



**Statutory review of the “closed material procedure”
provisions in the Justice and Security Act 2013**

Call for evidence: JUSTICE’s response

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For further information contact

Jodie Blackstock, Legal Director
jblackstock@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 0207 7626436
email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.¹ We have a long history of intervening in cases where closed material procedures have been in issue.² We responded to the consultation on the Justice and Security Green Paper³ (the "Green Paper"), and submitted briefings to both the House of Commons and the House of Lords during the passage of the Justice and Security Bill (the "JSB") through Parliament.⁴
2. This document is JUSTICE's response to the statutory review of the operation of sections 6 to 11 of the Justice and Security Act 2013 (the "JSA") on closed material procedure ("CMP")⁵ (the "Review"). In formulating our response, we convened a roundtable of lawyers with a range of experience in representing claimants in proceedings with CMP. Unfortunately, the Special Advocates we contacted were not given permission by the Government to speak to us.
3. We recognise that the Review only covers the operation of the JSA from 25 June 2013 to 24 June 2018. However, to provide as accurate a response as possible, we refer to and consider proceedings that have occurred to date.

¹ JUSTICE, *Secret Evidence*, 2009, available at: <https://justice.org.uk/secret-evidence/>.

² For instance, JUSTICE, together with Liberty, intervened in the cases of *Al-Rawi v Security Service* [2011] UKSC 34 and *Tariq v Home Office* [2011] UKSC 3 in the Supreme Court. Copies of JUSTICE's submissions can be found at: <https://justice.org.uk/al-rawi-deghayes-others-v-security-service-others-home-office-v-tariq/>.

³ HM Government, *Justice and Security Green Paper*, October 2011.

⁴ See JUSTICE's response to the Green Paper, evidence to the Joint Committee on Human Rights inquiry on the Green Paper, and various briefings on the JSB here: <https://justice.org.uk/justice-security-bill/>.

⁵ As set out in the *Call for evidence document* published by the Ministry of Justice, 7 April 2021, available at: <https://www.gov.uk/guidance/review-of-closed-material-procedure-in-the-justice-and-security-act-2013> (the "Call for Evidence").

Executive summary

4. The use of CMP is inherently unfair and is fundamentally inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Their use across the justice system threatens both the right to a fair hearing and the accountability of the Government. Overall, most of the policy rationale for the introduction of CMP through the JSA has not been made out and more evidence is now heard in secret when previously it would have been disclosed in open. We strongly oppose any extension of the current regime.

5. We recognise that the availability of CMP can be justified to the extent that it allows cases to be brought that would otherwise not be due to a lack of evidence or would be struck out as un-triable. However, this limited advantage should not be taken out of proportion to reality, especially given the impact of CMP on the fair administration of justice. Further, we are concerned that:
 - a. The Government's approach towards CMP is that it more readily seeks to withhold material and to do so on a class or general basis when CMP is available and adopts an excessively adversarial approach. This not only causes delays, but undermines the assurances given by the Government when the JSA was enacted that (i) CMP would not become commonplace, and (ii) a fine balance between open and fair justice and national security would be met.⁶
 - b. The approach of the courts towards CMP appears to be too ready to accept government claims for withholding information, which foregoes the necessary exacting scrutiny that we consider Parliament expected.

6. Our recommendations, set out below, include:
 - a. Improved reporting by the Government in its annual reports on CMP under the JSA (the "annual reports"),⁷ including information on case outcomes.

⁶ As the Special Advocates' have stated, "[t]he way in which CMPs have been operated by State parties have the effect of increasing the unfairness, beyond the level of unfairness that is inherent in the regime of CMPs sanctioned by Parliament." *Special Advocates' Submission to the Review*, 8 June 2021, p.48, available at: <https://ukhumanrightsblog.com/wp-content/uploads/2021/06/THE-OUSELEY-REVIEW-SAs-Submission-FINAL.pdf>.

⁷ Available at: <https://www.gov.uk/government/collections/use-of-closed-material-procedure-reports>.

- b. That the Government should take a constructive approach to CMP, seeking to ensure that it has the minimum impact on open justice possible, the claimant's case and the right to a fair hearing.
- c. The Government should provide information on its internal processes when deciding whether to seek to withhold material in closed proceedings, and the number of cases which the Government concludes are not appropriate for CMP.
- d. A single case management judge for cases where an application for CMP has been made and granted.
- e. Consideration of the merits in developing a pool of specialist judges who are allocated to cases involving CMP.
- f. A Practice Direction which clarifies the management and continued availability of closed judgments.
- g. The introduction of a protective costs regime for claimants in proceedings where there is CMP.

The Government's annual reports

7. The annual reporting requirement at section 12 JSA was introduced to address concerns about the lack of information on the operation of CMP⁸ and to increase "transparency".⁹ The Government explained that the clause was to ensure "regular but meaningful reporting",¹⁰ to update Parliament,¹¹ and give "assurance on how the Bill will be used."¹² However, despite the Government's annual reports, the information available on the use and impact of CMP continues to be limited and difficult to find. This makes external monitoring - crucial to ensure accountability - very difficult.¹³ We have the following main concerns:

⁸ See for example, HC Deb, 14 May 2012, col 18W.

⁹ HC Deb, 4 March 2013, cols. 761 and 780.

¹⁰ *Ibid.* col. 761.

¹¹ *Ibid.* col. 763.

¹² *Ibid.* col. 780. Similar comments were made in the House of Lords, HL Deb, 26 March 2013, col. 1060, "the Government have accepted that the unusual nature of CMPs means that there would be significant public and parliamentary interest in more information about how the provisions in this Bill will operate" (Lord Wallace of Tankerness).

¹³ As the Special Advocates highlight "there is currently a lack of publicly available information that would enable interested bodies and individuals to contribute to it." *Special Advocates' Submission to the Review*, note, no.6 above, p. 15.

- a. We are aware of judgments which are not listed in the annual reports, which calls into question their accuracy.
- b. The annual reports are unwieldy and difficult to follow, including locating the judgments listed.
- c. The annual reports do not necessarily provide sufficient information to be able to meaningfully assess the use and impact of CMP.

Gaps in the annual reports

8. Under section 12 JSA, the Secretary of State is required to report annually on the number of applications for an order under section 6 JSA that a CMP application can be made in the proceedings (a “CMP Declaration”), the number granted and revoked, and the number of final closed and not closed judgments given in “section 6 proceedings”.¹⁴ The reports include judgments made following an application for a CMP Declaration¹⁵ and those made to determine substantive proceedings. However, we have identified reported judgments under both categories which are not listed in the annual reports.¹⁶ **It is unclear why these cases were excluded, and we would welcome any explanation from the Government.** However, their exclusion and the lack of clarity undermines the proposed value of the annual reports as a comprehensive source of information.

¹⁴ Under s.12(3) JSA “the report may also include such other matters as the Secretary of State considers appropriate.” Since 2014, the reports also include the names of the parties in the cases referred to, following a report by the Bingham Centre for the Rule of Law on the 2013/2014 annual report. McNamara and Lock, *Closed Material Procedures under the Justice and Security Act 2013: A review of the First Report by the Secretary of State*, Bingham Centre for The Rule of Law, August 2014, available at: https://www.biicl.org/documents/284_cmps_the_first_year_-_bingham_centre_paper_2014-03.pdf.

The reports can also include other information on the cases listed, including, occasionally, if the application for the CMP Declaration was made in a previous reporting period and if the case has been withdrawn / settled such that it did not proceed to a substantive judgment.

¹⁵ In relation to open judgments, the reports describe these as “Final judgments which are NOT closed judgments – made regarding the outcome of the application for a CMP under section 6 Justice and Security Act 2013 proceedings during the reporting period.” The reports up to the 2015/2016 report also state that these judgments are those which are “made regarding the outcome of the application for a CMP declaration.” Our understanding is that there has not been any change to the category of judgments reported, being those on an application for a CMP Declaration.

¹⁶ In relation to the first see, for example, in *Eilish Morley v Secretary of State for Defence, Peter Keeley and Police Service of Northern Ireland* [2017] NIQB 8; *R (Michael Gallagher) v Secretary of State for Northern Ireland* [2016] NIQB 95; *Higgins and Lee v The Chief Constable of the Police Service of Northern Ireland*, [2016] NIGB 81; *Belhaj v DPP* [2017] EWHC 3056 (Admin) (Divisional Court) and [2018] UKSC 33 (Supreme Court).

In relation to the second, see, for example, *Kamoka and others v Secretary of State for Foreign and Commonwealth Affairs and others* [2016] EWHC 769 (QB) (High Court) and [2017] EWCA Civ 1665 (Court of Appeal).

