

Submission to CMP review (June 2021)

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A: Introduction

1. This submission addresses a number of the questions set out in the call for evidence under Themes 1, 3 and 4. It focuses especially on the extent to which the objectives of the JSA and its CMP provisions have been achieved, and identifying ways that those objectives could be more effectively achieved.
2. Some of the responses in this submission could be answers to specific questions posed under Themes 1, 3 and 4, or they could be positioned with reference to the final “any other points” question in Theme 4. The answers have been divided into the following:
 - Responses under Themes 1 and 3 mainly go directly to existing provisions of JSA. The concerns and recommendations have a direct bearing on the concerns of the review that are apparent in those questions and the operation of sections 6 to 11.
 - Two responses under Theme 4 (the management of closed judgments and opening up closed judgments) have been separated as they address provisions, practices and procedures that are affected by, or can affect, the operation of sections 6 to 11.
 - The third response under Theme 4 addresses the operation of CMP in the family courts and its relationship to the JSA.
3. While Theme 2 questions are not addressed that is not because the issues are not important. Rather, the lack of publicly available data makes it difficult to provide answers. At times, especially in Theme 2, questions will inevitably be more thoroughly answered by practitioners, particularly Special Advocates. However, the responses to the questions in Themes 1, 3 and 4 are in some respects directed towards filling that gap in the evidence.

B: Authorship and underpinning research

4. The submission has been authored by Dr Lawrence McNamara, a Reader in Law at the University of York and a Fellow of the Bingham Centre for the Rule of Law.¹
5. The author has been engaged with issues relating to the ways national security laws affect transparency and accountability for over 15 years. He held an ESRC Fellowship 2009-13 for the *Law, Terrorism and the Right to Know* project. He was engaged heavily with the passage of the Justice and Security Act from the Green Paper stage onwards. That engagement included giving written an oral evidence to the Joint Committee on Human Rights, preparing numerous briefings

¹ I am grateful to numerous colleagues for discussions about the research and analysis that has informed this submission. In particular, I am grateful to Dr Jessie Blackburn (Durham Law School, Durham University). I am grateful also to the many participants in projects that have underpinned the research; they gave time generously and views frankly.

for parliamentarians, and several of his recommendations made their way into the JSA (with direct reference in Hansard).² The Ministry of Justice indicated that his analysis of the first annual report by the Secretary of State resulted in greater and more specific content being included in subsequent annual reports.³

6. This submission draws on research conducted over several years, including for a project “*Opening Up Closed Judgments: Secrecy, Security and Accountability*”. The project was undertaken primarily in 2017-18 at the University of York and the Bingham Centre for the Rule of Law, and was funded by the Joseph Rowntree Charitable Trust. It engaged with a wide range of stakeholders from the legal profession, the judiciary, prosecuting authorities, government, archives, and civil society organisations from England and Northern Ireland.

C: Preliminary points: the scope of a review of the operation of CMP

7. The 2011-2013 proposals to extend CMPs across civil proceedings were highly controversial, and for good reason. CMPs are at odds with long established principles of natural justice and open justice. Of note, the non-state party will not have equality of arms with the state party. Although this review is a review of the operation of CMPs and – as the call for evidence points out – the “the overall principle of making a CMP part of the civil procedure ... has been decided by the UK Parliament in 2013, and it will be for the UK Parliament to decide whether this procedure should remain”⁴, the review should nonetheless take the broadest possible view of what issues are engaged in the operation of CMPs. This is because, as that observation notes, Parliamentary consideration of the future of CMPs will “tak[e] into account this review of its operation”.⁵ As the only review of CMPs and as the statutorily required review and as a review conducted by a former member of the senior judiciary, the review is likely to be given significant weight in any subsequent parliamentary consideration of the future of the law.
8. This demands a careful consideration of how the scope of the review remit under section 13 – “the operation of sections 6 to 11” – is to be approached. In this regard the scope of the review questions is welcome, capturing as they do a range of issues that arise from the way that those sections operate separately, together, and against the principles that underpinned the expansion of CMPs under the JSA. In particular, sections 6 to 11 operate to reduce transparency in the judicial process and limit the extent to which the executive is visibly held to account in the courts.

