our civil justice system. However, should Parliament accept the case for Part 2 of the Bill, JUSTICE considers that the whole package of amendments proposed by the JCHR should be adopted in order to empower and encourage the Court to consider the public interest in open, equal and adversarial justice and to try to ensure CMP remains a measure of last resort. If the Government resists this package of safeguards, JUSTICE considers that Parliamentarians should accept that the case for deletion is overwhelming.**

## Introduction

1. JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.<sup>1</sup> We have a long history of litigating in cases where closed material procedures have been in issue.<sup>2</sup>
2. Part 2 of the Bill would ensure closed material procedures (CMP) – where a party to proceedings and his lawyers (together with the public and the press) are excluded – and his interests represented by a publicly appointed security vetted lawyer – a Special Advocate - become an ordinary part of the civil “toolkit” for our judges (Clauses 6 – 12).
3. As amended, Clause 6 provides that the Court may order CMP of its own motion or on the application of the Secretary of State in any case where any party would be required to disclose sensitive material, defined as material, “the disclosure of which would be damaging to national security”. Other parties may only trigger CMP where they themselves would be required to disclose such material. The Government now proposes to accept that all parties should be able to request CMP on the same basis (Amendments 27, 42, 43, 44). Two tests must be satisfied before the Court may order CMP: (a) that a party will be required to disclose “sensitive material” to another person in the course of proceedings (sensitive material is material which if disclosed would be damaging to national security); and (b) that “it is in the interests of the fair and effective administration of justice in the proceedings” to allow CMP.

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<sup>1</sup> JUSTICE, *Secret Evidence*, 2009. Electronic copies are available online: <http://www.justice.org.uk/resources.php/33/secret-evidence>

<sup>2</sup> In 2010, JUSTICE jointly intervened with Inquest and Liberty in the Divisional Court in support of the decision of Lady Justice Hallett that she did not have the power to order to hear evidence in secret as part of the inquests arising from the 7/7 bombings (The Divisional Court accepted our submissions). Coroners do not have the inherent jurisdiction to order closed material proceedings. A copy of the judgment and JUSTICE’s submissions can be found here: <http://www.justice.org.uk/pages/r-secretary-of-state-for-the-home-department-v-assistant-deputy-coroner-for-inner-west-london.html>) We made submissions in *A v UK* in Strasbourg and *AF (No 3)* in the domestic courts (Full information on each of these submissions is available online. <http://www.justice.org.uk/pages/past-interventions.html>). JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court (*Al-Rawi v Security Service* [2011] UKSC 34; *Tariq v Home Office* [2011] UKSC 35. Copies of JUSTICE’s submissions can be found online: <http://www.justice.org.uk/pages/al-rawi-.html>) (*Tariq* is currently being considered by the European Court of Human Rights. JUSTICE is a third party intervener in the case). The key outcome in these cases – that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority – prompted the introduction of the Justice and Security Bill.

4. Once the Court has made a declaration that CMP is available, Clause 8 provides that Rules of Court will allow a relevant person to make applications for particular material (including individual documents, witness evidence or classes of material, for example) to be “closed” (i.e. heard without the presence of the other side or their legal representatives, but with the attendance of a Special Advocate). The Court can never order disclosure of any material at all damaging to national security, regardless of the context of the case or the seriousness of the harm concerned (Clause 8(1)(c)). The Court is permitted to provide a summary of the closed material – but not required to provide one – only where a summary would not be damaging to the interests of national security (Clause 8(1)(e)).<sup>3</sup>
5. **JUSTICE considers that that the operation of CMP is inherently unfair and that normalising the use of these controversial and previously exceptional hearings will undermine the credibility of our judges and public confidence in the civil justice system. Allowing one party – usually the Government – to present its case to the Court largely unchallenged and without the benefit of public scrutiny is an anathema to our long-standing common law protection of open, equal and adversarial justice. We urge Members to support the deletion of the central clauses of Part 2 of the Bill (AMENDMENTS 1-7, 15 – 25).**
6. The Bill faced robust scrutiny in the House of Lords. Peers from across the House – including Baroness Kennedy of the Shaws (Chair of JUSTICE and member of the Joint Committee on Human Rights), Lord Pannick, Lord Dubs and Lord Macdonald (the former Director of Public Prosecutions) – would have deleted these provisions from the Bill. Many Labour Peers chose to abstain. The official opposition, together with many others, supported the Bill only after amendment to insert changes recommended by the Joint Committee on Human Rights (JCHR). These changes would have permitted any party to make an application for CMP, without restriction. This basic acknowledgement of the need for equality of arms has now been accepted by the Government. However, the House of Lords would have required the Court to consider whether a claim for Public Interest Immunity (PII) should be made; whether the degree of harm to the interests of national security if the relevant material were disclosed would be likely to outweigh the public interest in the fair and open administration of justice; and whether a fair

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<sup>3</sup> Where the Court refuses to order that material be dealt with as closed or the Court directs that a summary must be provided, the Secretary of State is not compelled by the Bill to disclose that material (Clause 8(2)). Instead, if disclosure is refused, the Court can direct the relevant party not to rely on the material or to “make such concessions or take such other steps as the Court may specify” (Clause 8(3)).

determination of the proceedings would not be possible by any other means. These changes would limit the circumstances when CMP would be available to those cases which could not be tried by any other means. Inserting the balancing exercise familiar to PII claims (“the *Wiley* balance”) was deemed necessary to allow the Court to exercise some genuine discretion over whether the departure from the ordinary principles of open, equal and adversarial justice could be justified in light of the degree of harm posed to national security. The JCHR, supported by evidence from the Special Advocates considered these minimum amendments against the background of their conclusion that the Government had not made the case for the expansion of CMP.