Difficulties in following the information in the annual reports

9. It is arguable that judgments on the extent of disclosure once a CMP Declaration has been made fall under the definition of “section 6 proceedings”, being “any relevant civil proceedings in relation to which there is a declaration under section 6”,¹⁷ and therefore should be reported.¹⁸ However, such judgments do not seem to be reported, based on the categories in the annual reports¹⁹ and since there are judgments on the extent of disclosure which are not reported.²⁰ Given that these judgments often decide on the practical implications of CMP and help understand the extent of disagreement on what material can be withheld, **we would suggest that the Government includes judgments on disclosure in its annual reports.**
10. There are also a significant number of cases listed as having a judgment on an application for a CMP Declaration, where we have not been able to locate such a reported judgment,²¹ or the case at all.²² It may, of course, be that the judgments are not reported. **However, it would significantly assist those using the reports to monitor the use of CMP, if available citations and the dates of the applications, CMP Declarations and judgments were included.**²³

¹⁷ S.8(1) JSA. S.11(4) JSA specifies that “proceedings on, or in relation to, an application for a declaration under section 6” and “proceedings on, or in relation to, an application for a revocation under section 7”, as well as the equivalent for the court under its own motion, are “section 6 proceedings.”

¹⁸ This is also supported by the description of the reporting requirement given by the Government during Parliament debates, see HC Deb, 4 March 2013, col 762, “the new clauses would also cover proceedings deemed to be section 6 proceedings.”

¹⁹ See note no.15 above.

²⁰ For example, *R (K, A & B) v Secretary of State for Defence & Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 1261 (Admin) (Divisional Court) and [2016] EWCA Civ 1149 (Court of Appeal), and *Khaled v Security Services* [2016] EWHC 1727 (QB).

Though, there are also instances where a case is listed as having a judgment on an application for a CMP Declaration and the only reported judgment that we have been able to locate is on the extent of disclosure. For example, *R (Maftah and Khaled) v Secretary of State for Foreign and Commonwealth Affairs and others* [2017] EWHC 1422 (Admin).

²¹ For example, *R (AZ)* (CMP Declaration judgment listed in the 2014/2015 report) and *R (AS)* (CMP Declaration judgment listed in the 2018/2019 report).

²² *Abdulsalam v Secretary of State for the Home Department, Attorney General* (CMP Declaration judgment listed in the 2017/2018 report).

²³ The Bingham Centre for the Rule of Law in 2014 suggested that, subject to any secrecy requirements imposed by the courts or due to concerns for national security, the dates of applications and judgments that determined proceedings should be included in the reports. McNamara and Lock (2014), see note no.14 above.

Difficulties determining the outcome of cases involving CMP

11. There are several cases listed in the reports that we have been unable to determine the outcome of, including whether the cases settled.²⁴ We recognise that some of these cases may not have yet reached a substantive judgment, however **we would suggest that the Government records whenever a case in which a CMP Declaration is made is subsequently settled / withdrawn.** We welcome the detail provided in the more recent annual reports on this. However, where a case is settled / withdrawn in a reporting period other than the one where a CMP Declaration was made, the settlement / withdrawal may not be recorded. A more comprehensive means of reporting this information for each case would therefore be welcomed.

12. Additional information that we would suggest including in the annual reports to assist with transparency and monitoring is:
 - a. **Information as to whether a CMP Declaration was contested by the claimant (or any other party).** This information cannot be deciphered from the existence of judgments alone²⁵ and would assist in understanding the extent to which CMP is accepted by claimants.
 - b. **A record of whether applications for a CMP Declaration are refused,** since the lack of a CMP Declaration following an application does not necessarily mean it has been refused.²⁶

13. We recognise that the Government cannot be expected to report on all details of a case and sensitive information should be protected. However, to meet the aims expounded by the Government and to help ensure democratic accountability, especially since the cases often engage the Government's behaviour in relation to fundamental rights, the information provided must allow the public to ascertain when CMP is sought, used and its impact. **We therefore recommend that section 12 JSA be updated to include**

²⁴ For example, there are 14 cases listed as having a CMP Application and/or a CMP Declaration (but no judgment) which we have not been able to locate any judgments on. Many case names are not mentioned again in the reports. Even where a reported judgment can be located on a CMP Declaration or the extent of disclosure, there is often still uncertainty as to what happened to the case.

²⁵ It does not follow automatically from the existence of a reported judgment that an application for a CMP Declaration was contested, since a court may still provide written reasons for a CMP Declaration (see, for example, *R (Al-Fawwaz)* [2015] EWHC 468 (Admin)), or that if there is no judgment it was not contested.

²⁶ For example, it could be due to the claim being withdrawn or the application not yet having been determined. There is only one judgment listed in the reports that we are aware of where a CMP Declaration was refused, *XYZ v Secretary of State for Defence* [2017] EWHC 547 (QB).

further reporting requirements, as set out above.²⁷ However, absent such a change, we support the view of the Bingham Centre for the Rule of Law that “the section 12(3) power to include further information should be used to enhance transparency: what can be made public should be made public.”²⁸

The rationale and objectives for CMP

Theme 1: 6. How do you see the rationale for extending the use of CMP under the JSA?²⁹

Theme 3: 11. To what extent were the objectives set out by HM Government and the UK Parliament for the use of CMP under the JSA met? What concerns expressed about how it would operate have been experienced in practice?

Theme 3: 12. Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

14. The Call for Evidence raises questions as to the rationale for CMP under the JSA and whether the JSA has met its objectives, while also stating that it “is not a review of the overall principle of making a CMP part of the civil procedure”.³⁰ However, any review of the operation of the JSA must recognise the “serious departure” from the “fundamental principles”³¹ of open and natural justice that CMP entails.³² The JSA operates against this backdrop, and it is these principles that will be further compromised if it is operating ineffectively or unfairly.

²⁷ Including the names of the parties as the Government currently provides.

²⁸ McNamara and Lock (2014), note no.14 above, page 7.

²⁹ We understand that this question goes to the original rationale for implementing CMP in civil proceedings through the JSA, rather than a proposal to extend the use of CMP to further legal proceedings. There is no discussion of such a proposal in any of the supporting documents to the Review. JUSTICE is strongly opposed to any further extension of CMP beyond the current provisions of the JSA. If this is in contemplation, the Government must clearly set out any such proposals and their justifications and allow time for a full and detailed consultation.

³⁰ Call for Evidence, para. 5.

³¹ *R (Sarkandi & others) v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 687 at [57]. See also, *Abdule v Secretary of State for Foreign and Commonwealth Affairs and others* [2018] EWHC 692 (QB) at [37].

³² *Al-Rawi* note no.2 above at [14] (Lord Dyson).

15. In *Secret Evidence*, we conducted a major review of the operation of CMP and concluded that: CMP is inherently unfair³³ - denying the right to be heard,³⁴ the right to know the evidence against you,³⁵ the right to confront one's accuser and the right to an adversarial hearing and equality of arms³⁶ -; secret evidence cannot be fully challenged and is inherently unreliable;³⁷ CMP is undemocratic and prevents public transparency that justice is being done;³⁸ CMP is damaging to the integrity of courts and the rule of law;³⁹ and CMP can lead to inaccurate conclusions and a drop in professional standards which endanger security.⁴⁰ There are also generally better means than secret evidence of protecting national security which provide greater respect for the right to open justice and a fair hearing. For example, public interest immunity ("PII"),⁴¹ as well as confidentiality rings, redactions and anonymity orders,⁴² prevent any disclosure which could endanger national security.
16. Each of these criticisms of secret evidence applied at the time of the JSB and we shared the Joint Committee on Human Rights' ("JCHR") view that the Government had failed to make a case for the expansion of CMP in civil proceedings.⁴³ We still consider CMP to

³³ As the Special Advocates stated at the time that the JSB passed through Parliament, *Special Advocates' Memorandum on The Justice and Security Bill Submitted to The Joint Committee on Human Rights*, 14 June 2012.

³⁴ The right to be heard "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" *Re D (Minors)* [1996] AC 593 at 603-04 (Lord Mustill).

³⁵ As Lord Mance recognised in *Tariq* note no.2 above at [67], "it is a very significant inroad into conventional judicial procedure to hold a closed material procedure admissible, if it will lead to a claimant not knowing of such allegations in such detail."

³⁶ Each of these principles that make up the common law right to a fair hearing is denied when one party to a claim is denied access to – and the opportunity to challenge - the evidence used against them. *Secret Evidence*, paras 416 – 422.

³⁷ *Secret Evidence*, paras. 410 – 415. 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.

³⁸ *Secret Evidence*, paras. 423 – 425.

³⁹ *Secret Evidence*, paras. 426 – 429. The integrity of the courts depends on the public perception that our judges have adopted a fair and independent process to reach their conclusions.

⁴⁰ *Secret Evidence*, paras. 430 – 431.

⁴¹ *Secret Evidence*, paras. 432 – 437.

⁴² JCHR, *The Justice and Security Green Paper*, Twenty-fourth Report of Session 2010-12, HL Paper 286/HC 1777, para 8. Available at: <https://publications.parliament.uk/pa/jt201012/jtselect/jtrights/286/286.pdf>

⁴³ JCHR, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-2013, HL Paper 59/HC 370.

be inherently unfair with limited justification. However, we recognise that CMP can allow cases to be brought that would not otherwise be brought or would be struck out (see paragraphs 22 to 23 below).

The impact of CMP on the information before the court

17. The Government argued that CMP was needed in order to maximise the information before the Court, rather than PII excluding material, and to increase the likelihood that justice will be done.⁴⁴ When considering whether to make a CMP Declaration the courts also often consider PII to not be an adequate alternative as it would result in the court not considering the detail of the material.⁴⁵ However, there are several issues with this rationale.