² See, eg, Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24th Report of Session 2010-12, HL286, HC1777, 27 March 2012..

³ Lawrence McNamara & Danielle Locke, with Laila Hamzi, *Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State (with Dec 2014 Supplement)*, Bingham Centre for the Rule of Law, December 2014, see esp pp 10-11
<https://binghamcentre.biicl.org/publications/closed-material-proceedings-under-the-justice-and-security-act-a-review-of-the-first-report-by-the-secretary-of-state>

⁴ Call for evidence, [5]

⁵ Call for evidence, [5]

As a consequence, aspects of the JSA and the practices associated with it warrant attention because they go directly to the effects of how sections 6 to 11 operate. Examining the operation of the Act inherently engages questions of principle.

9. **Recommendation 1:**

- *In reviewing the operation of sections 6 to 11 the review should take an approach that recognises that the provisions under review operate pursuant to – and affect – fundamental principles of the rule of law, including natural justice, open justice and equality of arms.*

D: Theme 1 – Aims of CMP under the JSA

10. **Review question:** *How do you see the rationale for extending the use of CMP under the JSA?*⁶

11. Prior to the JSA, CMP could be used only in a quite narrow range of circumstances. The extension of CMP to civil proceedings generally was a worrying one for any number of reasons that arose in debates at the time.

12. The Supreme Court had made it clear in *Al Rawi* that the departures from established principles and protections were fraught with peril and the risk of injustice. Lord Kerr's statement in that case is often referred to: "To be truly valuable, evidence must be capable of withstanding challenge. ... Evidence which has been insulated from challenge may positively mislead."⁷ The departures were so significant that the Court held any general power to use CMPs must be authorised by the legislature.

13. In the course of consultation around the Green Paper that preceded the Justice and Security Bill, a submission signed by more than 50 special advocates noted the following:

"Those SAs who do have experience of acting in CMPs have consistently and regularly drawn attention, both in articles in print and in evidence to Parliamentary committees, to the considerable shortcomings of those procedures in terms of fairness. Nicholas Blake QC [as he then was] described the operation of CMPs in [SIAC] in the following way in evidence to the Joint Committee on Human Rights:

'the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system'.⁸

⁶ This question is potentially ambiguous. For the avoidance of doubt, it is being addressed in this submission as meaning "how do you see the rationale for extending CMP as the JSA did in 2013?", rather than "how do you see the rationale for extending CMPs under the JSA from here on into the future?"

⁷ *Al Rawi v The Security Service and others* [2011] UKSC 34, [93]

⁸ Justice and Security Green Paper: Response to Consultation from Special Advocates, 16 Dec 2011, [12],

14. The implications for open justice – and the transparency and democratic accountability it engenders – were not considered in the Green Paper at all. The Joint Committee on Human Rights described “the impact on media freedom and democratic accountability” as “the missing issue in the Green Paper.”⁹ Lord Neuberger’s exposition of the links was cited at length by the JCHR and warrants noting in this review:

“Although expressed in wide and general terms—and perhaps inevitably so expressed—in my judgment the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice and they are beyond question.”¹⁰

15. The Bill was introduced in the Lords on 28 May 2012. In the second reading speech the rationale for CMP was set out for the government by Lord Wallace of Tankerness.¹¹ At the core of it was that CMP (as opposed to PII) would enable courts to consider evidence that otherwise could not be considered and that was important because, “although the numbers of these cases are small, they often contain extremely significant allegations about the actions of the Government and the security and intelligence agencies. There is a real public interest in being able to get to the truth of such allegations.”¹² While there was an acknowledgment that critics thought the Green Paper proposals “were excessively broad in scope and risked undermining this country’s proud tradition of civil liberties”, the government’s position was that the proposals were narrow, with suitable safeguards, and were sensible and proportionate, and that it was “arguable to say that the rule of law is supported by courts being able to reach determinations on such matters.”¹³ Claims from returning Guantanamo detainees were regularly cited as the archetypal concern.