7. The Government has stripped out almost all of these changes, securing their reversal during Public Bill Committee, in most cases, by a single vote. The Government dismissed widespread criticism of its rewrite as “legal hairsplitting” or “semantics”.<sup>4</sup> These arguments were roundly rejected by the JCHR in its latest report on the bill. The Committee reiterates its view that the Government has not provided evidence to support the case for these controversial reforms.<sup>5</sup> Should the Bill proceed, the Committee calls for it to be amended significantly and the Lords amendments reinstated.
8. **JUSTICE does not consider that amendment can address the serious implications of Clauses 6 - 12 for our civil justice system. We do not consider that any specific safeguard could address the lack of evidence in support of the expansion of CMP. Nor can any of the amendments proposed ameliorate the significant risk that the use of CMP within the ordinary civil justice system poses for public confidence in our courts and the credibility of our judges.**
9. This briefing is in two parts. The first section deals with the threat to open, adversarial and equal justice posed by the expansion of CMP and the lack of evidence to support the Government’s case for reform. The second, deals with the amendments proposed by the JCHR, the official opposition and others, tabled for consideration on Report. Nothing in the latter sections of this briefing should be read as an endorsement of the expansion of CMP.

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<sup>4</sup> JCHR, Eighth Report of Session 2012-13, *Legislative Scrutiny: Justice and Security Bill (Second Report)*, HL 128/HC 1014, para 29-30. Herein “JCHR Second Report”, para 37.

<sup>5</sup> JCHR Second Report, para 29-30.

## A) NO CASE FOR EXPANDING CLOSED PROCEDURES

### i) Secret evidence and open justice

10. It is a basic principle of the common law that a person must know the evidence against them. The right to be heard includes the opportunity to challenge the evidence before the court. As our domestic courts have long recognised, it is the “first principle of fairness” that:

Each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of the material of what is said against him (or her), for what he does not know, he cannot answer.<sup>6</sup>

11. JUSTICE has long argued against the expansion of closed material procedures (CMP) as an unjustifiable interference with these common law principles of open, equal and adversarial justice. In *Secret Evidence* (2009), we conducted a major review of the operation of CMP and concluded:

- **Secret evidence is unfair:** Each of the principles that make up the common law right to a fair hearing – the right to be heard, the right to confront one’s accuser and the right to an adversarial hearing and equality of arms – is denied when one party to a claim is denied access to – and the opportunity to challenge - the evidence used against them.<sup>7</sup>
- **Secret evidence is unreliable:** Evidence which is considered by a court, but which goes unchallenged is inherently unreliable. This unreliability is compounded by the fact that “intelligence” produced by the intelligence services is not the product of a criminal investigation with the associated safeguards placed on the production of evidence.<sup>8</sup>
- **It is undemocratic:** Requiring the courts to conduct their work in public ensures through transparency that the public can satisfy themselves that justice is being done.

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<sup>6</sup> *Re D (Minors)* [1996] AC 593 at 603-04 (Lord Mustill).

<sup>7</sup> *Secret Evidence*, paras 416 - 422

<sup>8</sup> *Secret Evidence*, paras 410 – 415

The public's ability to scrutinise judicial decision making is plainly thwarted when proceedings, evidence and judgements are kept secret.<sup>9</sup>

- **Secret evidence is damaging to the integrity of our courts and the rule of law:** Lack of fairness damages the public good of the justice system itself. The integrity of the courts depends on the public perception that our judges have adopted a fair and independent process to reach their conclusions.<sup>10</sup>
- **It weakens security:** The use of unchallenged intelligence to affect the outcome of cases can lead to inaccurate conclusions which endanger security. In the case of civil claims involving allegations against Government agencies, this may allow the cover-up of serious wrong-doing and misconduct by officials and agents. This approach breeds complacency and could encourage a drop in professional standards, which in turn could reduce the confidence of the public in the security and intelligence services.<sup>11</sup>
- **The use of secret evidence is unnecessary:** Existing cases have shown that the Government may take an overly cautious approach to claiming secrecy, including for information already in the public domain. There are generally better means of protecting the important public interest in maintaining national security which provide greater respect for the right to open justice and a fair hearing, for example, public interest immunity (PII).<sup>12</sup>