18. First, unchallenged evidence undermines open, adversarial justice and is more likely to lead to an unjust result. Special Advocates have frequently raised the considerable difficulties they face in operating with closed procedures,⁴⁶ and that the provision of Special Advocates is not “capable of making CMPs ‘fair’ by any recognisable common law standards.”⁴⁷ The Government’s argument was made before the Supreme Court in *Al-Rawi* and dismissed, most eloquently by Lord Kerr:

The central fallacy of [the] 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.⁴⁸

⁴⁴ Green Paper, for example, paras. 2.2 – 2.3.

⁴⁵ For example, in *R (Michael Gallagher) v Secretary of State for Northern Ireland* [2016] NIQB 95, the High Court of Northern Ireland referred to gisting or summaries in the event of a successful PII application as not being attractive due to the detail in the sensitive material sample seen by the court, stating that: “[t]he detail of the documentation is integral to its importance in the litigation and, in the court’s estimation, much would be lost if the actual materials are not made available for the court’s evaluation” [54].

⁴⁶ See *Response of Special Advocates to the Green Paper*, 16 December 2011, para. 17, available at: <https://adam1cor.files.wordpress.com/2012/01/js-green-paper-sas-response-16-12-11-copy.pdf>.

⁴⁷ *Ibid*, para. 15. See also *Sarkandi*, note no.31 above, where the court recognised “the difficulties faced by special advocates in testing evidence that emerges in the closed material procedure, in circumstances where they cannot seek the instructions of the claimants on that evidence” [65].

⁴⁸ *Al-Rawi*, note no.2 above, at [93].

19. Second, often the court in a judgment on substantive proceedings where CMP was used will expressly state that little reliance has been placed on the material in closed,⁴⁹ or that the closed material supports the court's conclusions based on the open material.⁵⁰ The courts will also occasionally explain that only an open judgment is actually required to determine the issue, or that "*most of the salient points in [the] case can be addressed in OPEN.*"⁵¹ There will of course be incidences where CMP is deployed to allow key information to be considered by the court.⁵² However, the references to the limited impact of closed material leads us to question whether CMP was the most efficient and fair means of protecting national security in some cases.
20. Third, it does not automatically follow from a PII application that material will not be disclosed. The court will first consider the competing public interests in (a) protecting against the harm from disclosure and (b) the administration of justice, the *Wiley* balance,⁵³ as well as exploring the alternatives by which the balance may be secured.
21. Fourth, the material considered in CMP will be produced by the Government and the ability of the Special Advocate to determine how this material (or additional material which might be requested if the claimant were fully informed) might benefit the claimant's case is limited by their inability to take instructions after the material is disclosed.

The impact of CMP on allowing claims to proceed

22. The Government argued that CMP allows claims to continue where they would otherwise be struck out, and the claimant denied any possible redress, because the

⁴⁹ For example, *Belhaj v DPP* [2018] EWHC 513 at [36], "[h]ere all we need add is that nothing in Closed touches the conclusions we have reached above"; *W2 v Secretary of State for the Home Department* where both the High Court ([2017] EWHC 928 (Admin) at [6]) and the Court of Appeal ([2017] EWCA Civ 2146 at [9]) were clear that nothing heard in closed was taken into account when reaching the courts' conclusions.

⁵⁰ For example, *Kamoka and others v Secretary of State for Foreign and Commonwealth Affairs and others* [2017] EWCA Civ 1665 at [121]; *R (Al-Fawwaz) v Secretary of State for the Home Department* [2015] EWHC 166 (Admin) at [55]; *ND v Secretary of State for the Home Department* [2018] EWHC 2651 (Admin), where the court simply considered that the court's view as to the grounds of appeal were "reinforced by the closed evidence" [68], see also [83].

⁵¹ *Kind v Secretary of State for the Home Department* [2021] EWHC 710 (Admin).

⁵² For example, *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020 at [132].

⁵³ *R v CC (West Midlands) ex parte Wiley* [1995] 1 AC 274.

Government is unable to make out its defence. First, under *Carnduff v Rock*⁵⁴ a case can be un-triable if the public interest in withholding the evidence outweighs the countervailing public interest in having the claim litigated. In *Al-Rawi*, the Supreme Court accepted that there theoretically could be incidences where a case becomes un-triable due to the extent of sensitive material withheld under PII.⁵⁵ The *Carnduff* risk is frequently referred to in judgments as a reason why a CMP Declaration is required;⁵⁶ the alternative of no trial being “the antithesis of the fair and effective administration of justice.”⁵⁷ Alternatively, judicial reviews may fail because despite disclosure not being given by the Government the court cannot question the Government’s position, as was held in *AHK*.⁵⁸ We therefore recognise that CMP does also allow sensitive material held by the Government to be examined by a court and thus potentially make out the claimant’s case,⁵⁹ or at least allow the case to be brought.⁶⁰ These benefits do not, however, lead to the conclusion that CMP is always required or that it should be viewed, by definition, beneficial.

23. The risk of strike-out without CMP should not be exaggerated and taken out of proportion to justify any application for CMP. We recognise that the courts have referred to the possibility of strike-out as a hypothetical. However, this does not mean that the risk would have necessarily materialised, especially given the possibility of using alternative

⁵⁴ [2001] EWCA Civ 680. This was not a national security case, but a contractual claim brought by a police informant.

⁵⁵ *Al-Rawi*, note no.2 above, for example at [108]. See also Lord Kerr in *Tariq*, note no.2 above, at [110], where he considers strike-out may be a more palatable outcome than the introduction of CMP in some cases.

⁵⁶ For example, *McCafferty v Secretary of State for Northern Ireland* [2016] NIQB 47 at [24]; *R (Michael Gallagher) v Secretary of State for Northern Ireland* [2016] NIQB 95.

⁵⁷ *Belhaj v Jack Straw and others* [2017] EWHC 1861 (QB) at [28].

⁵⁸ *R (AHK) v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), where the court held that if the Government gave evidence that, having considered the applicants’ representations, there were good reasons for its decision, which it could not disclose, it would be impossible for the court to say that it was wrong, and the claims would fail.

⁵⁹ For example, in refusing the claimants’ application for summary judgment where a CMP was not in use, the High Court in *Kamoka and others v Security Service and others* [2019] EWHC 290 (QB) stated that “[t]he CPR Part 24 application is, properly understood, limited to a consideration of OPEN material; and it stands and falls by that” [15].

⁶⁰ Such as in the context of judicial review claims and, as we understand from practitioners, possibly for historic civil claims brought in Northern Ireland.

In *Momen Motasin v Crown Prosecution Service and others* [2017] EWHC 2071 (QB), one reason why the defendants’ strike-out application was unsuccessful was because of the possibility of a CMP which would preserve “the confidentiality of the material whilst still allowing the claim to be adjudicated upon” [25].

mechanisms to protect the various public interests in play. In our view, the likelihood of a stay or strike-out remains exceptional and unlikely.⁶¹ We considered the *Carnduff* risk to be dubious authority on which to proceed at the time of the JSA and we continue to have reservations.⁶² Further, there is uncertainty in the case law as to exactly what the approach should be where CMP is unavailable.⁶³ The correctness of an approach that renders a claimant unable to prove the unlawfulness of an executive decision in circumstances where the decision-maker had access to material withheld on public interest grounds has also been questioned.⁶⁴ For instance, in *Haralambous* the Supreme Court referred to such an approach as “unattractive, in that it is in some circumstances capable of depriving judicial review of any real teeth.”⁶⁵ The extent to which CMP in fact allows cases to continue is therefore incredibly difficult to discern.

The impact of CMP on settlement

24. The principal justification relied upon by the Government for the JSA was that it would avoid the Government being forced to settle claims where it is unable, due to national security concerns, to adduce central evidence to defend itself.⁶⁶ However, the Government failed to address the fundamental flaws in this assertion. Not least because the argument contradicts the Government’s alternative position that such claims will be struck-out or stayed (see above). Further, we are not aware of any instances prior to the JSA where the Government was forced to settle because of a national security risk.⁶⁷

⁶¹ This would be an extremely unattractive argument for a government to make in any context, especially where the claimant seeks redress for alleged serious violations of international human rights standards.

⁶² See JUSTICE submission in *Al-Rawi*, paras. 103 onwards. We also note the Government’s refusal to assist the JCHR in its efforts to better explore the extent of the challenge that the Government identified, by asking for further information on the volume and type of cases thought by the Government to be so “saturated” with material damaging to national security to make them un-triable. JCHR, HL Paper 59/HC 372, note no.43 above, paras. 43 – 46.

⁶³ See the UK Supreme Court judgment in *R (on the application of Haralambous) v Crown Court at St Albans and another* [2018] UKSC 1. For instance, in *Competition and Markets Authority v Concordia International RX (UK) Ltd* [2017] EWHC 2911 (Ch) a validly issued warrant could still be quashed even if the reasons for the warrant could not be disclosed on public interest grounds.

Carnduff was also an exceptional case and is the only example that we are aware of before the JSA’s enactment of a claim being rendered non-justiciable in the civil justice context.

⁶⁴ Based on the approach taken in *Inland Revenue Comrs v Rossminster Ltd* [1980] AC 952.