16. Lord Wallace cited a wider public interest that was affected by the settlement of claims: “The damage to the reputation of this country can be immense and those unrebutted allegations can be used by individuals seeking to garner support for terrorism in retaliation for perceived wrongdoing by this country.”¹⁴

17. The Bill was highly contentious in Parliament. The Daily Mail’s ‘Secret Justice’ campaign had brought the issues to wider public attention. The Parliamentary debates were at times close. Whether the section 6(5) criterion should be the “fair and effective” proposed in the original bill or the “fair and open” administration of justice proposed in amendments was contentious. The

http://webarchive.nationalarchives.gov.uk/20140911100308/http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf

⁹ Joint Committee on Human Rights, *The Justice and Security Green Paper*, 24th Report of Session 2010-12, HL286, HC1777, 27 March 2012, ch 6.

¹⁰ Ibid, [197]; Lord Neuberger, ‘Open Justice Unbound?’ Lecture to the Judicial Studies Board, 2011 (also published in Judith Townend (ed), *Justice Wide Open*, City University, 2011, <https://core.ac.uk/download/pdf/9559605.pdf>)

¹¹ HL Deb 28 May 2012, Col 1659ff

¹² HL Deb 28 May 2012, Col 1663. Lord Wallace said the number of cases at the time was 29.

¹³ HL Deb, 28 May 2012, Col 1660-1661, 1663

¹⁴ HL Deb, 28 May 2012, Col 1663.

Public Bill Committee amended the original to “fair and open”. The Commons reinstated “fair and effective”. The Lords narrowly rejected an amendment (154 to 178) to make it “fair and open” once again, though the rationale in some contributions for retaining “effective” was that fairness and established traditions included taking account of open justice.¹⁵

18. How, then, do these rationales look today?

19. First, they are as contentious and concerning today as they were at the time. Among the problems that remain unaddressed are:

- CMP, with its use of Special Advocates, was seen at the time as a plain option because it has been used in SIAC and, being ECHR compliant providing “sufficient procedural fairness”, expanded from there.¹⁶ However, the equation was then and remains now a false equivalence because, after the ECtHR found in *Chahal* that deportation procedures were not ECHR compliant, SIAC was established to *enhance* rights of individuals. In stark contrast, the effect of CMP under the JSA proposals was not to safeguard rights but to *diminish* them.
- The assertion that the rule of law is supported when courts can determine matters of the type in question is, and remains, one-dimensional. It does not consider other dimensions of the rule of law and fidelity to it. Among those are natural justice, equality of arms, open justice and democratic accountability.
- The stated risk that settlement would encourage terrorist recruitment and support whereas determinations would prevent that was, and remains, deeply flawed. It plainly ignores the likelihood that the substance underpinning determinations will remain secret (as was observed in the Lords).¹⁷ Moreover, it ignores the extent to which secrecy and a lack of transparency may drive discontent in marginalised communities; as a participant in the *Opening Up Closed Judgments* project put it, when a young person is recruited online and someone is telling them that the state is against them, secrecy makes the case for that. The absence of transparency (or retention of secrecy) that is brought about by the operation of the JSA remains unaddressed and is greater than need be.
- The proposition that the passage of the JSA would enable the government to successfully defend cases and thus avoid settlements is one that needs testing. It is unclear how many claims have been settled; this information should be published so that it can better be seen if the rationale has stood the test of time. The settlement in *Belhaj* is certainly the most visible matter, but it seems impossible to determine from the publicly available information whether there are other settlements and, if so, what they related to.

¹⁵ HL Deb 26 March 2013, Cols 1024-1056 (158-174)

¹⁶ Justice and Security Green Paper, 2011, [2.37], [2.70]

¹⁷ HL Deb, 28 May 2012, Col 1663 (Lord Thomas of Gresford)

Secondly, the rationales are problematic because they, along with the JSA itself, have become part of the accepted wisdom of how security-sensitive evidence is to be managed through exceptional approaches, in spite of the fact that the rationales have not been adequately addressed. In a recent article, Professor Lorna Woods, myself and Dr Judith Townend have argued that CMP now forms a part of the national security landscape and this brings risks with it because approaches are adopted and adapted without earlier concerns being addressed. This is exemplified in the Law Commission's mooting of adapting some aspects of CMP to the criminal context.¹⁸ As we have argued, there is strong evidence that "techniques to address concerns in one context have been redeployed despite significant concerns about their operation which have not been resolved."¹⁹

The consequence of that for this review is that the operation of sections 6 to 11 of the JSA needs to be viewed against the rationales as they were stated, and the identified and potential shortcomings of those rationales.