12. Each of these criticisms hold firm. Since the publication of *Secret Evidence* a number of developments have underlined our concern that the use of secret evidence is a practice which should not be extended, but rolled back. In *Al-Rawi v Security Service*, the Supreme Court determined that it did not have the jurisdiction to extend the use of CMP.<sup>13</sup> Lord Dyson stressed:

The common law principles...are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.<sup>14</sup> (Emphasis added)

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<sup>9</sup> *Secret Evidence*, paras 423 - 425

<sup>10</sup> *Secret Evidence*, paras, 426 - 429

<sup>11</sup> *Secret Evidence*, paras 430 - 431

<sup>12</sup> *Secret Evidence*, paras 432 - 437

<sup>13</sup> [2011] UKSC 34, para 69

<sup>14</sup> *Al-Rawi*, para 48.

13. Responding to the Government's proposals, the current Special Advocates (SAs) told the Government:

CMP represent a departure from the foundational principle of natural justice... The use of Special Advocates may attenuate the procedural unfairness entailed by CMPs to a limited extent, but even with the involvement of SAs, CMPs remain fundamentally unfair.<sup>15</sup>

**ii) No case for expanding secret evidence**

14. The JCHR has conducted close scrutiny of the Bill's proposals. They have concluded in three separate reports that the Government has failed to make the case for reform.<sup>16</sup> The latest concludes:

In our first Report on the Bill we concluded that "we remain unpersuaded that the Government has demonstrated by reference to evidence that there exist a significant and growing number of civil cases in which a CMP is 'essential' in the sense that the issues in the case cannot be determined at all without a CMP. [...] We have not seen anything to change the view we expressed on this issue in our First Report on the Bill."<sup>17</sup>

**15. We share the view that no adequate case for reform has been made and support the deletion of the key parts of Part 2.**

16. There is no national security justification for reform. The operation of PII has led to no disclosure which has endangered national security.<sup>18</sup> That PII will continue to operate in the context of inquests - where the Government does not have an option to withdraw or concede - underlines that the existing law poses no risk to national security. Each of the other arguments made by Government fails to provide any convincing justification for reform:

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<sup>15</sup> Response to Consultation from Special Advocates, 16 December 2011, para 2.

<sup>16</sup> Fourth Report of Session, *Legislative Scrutiny: Justice and Security Bill*, HL Paper 59, HC 372, para 46 (JCHR First Report). See also Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper*, HL Paper 286/HC 1777 and JCHR Second Report

<sup>17</sup> JCHR Second Report, para 29 – 30.

<sup>18</sup> Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper*, HL Paper 286/HC 1777, para 8.



- **“CMP is in the interests of justice as it will allow the Court to consider more information than it does under PII”**: The Government argues that CMP is needed in order to maximise the information before the Court and to increase the likelihood that justice will be done.<sup>19</sup> This argument was made before the Supreme Court and dismissed, most eloquently by Lord Kerr:

For what...could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of that argument, however lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.<sup>20</sup>

The Government neglects that although a successful application for PII may lead to non-disclosure of material; this stage will only be reached after the Court has considered the competing public interests within the *Wiley* balance, and the Court has explored the alternative means by which the balance may be secured, including through the use of confidentiality rings, redaction and anonymity orders. The Government continues to criticise PII during debate on the Bill, including reference to decades old scandals, including Matrix Churchill. Modern PII has much evolved. It prevents the use of class based claims and the introduction of the *Wiley* balance places far greater emphasis on the discretion of the Court.

- **“No evidence currently heard in open court will be heard in secret”<sup>21</sup>**: This ignores that CMP changes the nature of the judicial exercise, introducing a significant litigation advantage for one side in the case (usually the Government). It also neglects that the Government has determined that the question of CMP should be treated as largely distinct from PII; which will remain available, but governed by common law. On the current draft – and after any Government amendment – there would be no requirement on a judge looking at CMP to consider any alternative means of preventing harm to national security, while preserving open justice. In our view, this will rule out the many existing practical measures which may be taken to strike a more

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<sup>19</sup> *Green Paper*, for example, para 2.2 – 2.3.

<sup>20</sup> *Al-Rawi*, para 93

<sup>21</sup> Government Response to consultation on Justice and Security Green Paper, Executive Summary.

effective balance between open justice and security. Existing practice on redaction, confidentiality rings, undertakings and anonymity will fall by the wayside if the proposals in the Bill become law and it is possible that information that might previously have been heard utilising those techniques will be confined to CMP.<sup>22</sup>

- **“CMP will allow claims to proceed which might otherwise be struck out”:** In *Al-Rawi*, the Supreme Court accepted that where sensitive material was not protected by PII, it would theoretically be open to the Court to stay or strike-out the claim because it would not be in the public interest for it to proceed (relying on the precedent of *Carnduff v Rock*.<sup>23</sup>) The Government argues that CMP would be preferable to a claim being struck out and the claimant denied any possible redress. The case of *Carnduff v Rock* was exceptional and we are unaware of any other case where the risk of strike out has arisen. We consider it dubious authority on which to proceed.<sup>24</sup> In recent evidence to the JCHR, David Anderson QC referred to a number of cases where domestic courts have been asked to consider CMP and indicated that strike out could be possible without a closed procedure.<sup>25</sup> In our view, the likelihood of a stay or a strike out remains exceptional and unlikely.<sup>26</sup>

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<sup>22</sup> Evidence of Minister without Portfolio, 12 February 2013, HC 370-iv, QQ 96.