⁶⁵ *Haralambous*, note no.63 above, at [52].

⁶⁶ Green Paper, para. 1.18.

⁶⁷ The JCHR rejected the argument on the settlement risks in its report, stating that there was a “troubling lack of evidence of any actual cases demonstrating the problem,” JCHR, HL Paper 286/HC 1777, note no.42 above, paras. 67, 72 – 80. Settlement in the *Al-Rawi* litigation preceded the final decision of the Supreme Court that CMP was not an option and before the PII process had been exhausted.

25. On the other hand, our understanding from practitioners is that rather than allowing the Government to defend a case, in some instances CMP simply delayed the settlement process, resulting in additional expense and use of public resources. CMP also resulted in material, the disclosure of which was important for settlement, being initially kept in closed when it properly should have been disclosed in open; thus, delaying settlement.
26. Of the 42 cases listed⁶⁸ in the Government's annual reports from June 2014⁶⁹ to June 2020 on the use of CMP under the JSA, where a CMP Declaration was made, we are aware of 12 where the claim was settled, 5 cases where the claim was withdrawn⁷⁰ and 14 where we have located an open judgment deciding substantive issues in the proceedings. The remaining 11 cases are ongoing⁷¹ or we are unaware of the result. Therefore, nearly 40% of the cases for which we know the result have settled and 55% have either settled or withdrawn. We are, of course, unable to comment on whether the other cases would have settled were it not for CMP, or the impact of CMP on cases which did settle; it is a highly fact specific process and we are not privy to the material or considerations. However, the figures suggest that CMP has not decisively prevented settlement as the Government suggested it would.⁷² In fact, the continuing settlement of cases, despite CMP, is in line with the Government's own acceptance that it might still choose to settle, where "sensitivity" makes settlement the most attractive option.⁷³ We

⁶⁸ This is the number of cases listed in the "Additional information" section of the annual reports, rather than the number of "Declarations" stated in first section of the annual reports. We note that for the 16/17 annual report 12 CMP Declarations are said to have been made, however 14 separate cases are listed as having a CMP Declaration.

⁶⁹ The annual reports for June 2013 to June 2014 do not list the parties' names in the cases so have not been included.

⁷⁰ We note that both *R (Belhaj) v DPP* and *KCM and others v Secretary of State for the Home Department* were withdrawn following a CMP Declaration having been made. However, neither of these cases are listed in the annual reports as having a CMP Declaration.

⁷¹ We note that *R (Michael Gallagher) v Secretary of State for Northern Ireland* has had a substantive hearing where a CMP was used but the substantive judgment has not yet been handed down.

⁷² The Special Advocates in their submission to the Review point out that they are not aware of a single private law damages claim in which a CMP has been imposed which the Government has successfully defended at trial, rather than settled, despite avoiding settlement in private civil claims being the central argument advanced for CMP at the time of the JSB, see note no.6 above, pp. 9, 46.

⁷³ For example, the Minister for Security accepted during Committee Stage for the JSB 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". House of Commons, Public Bill Committee, 4 February 2013, Session 2012-13, Column number: 185, available at: <https://publications.parliament.uk/pa/cm201213/cmpublic/justiceandsecurity/130205/am/130205s01.htm>.

consider it important to record that where the Government considers settlement to be the preferred route, it is clearly against the interests of all parties, and the use of public resources, for the Government to claim CMP to unnecessarily delay such a settlement.

The impact of CMP on evidence previously heard in open and the normalisation of CMP

27. The Government when enacting the JSA provided reassurances that “no evidence currently heard in open court will be heard in secret.”⁷⁴ However, in line with JUSTICE’s and others’ concerns at the time, we are concerned that the courts’ application of the JSA (see further paragraphs 42 to 51 below in relation to Article 6 ECHR and the common law) and the Government’s use of CMP has led to evidence in closed when previously it would have been heard in open. In particular, the content of the sensitive material considered by the courts is unknown, however, based on discussions with practitioners and in reviewing the open judgments available, it appears that once the court has identified material as sensitive to national security and needing to be considered by the court, it will often conclude that CMP is the only viable solution.

The PII Pre-condition

28. Before making an application, the Secretary of State must satisfy the court that the possibility has been considered of making a PII claim to protect the material⁷⁵ (the “PII Pre-condition”). However, the courts have held that a confirmatory statement by the Secretary of State is sufficient.⁷⁶ The PII Pre-condition “does not require a claim to be made. Nor does it require the Court to consider whether a PII claim would succeed or be preferable to a closed material procedure for the purposes of this precondition.”⁷⁷ We are not aware of any cases where the PII Pre-condition was not met.

Consideration of alternatives as part of the Second Condition

29. In making a CMP Declaration the courts have held that they should consider under section 6(5) JSA (the condition that it be “in the interests of the fair and effective

⁷⁴ HM Government, *Response to the public consultation on Justice and Security*, May 2012, Executive Summary, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236055/8364.pdf.

⁷⁵ S.6(7) JSA.

⁷⁶ *XH and AI v Secretary of State for the Home Department* [2015] EWHC 2932 (Admin) at [12]

⁷⁷ *Belhaj v Jack Straw*, note no.57 above, at [52]; *Abdule v Secretary of State for Foreign and Commonwealth Affairs and others* [2018] EWHC 3594 (QB) at [31].

administration of justice in the proceedings to make a declaration” (the “Second Condition”)) whether there are any satisfactory alternative means of protecting national security.⁷⁸ However, we are only aware of one open judgment where in refusing to make a CMP Declaration, on the basis that the Government had not sufficiently pleaded its case, the court referred to the possibility of a confidentiality ring being a suitable alternative to CMP.⁷⁹ In general the courts have held that there are no suitable alternatives to a CMP Declaration,⁸⁰ concluding, for example, that:

- a. PII would risk too much information being excluded and the claim becoming un-triable.⁸¹
- b. Gisting or summaries of the sensitive material along with PII would prevent the court considering the necessary detail.⁸²
- c. Confidentiality rings risk disclosure, even inadvertent,⁸³ can have a “hobbling effect on the conduct of the Claimants’ case” if they are excluded from the confidentiality ring⁸⁴, and lead to difficulties “if, contrary to the arrangements, disclosure took place” and in deciding who should be included.⁸⁵
- d. Sitting in private, even alongside a confidentiality ring, risks disclosure.⁸⁶
- e. Imposing reporting restrictions, would not resolve the national security concerns relating to the claimants obtaining the information.⁸⁷

⁷⁸ *Sarkandi*, note no.31 above, at [61]; *Belhaj v Jack Straw*, note no.57 above, “if the sensitive material in question “can obviously be dealt with by an alternative and more satisfactory method, such as gisting, the second condition will not be fulfilled,” at [24].

⁷⁹ *XYZ v Secretary of State for Defence* [2017] EWHC 547 (QB). The material in question did not relate directly to the claimant and therefore the court could not see “that the inability of counsel to communicate the contents to him would create any professional embarrassment” or “that such restricted disclosure – as opposed to the publicity likely to result from use of the material in open court – would be damaging to national security” [22]. However, the court did not decide this issue.

⁸⁰ For example, *Sarkandi*, note no.31 above, and *XH*, note no.76 above.

⁸¹ For example, *Gallagher*, note no.45 above, at [53].

⁸² *Gallagher*, note no.45 above, at [54]; *Belhaj v Jack Straw*, note no.57 above, at [60(5)], “much of the material can only properly be understood and weighed in the context of a substantial part of the material as a whole.”

⁸³ *F v Security Service* [2014] 1 WLR 1699 at [51]. *Al Fawwaz*, note no.50 above, [6] – [10].

⁸⁴ *Belhaj v Jack Straw*, note no.57 above, at [60(6)].

⁸⁵ *Gallagher*, note no.45 above, at [56].

⁸⁶ *Gallagher*, note no.45 above, at [57].

⁸⁷ *Higgins and Lee v Chief Constable of the Police Service of Northern Ireland* [2016] NIGB 81 at [20].

30. In practice therefore, based on the open judgments, the Second Condition has not provided much of a safeguard to limit the use of CMP, if at all. Rather, it has become a stage which will almost inevitably be passed by the Government. The courts, despite recognising the need for any application to be “carefully scrutinised”⁸⁸, in practice feel compelled to make a CMP Declaration.⁸⁹

The courts’ approach when making a CMP Declaration

31. At the stage of making a CMP Declaration, the courts are deciding whether to open the “gateway”⁹⁰ for a CMP and are not making any decision on the use of CMP.⁹¹ A CMP will only actually be used if at the next stage the court orders for material to be kept in closed under section 8 JSA. This is the justification given for why when making a CMP Declaration the courts will “not be drawn into a detailed exercise”⁹² in relation to alternatives. The courts will also often make a CMP Declaration based on a sample of the sensitive material, the only requirement being that CMP “is justifiable by reference to no more than one issue in the case and by reference to no more than some sensitive material.”⁹³
32. Our understanding is that as a result the courts will often be willing to make a CMP Declaration – we have only come across one open judgment where the court refused to do so.⁹⁴ As was recognised in *Abdule* it “is clear from the authorities, that it is procedurally and evidentially quite a straightforward task for an applicant under s.6 to satisfy the twin criteria of that section”,⁹⁵ and based on their experiences the Special

⁸⁸ *HTF; ZMS and others v Secretary of State for Defence* [2017] EWHC 547 at [2].