E: Theme 3 - How has CMP under the JSA measured up against its original objectives?

20. **Review question:** *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?*
21. **Review question:** *Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?*
22. **Review question (from Theme 4):** *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.*
23. One of the major difficulties in ascertaining the extent to which objectives have been met is that the information available is (a) limited and (b) not presented in a way that is helpful. The annual reports by the Secretary of State delivered pursuant to section 12 are the primary source of information about the operation of the Act.
24. As explained above, the JSA was said to have safeguards. Certainly some of those safeguards have not operated effectively or appropriately.

¹⁸ Law Commission of England & Wales, *The Protection of Official Data: A Consultation Paper* (CP230, 2017), [5.53]; Law Commission of England & Wales, *The Protection of Official Data: Report* (Report 395, 2020), [7.83].

¹⁹ Lorna Woods OBE, Lawrence McNamara and Judith Townend, 'Executive Accountability and National Security' (2021) 84 *Modern Law Review* 553, 579.

(i) Extent to which the Act has been used and what lies ahead

Overall

25. The Act has been used quite considerably. While it is difficult to determine with precision in just how many matters and in what ways JSA CMPs have been engaged, a few clear trends seem apparent from what look to be somewhere in the vicinity of 80 matters:

- A wide scope of possible matters can be captured by the CMP provisions under the JSA. While the early rationales tended to focus on claims by returning Guantanamo detainees, it was apparent in the debates that the scope was intended to be wider, and that has turned out to be the case.
- There seems no question that when a government party applies for a section 6 declaration, the application will succeed. It is much less clear what that will mean for specific arguments and evidence under section 6 proceedings.
- There is no doubt that the trend is towards expansion and entrenchment of CMP as a part of the landscape in civil proceedings. The corollary of this is that the trend is towards diminishing avenues for transparency and accountability that are staples of the rule of law.

26. Together, and especially flowing from the last point, these have significant implications: as some rule of law protections are diminished, the need to enhance and strengthen other protections becomes imperative. This submission addresses a number of existing and potential rule of law safeguards.

Northern Ireland

27. Special attention should be given to the operation of the Act in Northern Ireland because the operation of the Act in that jurisdiction may raise many more problems than in Great Britain.

28. In research for the Opening Up Closed Judgments project a number of consultation meetings and a roundtable in Northern Ireland revealed many stakeholder concerns. Among these was that where CMP is used then there are particular challenges because of the relatively small number of Special Advocates working in that jurisdiction. While at present that may be manageable, what lies ahead is far more concerning.

29. Participants from various stakeholders and representing different interests agreed that – depending on how historical investigations are handled – the number of cases where CMPs may be sought could easily reach into the hundreds. A figure of 400 – 800 was discussed. In the event that comes to pass, there would be good reason to see the JSA processes as unsustainable in their current form and with current resources. The solutions to such a situation would be difficult to consider.

30. At consultation and roundtable events in London, which brought NI and GB stakeholders together, these potential figures were discussed again. Once more, no solution was apparent but it was agreed that in GB and at Westminster there was not an adequate understanding of the effects of the JSA in NI, especially with regard to the future.
31. At meetings throughout the project the view was commonly expressed that implications for NI were not adequately considered in the design of the JSA.
32. As well as being relevant to Theme 1, these matters are relevant to Theme 4 questions.
33. **Recommendation 2:**
- *The Review should engage strongly with Northern Ireland stakeholders, carefully assess the risks and challenges of the operation of CMP in Northern Ireland.*