<sup>23</sup> *Al-Rawi*, paras 50, 81- 82, 86, 103, 108, 158, 175 – 181. See also Lord Justice Mance in *Tariq* at 40, Lord Kerr at 110 (where he considers strike-out may be a more palatable outcome than the introduction of CMP in some cases). *Carnduff v Rock* [2001] EWCA Civ 680 was not a national security case. In fact, it was a contractual claim brought by a police informant. The case has itself been subject to criticism and may be wrongly decided.

<sup>24</sup> See JUSTICE submission in *Al-Rawi*, paras 103 on.

<sup>25</sup> HC 370-i. Uncorrected Transcript of Evidence, *The Justice and Security Bill*, 19 June 2012, QQ 4-5.

<sup>26</sup> We note that the Government has not sought to argue that claims should be struck out in this context, including in the *Al-Rawi* cases. We accept that this would be an extremely unattractive argument for a Government to make in any consequence, and in particular, in a context where the Claimant seeks redress for alleged serious violations of international human rights standards. However, that this option has only arisen in the context of arguments on CMP, without the issue having been tested in litigation, together with the role of the Court under PII and using alternative mechanisms to protect the various public interests in play (in preserving national security, in securing access to justice and protecting open and equal justice), compounds our view that strike out in practice, taken against the background of the Court’s existing role would be unlikely. If there were a risk, nothing in the Bill would redress this concern. The risk would be to the Claimant and his or her interest in a fair hearing. Under Clause 6, the Claimant can do nothing to prevent strike out should that option be on the table (and possibly proposed by the Secretary of State). Rather, CMP remains in the gift of the Secretary of State alone (See Supplementary Briefing on Amendments). With this in mind, we note the Government’s refusal to assist the Joint Committee on Human Rights in its efforts to better explore the extent of the challenge that the Government has identified, by asking for further information on the volume and type of cases thought by Government to be so “saturated” with material damaging to national security to make them untriable. Fourth Report of Session, *Legislative Scrutiny: Justice and Security Bill*, HL Paper 59, HC 372, paras 43 – 46.

The price of preserving the public interest in the credibility of the courts and the proper administration of justice may be the theoretical risk that in some circumstances one or other party may exceptionally be disadvantaged in the greater public interest.<sup>27</sup> Although this step may appear to have serious implications for access to justice; it remains a wholly theoretical prospect. It is for Parliament to determine whether this theoretical risk, in a limited number of cases justifies the interference with the principles of open, adversarial justice and the impact on the credibility of the judiciary which the expansion of CMP will have.

- **“CMP will protect the Government from having to settle claimants with undesirable defendants”**: The principal justification now relied upon by Government is the cost associated with settling the claims made by the Guantanamo detainees, and the cost of settling similar cases in the future. The Green Paper asserted that the Government was compelled to settle these claims because it was unable to adduce national security sensitive material in its defence and the Government continues to argue that it would be fairer if the Government were able to rely on material within a CMP that might otherwise be inadmissible as a result of PII.<sup>28</sup> The JCHR rejected this argument wholesale.<sup>29</sup> Settlement in the Guantanamo cases preceded the final decision of the Supreme Court that CMP was not an option. The application of PII was never tested by the Government in practice.

The Government continues to rely heavily on this argument. Its language has become increasingly intemperate and its argument less coherent. The Ken Clarke QC MP, Minister without Portfolio, has alleged that critics of the Bill, including JUSTICE, would prefer to “accept that millions of pounds could go without challenge to individuals who could be terrorists”.<sup>30</sup> Ignoring the distaste of a former Lord Chancellor labelling an entire category of uncharged claimants as possible terror suspects,<sup>31</sup> the Minister fails

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<sup>27</sup> We expand on this argument in our submissions to the Supreme Court in *Al-Rawi*, see paras 1-2.

<sup>28</sup> *Ibid*, para 1.18

<sup>29</sup> Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper*, HL Paper 286/HC 1777, para 72 – 80.