⁸⁹ The extent to which this is the case does, of course, depend on the extent to which the Government only applies for a CMP in cases where it is necessary and therefore how effective any internal Government consideration of whether a CMP is the only viable option is, as discussed at paragraph 41 below.

⁹⁰ *Sarkandi*, note no.31 above, at [19].

⁹¹ See, for instance, *Belhaj v Jack Straw*, note no.57 above, at [23]

⁹² *Belhaj v Jack Straw*, note no.57 above, at [24].

⁹³ *Belhaj v Jack Straw*, note no.57 above, at [22]. The conditions at section 6 JSA just need to be met “in relation to any material that would be required to be disclosed in the course of proceedings, s.6(6) JSA.

⁹⁴ *XYZ*, note no.79 above. The possibility of a CMP Declaration later in the proceedings was also not ruled out. We recognise that there may be cases without a reported judgment where a CMP Declaration was not made following a s.6 JSA application, for instance *Roddy Logan v Police Service of Northern Ireland*, or where the CMP Declaration was not made as it was not required in the hearing, for instance *Begum v Secretary of State for the Home Department*.

⁹⁵ *Abdule*, note no.31 above, at [30]

Advocates have described the conditions as “undemanding”.⁹⁶ Since the courts are only making a decision based on a sample at an early stage of proceedings, they are also faced with considerable uncertainty as to how relevant the sensitive material will be or what it will be. Especially as the material selected by the Government for the CMP Declaration application may not be representative of the totality of the material that will be sought to be in closed.⁹⁷ The courts take the approach that this uncertainty should not prevent the CMP gateway from being opened.⁹⁸

33. On making a CMP Declaration the courts will also refer to the need for continued “close and detailed consideration of what material the Defendants would be permitted to withhold”.⁹⁹ However, we are concerned that once a CMP Declaration is made it is very unclear to what extent material is or is not withheld. In many instances there will not be reported judgments, any reported open judgments provide little indication of the material withheld in closed, and any such judgments are not necessarily listed in the annual reports (see paragraph 9 above). We are also not aware of any cases where a CMP Declaration was made but then CMP was not used to some extent in the substantive proceedings where they occurred.¹⁰⁰ Further, as mentioned at paragraphs 8 and 11 above, there is a lack of clarity and accuracy in the Government’s annual reports in recording substantive hearings which involved CMP; information which is crucial to review the JSA’s impact on substantive case outcomes.

The courts’ approach to disclosure

34. We are also concerned that under the JSA the approach to what material should be withheld, once a CMP Declaration has been made, has resulted in evidence being in closed when prior to the JSA it would have been in open. Once a CMP Declaration has been made, under section 8(1)(c) JSA if disclosure of material would be damaging to

⁹⁶ The result being that in “at least some instances, cases which previously could have been fairly tried using PII and ancillary mechanisms (including gisting and confidentiality rings) are made subject to a s.6 declaration”, *Special Advocates’ Submission to the Review*, note no.6 above, p. 45.

⁹⁷ *Special Advocates’ Submission to the Review*, note no.6 above, p. 36.

⁹⁸ See *Sarkandi*, note no.31 above, at [47]; *McCafferty*, note no.58 above, at [24]. We understand from practitioners that often a CMP Declaration seems to be made out of convenience to allow the court to be able to consider the sensitive material in further detail under an application for it to be withheld under s.8 JSA.

⁹⁹ *Abdule*, note no.77 above, at [33].

¹⁰⁰ We note that the table of cases submitted by the Special Advocates to the Review states that a CMP was not pursued in *McGartland and Asher v Attorney General and Secretary of State for the Home Department* after a CMP Declaration was made.

national security the court must ensure that the material must not be disclosed in open, subject to the need to ensure compliance with Article 6 ECHR.¹⁰¹

35. The courts have reiterated that CMP must be conducted “with care and clarity”.¹⁰² However, from what is detailed in most the open judgments on disclosure we have reviewed, it is clear that the courts have allowed the Government’s application to withhold material in closed. In doing so the courts will often take a deferential approach towards the Government’s claims, including:

- a. Readily accepting that the material in question would pose a national security risk if it were disclosed.
- b. Rarely considering that any further disclosure is required under Article 6 (see paragraphs 46 to 48 below).
- c. Concluding that no alternative to CMP could be suitable to address the national security risks, referring to similar arguments used at the stage of making a CMP Declaration listed at paragraph 29 above.¹⁰³

36. Crucially, other than in relation to Article 6, once the court has determined that material could be damaging to national security if disclosed in open, there is no further balancing exercise or discretion available to the court, including as to the possibility of using alternative protective methods.¹⁰⁴ Therefore, if the Government wishes to rely on material which it considers could be damaging to national security if disclosed, the court will likely have to grant the Government’s request.

The contrast to PII

37. The approach under the JSA contrasts with the position under PII, where the analysis is significantly more involved and clearer. First, a threshold of “substantial harm”¹⁰⁵ to the public interest by disclosure must be met before PII can be asserted. Second, the

¹⁰¹ S.14(2)(c) JSA.

¹⁰² *Sarkandi*, note no.31 above, at [27].

¹⁰³ This includes concluding that a summary would not avoid disclosing sensitive material; the size of the claimant group meaning that disclosure would result in a significant amount of information being disclosed, “building up a substantial picture” of the sensitive material (*HTF*; *ZMS*, note no.88 above, at [30] and [32] respectively), and a confidentiality ring not being a viable solution (*Al-Fawwaz*, note no.50 above, at [10] – [11]).

¹⁰⁴ *Al-Fawwaz*, note no.50 above, at [8].

¹⁰⁵ *Wiley*, note no.53 above, at 281.

application of PII directly involves the balancing of two competing interests: the public interest in the proper administration of justice and fair determination of proceedings by making all relevant material available, and the public interest in not harming society as a whole by releasing confidential state information,¹⁰⁶ with each case taken on its own merits.¹⁰⁷ The court is required to be vigilant to ensure that PII is raised only in appropriate circumstances and with particularity.¹⁰⁸ In terms of procedure, an application for PII requires a PII Certificate usually issued by a Minister or other appropriate official which explains the reasons for claiming PII.¹⁰⁹ In contrast, there is no requirement in the JSA for the courts to look beyond the need for the fair and effective disposal of the immediate litigation, and it in effect limits the court from examining the impact of CMP on open, equal and adversarial justice.¹¹⁰

The normalisation of CMP

38. We are, of course, unable to comment on the material that was or was not disclosed in proceedings and there are a limited number of open judgments on disclosure. We are also aware that there will be many occasions where material has correctly been kept in closed. However, we are concerned that the impact of the JSA has been the normalisation of CMP,¹¹¹ which has, in effect, become the option for the court where it is administratively most convenient, regardless of whether other less draconian means might be used to safeguard national security.¹¹² When making a CMP Declaration the courts are privy to little information and arguably have little choice but to make the

¹⁰⁶ *Conway v Rimmer* [1968] A.C. 910 at 940, 952; *Wiley*, note no.53 above, at 281F “If a document is relevant and material then it must be disclosed ... unless a breach of confidentiality will cause harm to the public interest which outweighs the harm to the interests of justice caused by non-disclosure.” (Lord Templeman).

¹⁰⁷ Mathews and Malek, *Disclosure* (5th Edition, Sweet & Maxwell Ltd, 2016), para. 12.02.

¹⁰⁸ *Somerville v Scottish Ministers* [2007] 1 WLR 2734 at [63].

¹⁰⁹ *Disclosure* 5th Ed, note no.107 above, para. 12.13.

¹¹⁰ This has frequently been recognised by the courts who refuse to entertain arguments that CMP will be unfair or a breach of open justice (see further paragraph 43 below).

¹¹¹ As Dr Lawrence McNamara said when commenting on the increased number of applications CMP “appear to be becoming the norm in cases where security-sensitive information is an issue, and it represents a major departure from our traditions of open justice and the accountability those traditions help secure.” See, *Guardian*, *Secret court case application numbers more than double in a year*, 15 October 2015, available at: <https://www.theguardian.com/law/2015/oct/15/secret-court-case-application-numbers-more-than-double-in-year>.

¹¹² This was a concern that JUSTICE raised in its briefings on the JSB, see for example JUSTICE, *Justice and Security Bill (Part 2): Closed Material Procedures House of Commons Report Stage Briefing*, March 2013, para. 20.

declaration, however, once it has been made there is little room for manoeuvre as to what should be in closed. This will inevitably result in more material being kept in closed, with a corresponding impact upon the claimants' right to a fair trial and reduced accountability and open justice.