(ii) Reporting to Parliament

34. Reporting to Parliament is designed to add a degree of transparency to the use and operation of CMP, including the operation of sections 6 to 11, accordingly building trust and enabling monitoring of a degree of the extent and manner of CMP use. However, the reports have not been timely and the content, while having improved in substance since the first report, is delivered in a format that does not aid in transparency to anywhere near the extent that it might do. A failure to adhere to not merely the required degree of transparency but also the highest degree of transparency unnecessarily undermines
35. The timeliness of the reports has been problematic. Section 12(4) states that the s 12(1) duty on the SoS to prepare a report and lay it before Parliament “must be carried out as soon as reasonably practicable after the end of the twelve month period to which the report relates. These reports have generally been published several months after the period ends. It was:
- Period ending 24 June 2014: published after 2 months (Aug 2014)
 - Period ending 24 June 2015: published after 4 months (Oct 2015)
 - Period ending 24 June 2016: published after 5 months (Nov 2016)
 - Period ending 24 June 2017: published after 6 months (Dec 2017)
 - Period ending 24 June 2018: published after 6 months (Dec 2018)
 - Period ending 24 June 2019: published after 18 months (Dec 2020)
 - Period ending 24 June 2020: published after 10 months (Dec 2021)

For an area of procedure where the number of cases is somewhere in the vicinity of 20 a year, and where every case will be recorded with (at least) the Special Advocates Support Office and this easily identified, it is difficult to conclude that the reports have been prepared and laid before Parliament “as soon as practicable”, certainly since at least 2016, and the 2019 report seems on its face and in the absence of any explanation to the contrary to fall well short of what the law requires.

The delays and inconsistency work against transparency, especially when the content and format of reports is considered.

36. The content of reports is partly determined by s 12(2) requirements to report numbers of cases, and partly by the discretionary provision at s 12(3). At least two problems are clear.
37. First, the requirements of s 12(2) are not sufficient and are unnecessarily narrow because they do not require the names of cases to be reported, nor citation details or how specific cases were ultimately disposed of. That more detailed information would enhance transparency, enabling scrutiny by parliamentarians and by public interest, professional and media organisations. More detailed information has been published and clearly can be published without any risk whatsoever to national security. Any risk to security will already have been considered by the courts in anonymising party names.
38. Secondly, s 12(2) is not sufficient because it does not identify decisions that may have been handed down as interim decisions but which are delivered by a closed judgment. This requirement should be added so that the operation of CMP can be better understood.
39. While the content of reports has been enhanced by the inclusion of more information than is required, this was only done following a critical review of the first report by the Secretary of State.²⁰ There is nothing in the statute that prevents a secretary of state from reverting to the earlier approach. Moreover, the way that information is currently presented does not aid a reader because it is difficult to identify the progress of matters, especially if a matter is rolled up with another or subsequently reported under a different case name if one of multiple parties is subsequently dealt with separately. This could be remedied by reporting practices that provide lists on the basis of matters, and run across more than one reporting period.
40. The information gap could also be addressed by creating a publicly available list of matters where the operation of CMP has been triggered by a section 6 application. This would make timely, accurate and comprehensible information available.

(iii) The Section 13 Review Requirement

41. This current review is required under Section 13 of the JSA. Section 13(3) requires that “The review must be completed as soon as reasonably practicable after the end of the period to which the review relates.” The appointment of the reviewer was obviously delayed far beyond what was desirable and, on the face of it and absent any explanation, it seems it should have been reasonably practicable to appoint a reviewer much sooner.

²⁰ See McNamara & Locke, *Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State (with Dec 2014 Supplement)*, above n 3.

42. The review, however, remains very important and it is vital that this is not the last review. It should be noted that as the JSA section 13 currently stands, no further review is required by law.

43. **Recommendation 3:**

- *The Review should examine the reasons behind the time lag in appointing a reviewer and give a view about what would ordinarily be practicable for the timescale for appointment of a reviewer and completion of a review.*

44. **Recommendation 4:**

- *A periodic 5-year review should become a permanent feature of the JSA.²¹*

(iv) Settlement of cases

45. As noted above, it is not clear whether the JSA has achieved the goal of enabling the government to avoid settling disputes where it would previously have opted to do so and, in the words of Lord Wallace, whether “the courts have been able to reach determinations” on matters. There is a serious gap in data in this regard.

46. Recommendations 6-8 (below) speak directly to addressing that gap, but the significance of the gap warrants note, because it speaks more widely to doubts about whether CMP have operated to enhance the rule of law and democratic accountability that is a part of it.

47. The Belhaj matter is exemplary here. The Attorney-General’s apology in Parliament demonstrates starkly the extent to which states – including the UK – can fail in their compliance with the rule of law.²² Had the court proceedings not been determined as they were on other grounds, it seems certain that a CMP would have been used and it is by no means clear what would have happened. However, it is abundantly clear that the need for safeguards is vital.