<sup>30</sup> The Telegraph, *All right-thinking citizens should support secret courts*, 28 Feb 2013

<sup>31</sup> Lord Macdonald has publicly commented that if the Government were concerned that these monies were being used for purposes related to terrorism, the claimants would have committed an offence and would be liable to prosecution, and their assets could be frozen. That the Government has taken no such action suggests that the reference to the funding of terrorism may be hyperbole. See Reprieve, Briefing, 1 March 2013. [http://www.reprieve.org.uk/press/2013\\_03\\_01\\_Clarke\\_misleading\\_secret\\_courts/](http://www.reprieve.org.uk/press/2013_03_01_Clarke_misleading_secret_courts/)

to address the fundamental flaws in his assertion that the Government is ever forced to settle claims. Not least, as explained above, the Government has argued that, if a claim is untriable as a result of the abundance of relevant national security sensitive material, it may be struck out. Yet, no claim for strike out has ever been sought. On the other hand, the Minister for Security accepted during Committee Stage that: “Even with CMPs...because of some sensitivity in respect of a particular piece of intelligence, reaching a settlement may still be the most appropriate outcome”.<sup>32</sup> So while ramping up the rhetoric, the Government has accepted that regardless of whether CMP might be available, it might yet choose to settle, where “sensitivity” makes settlement the most attractive option. This undermines its argument that CMP is essential; and that there is a compelling case for expansion. On the Government’s own case, it would treat PII, CMP and settlement as alternative tools in its litigation strategy.

### iii) Has the Government now made the case for reform?

17. Introducing the Government’s package of amendments for Report Stage, the Minister without Portfolio has argued that the Government has “gone to extreme lengths to meet every practical objection” to the measures in the Bill. He said: “These final amendments should resolve all right thinking citizens of Middle England that this is a sensible, worthwhile Bill”. The Minister dismissed critics of the Bill as “hardliners”.<sup>33</sup>
18. A range of organisations and individuals have expressed concern about the expansion of CMP, including the TUC,<sup>34</sup> the Law Society,<sup>35</sup> the Bar Council,<sup>36</sup> the UN Special Rapporteur on Torture,<sup>37</sup> the Equality and Human Rights Commission,<sup>38</sup> the Liberal Democrat Party,<sup>39</sup> the House of Lords Constitution Committee<sup>40</sup> and the JCHR. This Government neglects the cross-party critique of the Bill in the House of Lords and the significant divisions during Public Bill Committee, won only with the narrowest of margins.

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<sup>32</sup> HC PBC Deb, 5 feb 2013, Col 185.

<sup>33</sup> The Telegraph, *All right-thinking citizens should support secret courts*, 28 Feb 2013

<sup>34</sup> <http://l-r-c.org.uk/news/story/struggles-on-the-agenda-at-tuc/>

<sup>35</sup> <http://www.lawsociety.org.uk/representation/parliamentary-briefings/justice-and-security-bill---law-society-briefing/>

<sup>36</sup> <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2012/july/bar-council-chair-condemns-secret-court-plans/>

<sup>37</sup> <http://www.guardian.co.uk/law/2012/sep/11/un-official-secret-courts-torture>

<sup>38</sup> <http://www.equalityhumanrights.com/news/2012/october/commission-advises-parliamentarians-on-violations-in-justice-and-security-bill/>

<sup>39</sup> <http://www.guardian.co.uk/law/2012/sep/25/secret-courts-lib-dem-conference>

<sup>40</sup> <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1802.htm>

Criticism continues to come from individuals of all political persuasions and none. Dominic Raab MP has called the Bill a “grubby piece of legislation” which “erodes the basic principles of British justice”.<sup>41</sup> In a paper for the Centre for Policy Studies, *Neither Just nor Secure*, Andrew Tyrie MP and Anthony Peto QC, conclude that: the Bill “in its current form risks damaging Britain’s system of open justice and the reputation and effectiveness of the security agencies in the struggle against terrorism”.<sup>42</sup> Reverend Nicholas Mercer, a lieutenant colonel who was the army’s most senior lawyer during the last Iraq war, told the Daily Mail’s campaign against the Bill: “The bill is an affront to the open justice on which this country rightly prides itself”.<sup>43</sup>

19. In anticipation of this debate, the Special Advocates have reiterated their earlier conclusion that no case has been made for expanding CMP. They reject the Government’s argument that changes made to the Bill are adequate to ensure fairness.<sup>44</sup> These security-vetted lawyers – who sit at the heart of any CMP – cannot easily be dismissed. They would serve to profit from the expansion of the operation of these exceptional measures. That they urge Parliament to reject the Government’s proposals should carry significant weight.

20. That so diverse a range of stakeholders oppose the Bill is unsurprising. The Government has accepted very few substantial changes:

- **No unfettered power to expand secret evidence:** The Government accepted the deletion of a broad based delegated power to expand the use of CMP to any other civil proceedings (previously Clause 11). This power was extremely broad and would undermine the ability of Parliament to effectively scrutinise the growth of closed procedures beyond that authorised by primary legislation.
- **Ministerial control and judicial discretion:** Earlier iterations of the proposals would have permitted the Minister to certify cases as eligible for CMP, subject only to judicial review (Green Paper) or would have required CMP to be imposed in any case where the Secretary of State could produce any evidence that national security may be at risk (Clause 6). The current version of the Bill provides that the

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<sup>41</sup> The Telegraph, *All right-thinking citizens should support secret courts*, 28 Feb 2013

<sup>42</sup> CPS, *Neither Just nor Secure*, 2013, Summary.

<sup>43</sup> Daily Mail, *Scrap dangerous and unnecessary secret courts*, 27 February 2013.