The Government's approach to CMP and withholding material in closed

39. Our understanding from practitioners, which aligns with the experience of Special Advocates,¹¹³ is that there appears to be a tendency for the Government to seek as much material as possible to be held in closed, treating the CMP process as an adversarial tool, which can result in prolonged debates with the Special Advocates. The adversarial nature of the process can be gathered from open judgments referring to these extensive disputes, often lamenting the time they have taken.¹¹⁴ We question whether these disputes assist the fair and effective resolution of legal proceedings. We are concerned that such lengthy debates suggest that not only the Government is seeking to withhold material in closed which previously would have been in open, but also that, to some extent, this will inevitably be the result of such debate.
40. It is vital that the Government does not seek to deploy CMP, save in truly exceptional and meritorious cases, and only then in relation to the narrowest range of material possible. **We consider that the Government should not approach the question of whether to apply for material to be in closed in the mode of an adversarial litigant, seeking to begin wide and end up with a more reasonable narrow result, but as a public body, seeking only that which is strictly necessary and trying to limit the impact on natural justice, the disadvantages to claimants' cases and the public interest in open justice that result from CMP¹¹⁵** (see further paragraph 55 below).

¹¹³ *Special Advocates' Submission to the Review*, note no.6 above, pp. 32 – 34. The Special Advocates state that they “have a concern that Government bodies, and those acting for them, frequently do not recognise the duty on them at every stage to maximise the openness of any proceedings subject to a CMP, subject only to the statutory requirements.”

¹¹⁴ In *Rahmatullah and Ali v Secretary of State for Defence* [2019] EWHC 3849 (QB), the court referred to the ongoing debates on disclosure in the proceedings, stating that “[t]he issue of disclosure has given rise to a good deal of mutual recrimination between the defendants and the Special Advocates ...each accusing the other of taking bad points and causing unnecessary delay” [5].

¹¹⁵ As the Special Advocates state “there is a heightened duty on all those operating such exceptional procedures to ensure that in each case the incursions into ordinary fair trial principles are no greater than may be strictly justified under the [JSA].” This applies most particularly to the state bodies involved. *Special Advocates' Submission to the Review*, note no.6 above, p. 5.

41. We recognise that it is possible that the Government is only seeking CMP in cases and for a limited number of documents following rigorous consideration.¹¹⁶ However, we are unaware of the Government's internal review process when deciding whether to apply for a CMP Declaration and subsequently when deciding what material should be withheld in closed.¹¹⁷ Nor do we know for how many cases upon review the Government decides not to apply for a CMP Declaration. **We consider that that the Government should, at a minimum, provide any policy, its internal processes and the numbers of cases that are considered internally for a CMP but are then considered not appropriate to the Review.** Wider publication of this information would greatly assist those external to the closed procedures to evaluate the impact of the JSA.

Article 6 and common law principles of natural justice and open justice

Theme 1: 7. What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to Article 6 ECHR (right to a fair trial) and the meaning of "civil proceedings", and how have the disclosure limits and obligations been affected in cases to which Article 6 applied?

Theme 2: 9. How often was Article 6 ECHR disclosure invoked and ordered? How were the tests for the application of Article 6 ECHR formulated for those cases? What difference to the disclosure ordered did this make?

42. In summary, our understanding is that the courts generally limit the impact of considerations of fairness, both under the common law and Article 6, and confine disclosure to just that which is allowed under s.8 JSA.

The courts' approach when making a CMP Declaration

Open justice and natural justice

43. When considering whether to make a CMP Declaration the courts take the approach that, whilst recognising that CMP is "a serious departure from the fundamental principles

¹¹⁶ Though see the *Special Advocates' Submission to the Review*, note no.6 above, p. 36, which refers to instances of "s.6 applications being issued inappropriately, and without due consideration."

¹¹⁷ In contrast, prior to the Government making an application for PII, the relevant Government decision-maker was required to conduct the *Wiley* balance themselves. The Government practice required a minister to consider both whether the document could attract PII but also "the strength of the public interest in disclosing the document." Thus, helping ensure that PII was only sought where necessary and once the negative implications of PII on the claimant and the public were considered. *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996); Disclosure 5th Ed, note no.107 above, para. 12.13.

of open justice and natural justice”, questions as to whether CMP can ever be fair, either under common law principles of fairness or under Article 6, have been authoritatively determined by Parliament by enacting the JSA¹¹⁸ and that “protections against inappropriate use of CMPs were built into the provisions themselves.”¹¹⁹ The courts will therefore reject any general arguments that a CMP Declaration should not be made due to the impact on a fair trial, or natural justice and open justice at,¹²⁰ or that the CMP provisions should be given “a narrow or restrictive construction” based on the principle of legality.¹²¹

The Second Condition

44. The Second Condition for a CMP Declaration requires the court, “to weigh fairness and effectiveness of [CMP] to the plaintiff and to the defendant.”¹²² However, despite recognising the difficulties faced by Special Advocates, often the courts will still make a CMP Declaration in light of what the courts view as no practicable alternative to address the national security concerns.¹²³ They further point to the elements of CMP which are said to ensure fairness, including that “the plaintiff has a team of lawyers who can communicate freely with him together with special advocates to represent his interests.”¹²⁴

The courts’ discretion

45. The court have a discretion as to whether to make a CMP Declaration, even if the statutory conditions are otherwise satisfied.¹²⁵ However, as the court recognised in *XH* “given that the second condition requires the court to conclude that it is in the interests of the fair and effective administration of justice in the proceedings to make the declaration,” the circumstances where this discretion would be exercised against making

¹¹⁸ The only exception being the requirement on courts to assess under s.14(2)(c) JSA whether further specific disclosure is required to meet Article 6 (see paragraph 46 below). The courts reiterate that the JSA is “Parliament’s assessment of how, in relevant civil proceedings, the balance is to be struck between the competing interests”, *Sarkandi*, note no.31 above, at [57] - [58].

¹¹⁹ *Sarkandi*, note no.31 above, at [58].

¹²⁰ For example, *Higgins and Lee*, note no.87 above, at [16].

¹²¹ *Belhaj v DPP* [2018] UKSC 33 at [14].

¹²² *McCafferty*, note no.58 above, at [24].

¹²³ For example, *Higgins and Lee*, note no.87 above, at [16].

¹²⁴ *McCafferty*, note no.58 above, at [24].

¹²⁵ S.6(1) JSA; this discretion was expressly recognised by the court in *XH*, note no.76 above, at [22].

a CMP Declaration “are likely to be few and far between.”¹²⁶ We are not aware of any such cases.

Approach to disclosure in CMP and Article 6

AF (No.3) disclosure and Article 6 requirements

46. Under section 14(2)(c) JSA a court should not act inconsistently with Article 6 ECHR. In *AF (No.3)*¹²⁷, in the context of deprivations to the claimant’s right to personal liberty, the House of Lords held that Article 6 required that the claimant “**be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.**”¹²⁸ The courts have recognised that “if Article 6 requires disclosure of material or a summary notwithstanding that disclosure would be damaging to the interests of national security, the JSA does not preclude such disclosure.”¹²⁹ The more serious the deprivation of liberty or restrictive the measure, the more disclosure based on *AF (No.3)* is likely.¹³⁰ However, in the majority of cases under the JSA, *AF (No.3)* disclosure did not arise;¹³¹ often because the deprivation of liberty is not sufficient on the “spectrum” of possible issues,¹³² or the claims are brought in private law for compensation.¹³³

¹²⁶ *XH*, note no.76 above, at [22]; *Abdule*, note no.77 above, at [49].

¹²⁷ [2009] UKHL 28.

¹²⁸ *Ibid* at [59]. Provided that “sufficient information” is disclosed, the House of Lords held that there can still be a fair trial notwithstanding that the claimant may not be provided with all “the detail or the sources of the evidence forming the basis of the allegations” against them.

¹²⁹ *Sarkandi*, note no.31 above, at [22]; *McGartland*, note no.77 above, at [18].

¹³⁰ Disclosure 5th Ed, note no.107 above, para. 12.08. The courts have extended the “cases in which *AF (No.3)* disclosure must be given from detention cases to (among other things) asset freezing orders; directions to banks relating to financial restrictions pursuant to the Counter-Terrorism Act 2008; and orders made under the Terrorism Prevention and Investigation Measures (“TPIM”) Act 2011.” *Reprieve v Prime Minister* [2020] EWHC 1695 (Admin) at [24].

¹³¹ For instance, see *Khaled v Security Service* [2016] EWHC 1727 (QB).

¹³² For example, *Kamoka and others v Secretary of State for Foreign and Commonwealth Affairs and others* [2015] EWHC 3307 (QB) at [27]; *Reprieve v Prime Minister*, note no.130 above, at [45]; *Khaled v Security Service*, note no.131 above, at [34].

¹³³ For example, *HTF*; *ZMS*, note no.88 above, at [36]. Generally, courts have not been sympathetic to the application of *AF (No. 3)* in private law claims for damages, see McCullough QC and Rahman QC, *Disclosure in Closed Material Proceedings: What Has to Be Revealed?*, Judicial Review, 24:3, 223-242, November 2019, available at: <https://doi.org/10.1080/10854681.2019.1654213>.