(v) Disclosure of state actions and executive accountability

48. Lord Wallace referred to a risk of damage to the country’s reputation arising from “perceived settlement of claims” and that it is better for courts to determine matters. However, the risk to national reputation results in the first instance from failures of the state to comply with human rights obligations and with the rule of law. If those failures are hidden by the use of procedures that are not characterised by transparency as far as possible, then there is a risk that CMP operates to undermine the rule of law.

²¹ This recommendation should not be read as an endorsement of the JSA or an acceptance that it is necessary or wise. Those matters were and remain contentious but are not addressed in this review or this submission.

²² HC Deb, 10 May 2018, Vol 640, Cols 926-927 (Jeremy Wright MP, Attorney-General)

49. There are, without doubt, aspects of matters that cannot be made public at some points in time because they would genuinely pose a real risk to national security – the identification of informants and of intelligence methods being archetypal examples – but those aspects of disputes may be limited. Where courts are used to secure secrecy then the public and parliamentarians are required to place an extraordinarily high degree of trust in the courts, and for that trust to be sustained there must be as much transparency as possible.
50. This arises as a consideration in matters where the state can successfully defend a claim, but it is perhaps more significant in circumstances where the power of the state has been exercised in ways that have failed, and where accountability will be enhanced by transparency.
51. CMP operates in a way that uses of the courts and special advocates as “trusted intermediaries”, which is part of a wider pattern of approaches to diluting transparency and accountability in national security matters. Woods, Townend and I have addressed this in some depth recently:

“The deployment of the trusted intermediary model has had significant consequences, most notably a lack of accountability to parliament, a limitation of transparency in the courts (open justice) and a troubling re-shaping of the judicial role and function under the constitution. ... This indirect form of accountability substitutes the principle of general transparency with a principle of transparency to the trusted few. ... Our concern is that executive accountability becomes diluted in ways that give the misleading appearance of accountability.”²³

52. Accordingly, if sections 6 to 11 of the JSA are to operate in ways that meet the objectives of the Act, providing suitable safeguards, there needs to be a substantial reconsideration of the extent to which information about proceedings subject to CMP applications and the manner in which it is provided. This might be addressed in two respects.

53. First, there is the position with regard to procedure and information

Recommendations 4-7 below are all concerned with procedure and information. They identify matters that can and should be addressed within the current statutory framework.

The subsequent section in Part F of this submission, “Management of closed judgments in CMP cases”, addresses the current Practice Direction and Guidance associated with closed judgments under the JSA, including the Closed Judgments Library.

The confidential annex to this submission addresses those matters further.

54. Secondly, there is the position with regard to the substance of information.

There should be a system in place that opens up the genuine possibility that information contained in closed judgments delivered pursuant to sections 6 to 11 may be disclosed if publications

²³ Lorna Woods OBE, Lawrence McNamara & Judith Townend, ‘Executive Accountability and National Security’ (2021) 84 *Modern Law Review* 553, 555, 580 and 568-569 on CMP.

would no longer present a risk to national security. This is an important safeguard in the operation of sections 6 to 11 because it enables the process, arguments, evidence, the evaluation of evidence, and the decisions of the courts to be scrutinised.

The possibility of scrutiny - rather than the existence of judgments that are closed from the public eye indefinitely, even if disclosure would pose no national security risk – will help maintain trust in the courts and in the agencies whose work is being examined.

It is particularly pressing because, unlike the position regarding (for instance) Cabinet papers, there is currently no system at all for subsequent release of closed judgments.

This is addressed in the second section in Part F, 'Opening Up Closed Judgments'.