<sup>44</sup> JCHR Second Report, Written Evidence, pp 43-45.

Court “may” order CMP, but provides little guidance to the Court on the grounds it might look to as justification to refuse CMP. Although, the Court must consider whether CMP is in the interests of the “fair and effective administration of justice in these proceedings”, this is a limited and limiting hurdle. It does not require the Court to look beyond the need for fair and effective disposal of the immediate litigation. It removes any reference to the “fair and open administration of justice” more generally, suggesting that the Court is prohibited from examining the wider impact of CMP on open, equal and adversarial justice. Instead, it leaves CMP as an option for the Court where it is administratively most convenient, regardless of whether other less draconian means might be used to safeguard national security.

- **A judicial duty to review CMP:** The Court will have a duty to conduct a formal review when pre-trial disclosure is completed (Clause 7). Any CMP imposed under the Bill will now be subject to revocation by the judge when the case for its continuation is no longer “in the interests of the fair and effective administration of justice in the proceedings”. While this clarification is welcome, it should not be oversold as a panacea to widespread concerns about the operation of CMP. At its highest, this provision will trigger an automatic consideration of the ongoing validity of CMP which it would be expected might be raised by any qualified Special Advocate in any event.

21. The “final amendments” proposed by the Minister do not disturb the core provisions on CMP:

- **A requirement on the Secretary of State to consider PII:** Amendment 47 would require the Court to be satisfied that the Secretary of State had “considered” an application for PII before making an application for CMP. There has been some suggestion that this clause taken together with a) the shift in Clause 6 from a duty to impose CMP (“must”) to a discretionary power (“may”) and b) the requirement that any CMP is in “the interests of the fair and effective administration in the proceedings” will enable the Court to consider alternatives to CMP, and ultimately reject CMP as other measures are more appropriate. There is nothing on the face of the Bill or in this amendment which, in our view, provides a solid foundation for this conclusion. In the language of Amendment 47, the Court need only be satisfied that the Secretary of State has considered PII. Without an amendment akin to that recommended by the JCHR – to provide that no fair determination of the proceedings is possible without CMP – there is nothing on the face of the

statute to require that the Court explore further any alternatives to CMP. The language of this amendment clearly differs from the package proposed by the JCHR which would empower the Court to consider itself whether an application for PII should have been made, in reaching its conclusion whether justice in the case might have been met by other means.

- **Review and renewal:** The Secretary of State proposes that Parliament should be provided with an annual report on the use of CMP, including relevant statistics about their frequency. An independent reviewer will be appointed to conduct an ad-hoc review of the operation of the proposals in the Bill after 5 years. While acceptance of the principle of review is welcome, the proposal for a single post-legislative review falls far short of the JCHR recommendation for annual renewal.
- **Equal access:** the Government has belatedly accepted that all parties should have equal access to CMP.

22. These amendments are not designed to restrict the use of CMP to cases where they might otherwise be incapable of trial, or otherwise. It is unsurprising that the JCHR has called for the Bill to be amended to meet their concerns.

- **Public Interest Immunity and the “last resort”:** The “fair and effective” test is not a suitable alternative to requiring the Court to consider whether PII – or any alternative means – could have been used to protect national security. This “fair and effective” test not a test of “strict necessity” and “may lead to CMPs being used in cases where the proceedings could still be heard sufficiently fairly by a claim being made by PII” (and thus, allowing for the consideration of other alternatives, such as confidentiality rings etc). The Special Advocates consider that it is essential that the Bill spell out the test to be applied by the Court to ensure that the discretion is actively exercised:

If it is not spelled out, there is a risk that the court will not address its mind to the question of whether the case could be tried fairly under existing procedures. There is a risk that CMPs will become the default option and that what was justified as an exceptional procedure will come to be accepted as the norm.<sup>45</sup>

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<sup>45</sup> JCHR Second Report, paras 73-77.

- **“The Wiley Balance”** Nor is this test a substitute for the requirement of the Court to consider the degree of risk posed to national security by disclosure against the competing public interest in the fair and open administration of justice. The Minister made clear in evidence that the Government did not consider that openness was a relevant consideration for the Court once an application for CMP had been made. This begs the question, on what basis the Court is expected to exercise any discretion to refuse CMP. The JCHR determined that the Government’s argument invites the conclusion that:

there can only be one answer to the question once an application is made for CMP: that the only choice in such cases is between a CMP and the case not being heard at all. In fact, this part of the Bill is defining the test which determines whether or not there should be a CMP. In making that decision, it is obvious to us that the desirability of openness is an important consideration which should weigh in the judicial balance. The Government’s approach, by not taking open justice into account would make it more likely that CMPs would take place in practice.<sup>46</sup>