47. In considering the requirements of Article 6 the courts will consider both the nature of the issue at stake and what is needed for the fair disposal of the litigation,¹³⁴ reiterating that what is needed for “effective instructions”¹³⁵ depends “on context and all the circumstances of the case.”¹³⁶ Further, the courts have started to develop the concept of a “sliding scale for the purposes of disclosure”¹³⁷ and a “spectrum of disclosure rather than a hierarchy”¹³⁸ suggesting that Article 6 may require some level of disclosure even where the irreducible minimum under *AF (No. 3)* does not apply.¹³⁹ However, whether it be under *AF (No. 3)* alone or under the purported sliding scale – “in practice the excluded party gets nothing.”¹⁴⁰ Reasons advanced for why Article 6 would not require any further disclosure include:
- a. The level of information known or suspected by claimants¹⁴¹, already in the public domain,¹⁴² or provided by the Government.¹⁴³
 - b. The relevance of the information sought to claimants’ cases.¹⁴⁴
 - c. The claimant’s ability to give instructions not being dependent on viewing the sensitive material¹⁴⁵ and the limited extent that claimants could provide instructions specific to the sensitive material.¹⁴⁶

¹³⁴ *Kamoka and others*, note no.132 above, at [23]; *Reprieve v Prime Minister*, note no.130 above, at [29]. Including “the ability or otherwise of special advocates to protect the claimants’ interests in the absence of disclosure to the claimants, and the importance of the withheld material to the issues in the case” *HTF; ZMS*, note no. 88 above, at [34].

¹³⁵ *HTF; ZMS*, note no. 88 above, at [17].

¹³⁶ *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776 at [23].

¹³⁷ *R (AZ) v Secretary of State for the Home Department* [2017] EWCA Civ 35 at [29].

¹³⁸ *K, A and B v Secretary of State for Defence* [2017] EWHC 830 (Admin) at [12]. There is currently some uncertainty in recent judgments as to the extent of disclosure required by Article 6, even where *AF (No.3)* does not apply, and instead “article 6(1) would require some definite but lesser degree of disclosure than *AF (No 3)*”, *Reprieve v Prime Minister* no.130 at [51].

¹³⁹ McCullough QC and Rahman QC (2019), note no.133 above, paras. 50 - 66.

¹⁴⁰ McCullough QC and Rahman QC (2019), note no.133 above, para. 64.

¹⁴¹ For example, *HTF; ZMS*, note no. 88 above, at [38], [49].

¹⁴² *Kamoka and others*, note no.132 above, at [30]; *Khaled v Security Service*, note no.131 above, at [35].

¹⁴³ *Reprieve v Prime Minister*, note no.130 above, at [48].

¹⁴⁴ *Kamoka and others*, note no.142 above, at [33]; *HTF; ZMS*, note no. 88 above, at [39].

¹⁴⁵ For example, *HTF; ZMS*, note no. 88 above, at [37], [47] – [48].

¹⁴⁶ *Kamoka and others*, note no.132 above, at [33].

- d. That the Special Advocates viewing the material and making representations is sufficient to meet Article 6.¹⁴⁷

48. The courts have therefore rarely held in the context of the JSA that Article 6 required any disclosure that would otherwise not be allowed under section 8 JSA. The result being that “[a]s much as possible must be disclosed to the Claimant, consistent with the Court's obligations under s.8(1)(c) of the JSA 2013, and CPR 82.14(10), but no more.”¹⁴⁸

Concerns with the limited role of Article 6 and common law principles of fairness

49. We are unable to comment on the extent to which applications to withhold disclosure under section 8 JSA have been refused by the court without further open judgments, or the extent to which disclosure was negotiated between the Special Advocates and the Government. However, the picture that emerges from the open case law and the experiences of practitioners is one of reduced scrutiny by the courts, who appear to us to (i) take an overarching approach to the common law, assuming that the process is generally intrinsically fair, rather than reviewing each case; and (ii) take an unduly narrow approach to Article 6 disclosure.¹⁴⁹ As detailed above in paragraph 37, this is arguably a significantly lower level of scrutiny than that conducted under PII, and we have two particular concerns with the approach.
50. First, although the principle of open justice, as protected by the common law and Article 6 allows for exceptions, these are narrowly defined and strictly limited to specific circumstances in individual cases where there is compelling evidence that the exception is necessary for the public interest. As the Supreme Court made clear in *Al-Rawi* this fundamental principle cannot – and should not – be abrogated without weighty reasons.
51. Second, CMP has a significant impact on a claimant's ability to obtain a fair hearing, which presupposes adversarial proceedings and equality of arms. We do not have experience of the closed proceedings and were unable to talk to those who have.

¹⁴⁷ *Khaled v Security Service*, note no.131 above, at [37] – [38]; *HTF*; *ZMS*, note no. 88 above, at [40] and [50].

¹⁴⁸ *Khaled v Security Service* [2016] EWHC 1727 (QB) at [42]. See also *Kamoka and others*, note no.132 above.

¹⁴⁹ *McCullough QC and Rahman QC* (2019), note no.133 above, para. 66(9).

However, there are inherent difficulties with CMP¹⁵⁰ and the appointment of a Special Advocate cannot automatically render CMP fair.¹⁵¹ Serious difficulties with CMP raised by the Special Advocates at the time of the JSB ranged from the bar on communication with the claimant and open representatives and limitations on their practical ability to call reliable evidence, to the lack of formal rules of evidence in CMP and the prejudicial impact of late disclosure by Government agencies.¹⁵² These concerns are heightened by the importance of the issues at stake in the cases where CMP has been used, often involving allegations of serious violations of fundamental rights.¹⁵³

Definition of “civil proceedings”

Theme 1: 7. What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to...the meaning of “civil proceedings”

52. The first part of this question on the interpretation of the CMP provisions is addressed above.¹⁵⁴ In relation specifically to section 6(11) JSA and the reserve of CMP to “civil proceedings”, we are aware of two cases where this provision was in issue. First, in *R (Al-Fawwaz)*, the High Court held that a judicial review of the Secretary of State’s refusal on national security grounds to provide material to a New York court, where the claimant was on trial, did not constitute “proceedings in a criminal cause or matter” so was not excluded from the JSA under section 6(11).¹⁵⁵ In contrast, in *Belhaj v DPP* the Supreme

¹⁵⁰ See, for instance, Angus McCullough QC, “*Secret Justice: An Oxymoron and the Overdue Review*”, UK Human Rights Blog, 28 January 2020, available at: <https://ukhumanrightsblog.com/2020/01/28/secret-justice-an-oxymoron-and-the-overdue-review/>.

¹⁵¹ As Special Advocates told the Government, “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.” *Response of Special Advocates to the Green Paper*, note no.46 above, para. 2.

¹⁵² *Ibid.* para. 17.

¹⁵³ For example, as Lord Sumption noted in *Belhaj v Straw* [2017] 2 WLR 456 at [278], the allegations in the case involved a “combination of violation of peremptory norms of international law and inconsistency with principles of the administration of justice in England which have been regarded as fundamental since the 17th century.”

¹⁵⁴ See, for example, paragraphs 22, 27 to 36 and 42 to 48.

¹⁵⁵ [2015] EWHC 468 at [7], the court held, taking a purposive interpretation, that the proceedings were “a step removed from any proceedings which can properly be categorised as a criminal cause or matter.”

Court held that the judicial review of a decision by the DPP not to prosecute constituted such proceedings, and therefore CMP under the JSA was unavailable.¹⁵⁶

Procedure and process of CMP

Theme 2: 8. What was the impact on the timetable of cases of a CMP application, disclosure processes, and further consideration of continuation of CMP?

Theme 4: Whether changes to the procedure or the language of the Act are recommended to improve the process.

Theme 4:13. This theme includes, in particular, the overall time taken by the procedure, the cost involved including legal aid, and the operation of the Special Advocates.

Theme 4: 14. Can the procedural steps be simplified? Are there procedural safeguards which are unnecessary or others which are needed, especially in relation to Article 6 ECHR?

Theme 4: 15. Are there any changes to CPR Part 82 which should be made?

Theme 4: 16. Are there any other points which respondents wish to make, not covered by the above questions, bearing on the operation of the CMP?

Delay resulting from CMP

53. CMP can add, sometimes excessive¹⁵⁷, delay and complexities to proceedings, due to, for example, additional court proceedings and determining what material is withheld in closed.¹⁵⁸ We question whether this is always necessary, given our understanding that the eventual result for many cases is not dependent on the closed material.
54. Where CMP is required we recognise that some delay is inevitable, however all parties to proceedings should, as far as possible, seek to limit delay and ensure cases are dealt with proportionately.¹⁵⁹ We are concerned that the Government can take an adversarial

¹⁵⁶ *Belhaj v DPP*, note no.121 above, at [21] – [24]. We understand that this case subsequently settled.

¹⁵⁷ By way of example, in the context of judicial reviews transferred to the Special Immigration Appeals Commission (“SIAC”) under s.15 JSA, the cases of *IG* and *AR* challenging decisions to refuse naturalisations made respectively in 2007 and 2008 are still ongoing.

¹⁵⁸ See, for example, the discussion on the potential for CMP, including the applications for a CMP Declaration, to cause delay in *R (MR) v Secretary of State for the Home Department* [2016] EWHC 1113 (Admin), and the remarks made by the court in *Kamoka and others v Secretary of State for Foreign and Commonwealth Affairs and others* [2019] EWHC 290 that an application for a CMP Declaration ahead of a summary judgment application would not be useful or sensible as it would “necessarily cause significant delay (the material is not immediately available) and no doubt prompt the defendants to seek to deploy in CLOSED a limited range of further material on a selective basis, as they would be entitled to do on a CPR Part 24 application” [15].