55. **Recommendation 5:**

- *The Review should examine the reasons behind the time lag in reporting and give a view about what would ordinarily be practicable for preparation and laying of a report before parliament.*

56. **Recommendation 6:**

- *Section 12(2) should be amended so that further information is required in reports, including the case names, case identifiers (case number and where relevant citation of judgments), and hearing and decision dates, and how a matter was ultimately disposed of (including if by settlement).*

57. **Recommendation 7:**

- *The Review should identify standards and practices for reporting that will enhance transparency, including:*
 - (a) *the addition of an appendix to each annual report that lists, by case name with identifier / citation, all matters that have been the subject of a CMP application whether first sought in that period or earlier and have not yet been disposed of, and any judgments or orders in existence (whether closed or open);*
 - (b) *the addition of an appendix to each annual report that lists, by case name with identifier / citation, all matters that have been the subject of a CMP application whether first sought in that period or earlier and have been disposed of in the current period, including whether by settlement, and any judgments or orders in existence (whether closed or open).*

58. **Recommendation 8:**

- *There should be a publicly available list of matters where a CMP has been sought, with case name and citation, and listing any associated judgments and orders, enabling matters to be identified from the point of a section 6 application through to disposal.*

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

59. **Review question 14:** *Are there procedural safeguards which are unnecessary or others which are needed, especially in relation to Article 6 EHCR?*
60. **Review question 16:** *Are there any other points which respondents wish to make, not covered by the above questions, which bear on the operation of the Act?*

(i) Management of closed judgments in CMP cases

61. In *Incedal*, the Court of Appeal noted that closed judgments “are not retained within the court files or, as far as we have been able to ascertain, in any specified place within the court.” This mattered because appellate courts need access to judgments and because “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.”²⁴
62. It set the wheels in motion for what would become the “library of closed judgments” that was announced in a Practice Direction (PD) issued on 14 January 2019.²⁵
63. The PD expressly captures closed judgments issued under the JSA, though it is not limited to those. It seeks to establish a repository of judgments that can be consulted and referred to by SAs. This should improve the efficiency and consistency of the operation of sections 6 to 11.
64. This is a welcome development. It adds considerable certainty to the closed judgments regime and will ensure that judgments can be considered in subsequent cases.
65. That said, there are problems. Some are beyond the scope of this review. For instance, it is not clear from the PD whether judgments in criminal cases are included or whether SIAC decisions are included. I have addressed those matters in more detail in published work.²⁶ Others, however, are very relevant to judgments handed down pursuant to the JSA. These will be addressed here, drawing on that published work.

²⁴ *Guardian News Media Ltd v Incedal* [2016] EWCA Crim 11.

²⁵ *Practice Direction: Closed Judgments*, Lord Chief Justice of England & Wales and Senior President of Tribunals, 14 January 2019 <https://www.judiciary.uk/wp-content/uploads/2019/01/lcj-and-spt-practice-direction-closed-judgments-jan-2019-as-published.pdf>

²⁶ Lawrence McNamara, ‘Closed judgments: security, accountability and court processes’, UK Human Rights Blog, 25 January 2019 <https://ukhumanrightsblog.com/2019/01/25/closed-judgments-security-accountability-and-court-processes/>

Destruction of judgments

66. The Practice Direction indicates in paragraph 3 that judgments will be destroyed: “If it is decided to retain the judgment in the library, the relevant judge(s) or tribunal judge(s) will be informed. If the judgment is not to be retained, it will be disposed of securely.”
67. Many problems arise from that paragraph.
68. First, is this suggesting that a judge will be informed if a judgment is retained, but not if a judgment is to be destroyed? Surely that cannot be the case.
69. Secondly, there is no indication of criteria for retention or destruction, no timescale, no process set out – for instance, who will be consulted in the decision-making process, notification of judgments that are marked for destruction, or whether there might be some appeal or contesting of decisions. While those matters might not strictly be suitable for the Practice Direction, they are matters that must be addressed.
70. It might be thought important for both practical purposes and for public confidence that that no judgments are destroyed without such processes in place, and without ample time to ensure that processes can be put in place. That may be so – but it is not enough.
71. Instead, no closed judgments should ever be destroyed. CMPs are concerned with the actions of the state in matters of liberty and rights. There are massively important public interests at stake. It is of course hugely challenging for the government and the courts to manage information it needs rightly to keep secret for good reasons, but it is important that the management of closed judgments works to enhance not only security but also transparency and accountability. The *Belhaj* case – which involved rendition and mistreatment, if not torture - resulted in a public apology in parliament. Closed material procedures were sought in that case and while it is impossible to know what would have happened had the litigation proceed, the processes that govern retention should be clear and should not countenance destruction. It would be unacceptable that material is destroyed that might subsequently reveal without any risk to national security that actions of the state were incompatible or compatible – both are important – with legal obligations or commitments to the rule of law.
72. It would be desirable to have at the earliest opportunity some reassurance from the courts or the executive that no judgments have been destroyed and that none will be destroyed, or least that none will be destroyed without a thorough consultation on the issues and processes.
73. **Recommendation 9:**
- No closed judgments should be destroyed. The Review should ascertain and report on whether any judgments have been destroyed and, if so, what judgments have been destroyed.