- **Duty to review:** The JCHR welcomes the duty to review, but expressly recognises its limitations. The Committee calls for the Bill to be amended to allow the Court to consider all of the criteria for CMP on review, not just the “fair and effective” test.
- **Judicial discretion within CMP:** When considering whether specific material should be closed or open, the judge should balance the competing public interests at play, including the interest in open justice. The Government’s argument that the public interest in openness is irrelevant to CMP, once a Minister has decided to make an application is no answer to the rule – reiterated by the Supreme Court in *Al-Rawi* - that limitations on the ordinary processes of open justice like CMP must be justified with compelling reasons. The Special Advocates consider that it is essential that the Court should be required to conduct this balancing exercise in considering whether to close certain documents or categories of material. As the JCHR explains, Article 6 ECHR will require a similar balance to be required in cases where Article 6 is clearly engaged: “by choosing to resist the introduction of judicial balancing into the CMP except where it is required by Article 6 ECHR, the

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<sup>46</sup> JCHR Second Report, para 61.



Government is treating common law fairness as being of lesser content than the right to a fair hearing in Article 6 ECHR".<sup>47</sup>

- **“Gisting”**: The JCHR recommends that Clause 8 require the Court to provide such summary to an excluded party as would be necessary to allow him or her to give instructions to the Special Advocate. An amendment for this purpose was narrowly defeated at Committee Stage.
- **Review and renewal**: The JCHR would provide for the provisions on CMP to lapse unless renewed by both Houses of Parliament on an annual basis.

23. None of these amendments address the concern that the Government has failed to make the case for reform. They do not eliminate the risk that the expansion of CMP will pose to public confidence in our civil justice system or the credibility of our judiciary. For example, a requirement to provide a summary adequate to allow instructions to be given to a Special Advocate will enhance the role of the Special Advocate and increase the likelihood that the interests of the party excluded might be represented to the Court in the context of the closed hearing. It would allow the Special Advocate to challenge the validity of the CMP should the Government resist the provision of a summary adequate to allow instructions to be given. However, this would not entirely address the impact of the provisions on the principle of open justice, nor the negative public perception likely to be generated by the impression that the Government is being enabled to speak in private to a judge about evidence and submissions not available to the other party.

24. We remain concerned that, despite any limiting amendment, closed hearings are likely to become the default in national security cases, once CMP becomes an accepted part of the civil justice tool-kit. This will, in practice, rule out the many existing practical measures which may be taken to strike a more effective balance between open justice and security. Existing practice on redaction, confidentiality rings, undertakings and anonymity will fall by the wayside if the proposals in the Bill become law. This will reduce the likelihood that significant claims against the Government are exposed to public scrutiny, with a corresponding reduction in the ability of a judicial hearing to enhance transparency and accountability. These concerns are compounded in the light of the fact that these cases may involve allegations of serious wrongdoing by the Government, including allegations of torture, inhuman and degrading treatment.

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<sup>47</sup> JCHR Second Report, paras 86-87.

25. In the next section, we consider some of the amendments proposed by the Government, the JCHR and others. **We consider that amendment cannot address the serious failings in this Bill and support deletion of Clauses 6 – 12 from the Bill.**

## B) AMENDMENTS TABLED ON REPORT

**26. JUSTICE urges Members to support the deletion amendments tabled (AMENDMENTS 1-7; AMENDMENTS 15 – 25).<sup>48</sup>**

**27.** The JCHR has insisted on the restoration of changes made by the House of Lords on their recommendation and the adoption of the remainder of their package of amendments designed to deal with a few of the worst excesses of the Government’s proposals. As explained above, these amendments will not address the lack of compelling evidence that the expansion of CMP is strictly necessary despite its impact on the right to a fair, adversarial and open hearing.

**28. However, should Parliament accept the case for Part 2 of the Bill, JUSTICE considers that the whole package of amendments proposed by the JCHR should be adopted in order to empower and encourage the Court to consider the public interest in open, equal and adversarial justice and to try to ensure CMP remains a measure of last resort. If the Government resists this package of safeguards, JUSTICE considers the case for deletion irresistible.**

### **i) Opening the door to CMP: *Applying the Wiley Balance* (Clause 6)**

#### **AMENDMENT 30**

29. Amendment 30 would reinstate the changes accepted by the House of Lords, designed to require the Court to balance the competing public interests in national security against the public interest in the fair and open administration of justice (the *Wiley* balance) before opening the door to CMP.

### **ii) The Last Resort**

#### **AMENDMENTS 31, 32, 33, 34**

30. Amendments 31 – 34 would reinstate the House of Lords amendments on “last resort”. Collectively, these would give effect to the recommendations of the JCHR that the Court be instructed to consider alternative means of achieving a just result before CMP becomes

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<sup>48</sup> This briefing does not deal in detail with our objection to the ouster of Norwich Pharmacal jurisdiction. The analysis in our briefing for House of Lords Report Stage stands: <http://www.justice.org.uk/data/files/resources/325/Justice-and-Security-Bill-HL-Report-Stage-Part-2-Briefing-FINAL-November-2012.pdf>

available. Amendment 31 would require that the Court determine that the fair determination of proceedings is not possible using other means, such as PII, including confidentiality rings etc. Amendment 34 enables the Court to consider directly whether a claim for public interest immunity could be made in relation to the material, as part of its consideration of CMP.