¹⁵⁹ In accordance with the overriding objective at CPR 1.1.

approach to CMP, such as seeking to withhold material excessively (see paragraph 39 above). Further, we understand from practitioners that in their experience the Government can be excessively adversarial in relation to procedural issues, for example requesting undue time periods for disclosure.¹⁶⁰ The result is that unnecessary delay¹⁶¹ and uncertainty is created for the case's resolution, as well as increased use of public resources.

55. We recognise that in adversarial litigation the Government is entitled to seek to defend its case in the best way that it can. However, the Government must act in the public interest. In CMP the claimant is significantly disadvantaged in their ability to effectively make their case and due to delays to proceedings and disclosure that CMP can cause. **In this context, we question whether the Government should have a duty to limit the impact CMP has on the claimant and on the public interest in open justice.** As the Master in *Abdule* recognised the court has “a positive duty to place parties as far as possible on an equal footing, secure Art[icle] 6 rights and as far as practicable protect the principles of open justice and natural justice.”¹⁶² We consider the same should apply to the Government.

Complexities involved in CMP and judges

56. CMP raises highly complex substantive and procedural issues, including considerations of national security and Article 6, and the cases often have detailed factual and legal backgrounds. Frequently there will be prolonged preliminary stages with numerous issues arising from CMP. In this context, each new judge that considers the case must become familiar with the details and the exceptional nature of CMP. We understand that in appeals under the Terrorism Prevention and Investigation Measures Act 2011 one judge is allocated for case management. **Likewise, to help mitigate the resulting delay from CMP under the JSA, we suggest that once an application for a CMP Declaration has been made there should be a single case management judge.** This judge may not necessarily decide on the substantive issues but would manage the case up to the substantive hearing – helping the case to run quicker by being familiar with it

¹⁶⁰ See further the *Special Advocates' Submission to the Review*, note no.6 above, pp. 44 – 45, which sets out the Special Advocates' experiences of state bodies acting in a manner which protracts a case's timetable, often citing resource limitations and competing priorities which “courts, perhaps inevitably, are reluctant to gainsay”.

¹⁶¹ For example, *ND v Secretary of State for the Home Department* [2018] EWHC 2651 where the court referred to the “lengthy business even for the SSHD to get to the stage of agreeing disclosures or gists.”

¹⁶² *Abdule*, note no.31 above, at [41].

and having greater confidence when faced with what may become repetitive explanations and excuses for delay from the parties.

57. **We also consider that there may be merit in developing a pool of designated specialist, security-vetted judges who are able to deal with CMP under the JSA.** This would help ensure that the knowledge and experience of judges navigating these cases is used most effectively. A pool of specialist judges could also help alleviate the risk of inconsistent approaches to CMP procedure, due to its complexity and closed judgments (see further below).

Closed judgments

58. Where a CMP is used, the court has the option of handing down a closed judgment, not available to the public, non-state parties or their legal representatives, as well as an open judgment. Closed judgments are by their nature a departure from fundamental rule of law standards of equality of arms and open justice, as well as Article 6. The fact that significant parts of a court's reasoning will be in a closed judgment, undermines the common law system of precedent¹⁶³ and raises significant difficulties in ensuring a consistent approach to decision-making, both to procedural and substantive issues. If there is no accessible case law library of closed judgments¹⁶⁴, this risks judges acting in silos¹⁶⁵ and legal representatives, including Special Advocates¹⁶⁶, not making fully informed representations based on past decisions and practices, undermining the

¹⁶³ *Response of Special Advocates to the Green Paper*, note no.46 above, para. 38(e), “[t]he common law develops on a case-by-case basis, through judgments based on the application of legal principles to a variety of facts. How is the process to be reconciled with the accumulation of a body of secret case law, accessible only to the government and a small group of special advocates?”

¹⁶⁴ When the JSA was passed, the Government committed to creating a “searchable database containing summaries of closed judgments”, *HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-2013*, January 2013, p. 24, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235972/8533.pdf. However, we understand that no such database has become available to Special Advocates, *Special Advocates' Submission to the Review*, note no.6 above, p. 29.

¹⁶⁵ As the Court of Appeal stated in *Guardian News and Media Ltd & Ors v R. & Incedal* [2016] EWCA Crim 11 at [79] “a court ought to be able to refer to earlier decisions to achieve consistency and take advantage of the experience to be derived from the way in which the issues were approached.” The court was clear that having no record of closed judgments is “not satisfactory”.

¹⁶⁶ The Special Advocates raised the lack of a searchable database of closed judgments in their response to the Green Paper, *Response of Special Advocates to the Green Paper*, note no.46 above, para. 17(8).

equality of arms.¹⁶⁷ **Judges and Special Advocates acting in CMP cases should have access to prior closed judgments to inform their decisions and representations, respectively.**

59. We recognise that a Practice Direction has been promulgated which intends to create a “library of closed judgments”.¹⁶⁸ However, we understand that this library has not been made available to Special Advocates.¹⁶⁹ We are also very concerned by the possibility that closed judgments could be destroyed, especially where there are no clear processes in place for such decisions,¹⁷⁰ which risks jeopardising the transparency and accountability of the executive.¹⁷¹ As the Court of Appeal has recognised, “it must always be a possibility, that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public.”¹⁷² We therefore support Dr Lawrence McNamara’s recommendation¹⁷³ that **a Practice Direction should be produced which clarifies the procedural and administrative management of closed judgments.**

Funding, access to justice and costs

60. CMP prevents claimants and their legal advisers from being able to assess the prospects of a claim or an appeal, and therefore poses a significant barrier to access to justice and funding. To get a case off the ground – whether in seeking legal aid, looking to enter a conditional fee agreement, or obtaining after the event insurance – a claimant will seek advice from their legal team on the prospects of success. As we highlighted in our response to the Green Paper, “legal advisers in cases where CMP are likely will have an unenviable, if not impossible task in trying to reliably predict prospects of success in a case where they are unlikely to be permitted to see all of the evidence in the case and

¹⁶⁷ See the *Special Advocates’ Submission to the Review*, note no.6 above, p. 29, for difficulties faced by Special Advocates in being unable to access prior closed judgments when the Government in practice does and may cite such closed judgments in response to Special Advocates’ submissions.

¹⁶⁸ Practice Direction: Closed Judgments, 15 January 2019, available at: <https://www.judiciary.uk/wp-content/uploads/2019/01/lcj-and-spt-practice-direction-closed-judgments-jan-2019-as-published.pdf>.

¹⁶⁹ *Special Advocates’ Submission to the Review*, note no.6 above, p. 29.

¹⁷⁰ See further, Dr Lawrence McNamara, *Closed judgments: security, accountability and court processes*, UK Human Rights Blog, 25 January 2019, available at: <https://ukhumanrightsblog.com/2019/01/25/closed-judgments-security-accountability-and-court-processes/>.

¹⁷¹ *Ibid.*

¹⁷² *Incedal*, note no.165 above, at [79].

¹⁷³ *Ibid.*

where they know the claimant is likely to be precluded from making full submissions on the law as applicable to the closed material.” Our understanding from practitioners is that this position has not changed. Further, funding often depends on their being a reliable assessment of prospects, and as the Special Advocates have highlighted, “[i]t is not apparent how a litigant deprived of relevant material could achieve access to the courts, unless in the improbable position of being able to fund a claim privately.”¹⁷⁴

61. The claimant is required to rely on their, often-limited, own knowledge to bring a claim, and when appealing to trust the Special Advocates that there are grounds. Where there is material which is concealed, litigants who are self-funding are not able to make an informed decision in weighing up the costs risks against the prospects of success and it is therefore unjust to impose a costs risk.¹⁷⁵ It is possible that no order as to costs against an unsuccessful claimant in CMP¹⁷⁶, a protective costs order, or, in judicial review, a costs capping order¹⁷⁷, could be made. However, this is not guaranteed and therefore does not provide claimants with the required reassurance prior to bringing a claim / appeal.¹⁷⁸ Therefore, **we suggest that a form of protective costs for proceedings where there is a CMP should be considered.**

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29 June 2021

¹⁷⁴ *Response of Special Advocates to the Green Paper*, note no.46 above, para. 38(a).

¹⁷⁵ In contrast, s.2C Special Immigration Appeals Commission Act 1997 provides only for relief if the direction on exclusion is set aside. As the High Court stated in *R (Ignaoua) v SSHD* at [2014] EWHC 1382 (Admin) at [38] “SIAC has no jurisdiction to award costs...against an unsuccessful Claimant.”

¹⁷⁶ For example, in *CF v Secretary of State for the Home Department*, unreported, 1 May 2014, in the context of TPIM, the court when declining to award any costs recognised the unfairness of imposing costs on a claimant in such a situation.

¹⁷⁷ Under sections 88 – 90 of the Criminal Justice and Courts Act 2015.

¹⁷⁸ See also *Special Advocates’ Submission to the Review*, note no.6 above, p. 43 which highlights the difficulties that arise due to there being no settled practice for dealing with costs liabilities where a step, which has been instigated by the Special Advocates, is taken based entirely on closed evidence.