31. By way of contrast, Amendment 47 would only require the Court to be satisfied that the Secretary of State had “considered” an application for PII before making an application for CMP.

### **iii) CMP: *Applying the Wiley Balance* (Clause 8)**

#### **AMENDMENT 38**

32. Amendment 38 gives effect to the JCHR recommendation that the Court should balance the competing public interests in protecting national security and the fair and open administration of justice when considering whether material should be considered closed or open, once a CMP has been initiated.

### **iv) Summaries and “Gisting”**

#### **AMENDMENT 39, 40**

33. Amendments 39 and 40 give effect to the JCHR recommendation that the Court should be required to give any excluded claimant access to such summary of material as is necessary to allow him or her to give instructions to a special advocate.

34. These amendments preserve the Court’s power to refuse a summary when there is a risk to national security. In these circumstances, the Court will have the power pursuant to Clause 8, to require the Secretary of State not to rely on certain information, as recommended by the JCHR.

### **v) The duty to review (Clause 7)**

#### **AMENDMENTS 35, 36, 37**

35. These amendments would expand the Court’s discretion in conducting the formal review envisaged under Clause 7, to permit a CMP declaration to be revoked when any of the criteria under Clause 6 are no longer satisfied. At present the judge is limited by the Bill to the consideration of whether CMP remains in “the interests of the fair and effective

administration of justice in the proceedings”. Without amendment, the Court would not be empowered by the Bill to consider whether the national security risk was ill-founded or whether the material was irrelevant and not subject to a requirement to disclose.

## **vi) Review and Renewal: Enhancing Parliamentary Oversight**

### **NEW CLAUSES 4, 5 and 6**

36. NC 4 would give effect to the recommendation of the JCHR that the Bill should be subject to annual renewal by Parliament. In NC 5, the Government proposes that there should be a requirement for the Secretary of State to report to Parliament on an annual basis to provide information to Parliament on the operation of closed material procedures. These reports will include statistical information on the operation of CMP. NC 6 will provide for an independent reviewer to conduct a one-off formal review of the operation of the proposed new CMP arrangements after the provisions have been in force for a period of 5 years.

37. We have found it routinely difficult to access information on the operation of existing CMP. It is clear that members seeking information during the Green Paper process and during the passage of the Bill have had similar difficulties.<sup>49</sup> Ministers have indicated that information has not been stored and that it would now be disproportionately expensive to collate. The Lords Constitution Committee has recommended that the Government should be required to both keep consolidated records on the use of CMP and to provide for independent review.<sup>50</sup> JUSTICE considers that, in light of the exceptional nature of these measures, reporting and review requirements would not be unduly onerous and will allow Parliament to continue to monitor the impact of the use of CMP in future. While this amendment refers specifically to Part 2 of this Bill, in light of the exceptional nature of these proceedings, JUSTICE considers that there is a good case for maintaining up to date and consolidated statistics on the operation of all existing CMP. **JUSTICE supports the proposal that annual statistics should be compiled and reported to Parliament (NC 5).**

38. As the final safeguard in its package of amendments, the JCHR recommends that the Bill should be subject to annual review and renewal. Their proposal – like that applied to

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<sup>49</sup> See for example, HC Deb, 14 May 2012, col 18W.

<sup>50</sup> Third Report of Session 2012-12, *The Justice and Security Bill*, HL Paper 18, paras 34 – 35.

control orders – would provide for the Bill to lapse unless renewed by both Houses following Parliamentary debate. NC 4 would give effect to this recommendation.<sup>51</sup>

39. In our view, this form of after-the-event political compromise addresses neither the need to justify the need to act; nor will it protect against any harm which might ensue while the Act is in force. The impact of the mechanism of annual renewal on the use of CMP in connection with the control orders regime (with renewals year on year despite significant criticism of the fairness of the proceedings from commentators and the JCHR and litigation challenging the fairness of the process proceeding throughout) serves to highlight the limitations of subsequent parliamentary review. However, it does provide a regular opportunity for ongoing Parliamentary oversight of contentious legislation which has constitutional and human rights implications which may require review.
40. NC 6 provides for a single ad-hoc post legislative review after 5 years. There is no provision for rolling review. This is very different from the annual renewal process envisaged by the JCHR. The Government amendment provides very little acknowledgement of the significance of the departure that CMP makes from ordinary civil proceedings. Review and/or renewal provide a limited safeguard against continuing misuse. However, an ad-hoc review with no leverage for Government to take its conclusions falls far short of the mechanism for parliamentary engagement proposed by the JCHR with cross-party consensus.
41. **If Part 2 is passed, Parliament should limit the shelf-life of these potentially damaging legislative proposals through a combination of sunset clause and subsequent parliamentary renewal. We consider that a period of 1 year would be appropriate to allow for close scrutiny of the implications of these measures for the civil justice system (NC 4).**

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<sup>51</sup> JCHR Second Report, para 99.