The closed judgments library

74. Paragraph 4 refers to a document titled, “Closed Judgments Library – Security Guidance of 2017” and says it can be obtained from the court.
75. As this might address some of the concerns above it is important.
76. This guidance document is marked “official sensitive” and is not publicly available. The court state that “It is intended only for those who may have to deal with closed cases and/or documents” and where a person has it then it “cannot be quoted, passed on or published.”²⁷
77. The fact that the guidance will not be publicly available and cannot be quoted from means that people cannot know what, if any, processes exist. Cabinet Office guidelines on protective marking emphasise there should be a “clear and justifiable requirement” (emphasis in original) if official sensitive marking is to be used, and it is not clear what that justification is.”²⁸
78. There is a strong case for more comprehensive, public facing guidance about how closed judgments are to be handled. Significantly, as CMPs under sections 6 to 11, and the closed judgments handed down under the Act, are a radical and troubling departure from the norms of natural and open justice, the principles that guide administrative and procedural management of the judgments should be articulated explicitly and should recognise the rule of law commitments that are fundament to the constitution.
79. I will suggest the following as a starting point for how they might be articulated in a closed judgments Practice Direction and in the principles this R80eview might advance on these issues. This is framed to capture the breadth of material the PD can capture, and treatment of JSA judgments should sit within this:

“Closed material procedures (CMP), by their nature, depart from established principles of equality of arms and open justice (eg, Al Rawi [2011] UKSC 34). The Justice and Security Act 2013 is among the statutes that permits CMP. While criminal cases do not use CMP there have been occasions where media and public access to trials has been heavily restricted and closed judgments handed down.

“Both civil and criminal procedures have a significant impact on open justice. Departures from openness are to be avoided unless proportionate and necessary. In keeping with that principle, information about process should wherever possible be accessible.

“Accordingly, information about the management of closed judgments should wherever possible be in a form suitable for publication.

²⁷ Emails on file with the author.

²⁸ Cabinet Office, *Government Security Classifications*, May 2018
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715778/May-2018_Government-Security-Classifications-2.pdf

“To that end, this Practice Direction provides information about both process and management of closed judgments. Material in any accompanying guidance should be limited to technical and procedural aspects relating to the operation and functions of the library of closed judgments. The guidance will be marked “official sensitive” and will not be publicly available. When updating this Practice Direction or the guidance, content should be included in the Practice Direction rather than guidance wherever possible.”

80. It is not clear from the Practice Direction whether there will be a publicly available list of judgments that are held in the Closed Judgments Library. There is no reason why a list should not be publicly accessible, not least as the annual reports now provide case names. In addition, it could be anticipated that it would be more efficient if barristers and solicitors who are not Special Advocates could ascertain whether judgments are held in particular matters, as well as enhancing transparency.

81. **Recommendation 10:**

- *There should be a clear, comprehensive and principled system in place for the management of closed judgments. Information about that system should as far as possible be accessible to the public without restriction.*

82. **Recommendation 11:**

- A list of closed judgments handed down pursuant to the JSA should be publicly available. While this may be most practical through HMCTS and the Closed Judgments library, it could also be done through annual reporting or a database hosted by GLD or SASO (see Recommendations 6 & 7, above).

83. The **confidential annex to this submission** addresses the PD and the Security Guidance in more detail with a view to giving specific content to the above recommendations.

(vi) Opening up closed judgments

84. The relevant shortcoming in safeguards was outlined in paragraph 53 (above): as the law, practice and procedure currently stand, where a closed judgment is handed down pursuant to the operation of sections 6 to 11 of the JSA then it will remain closed forever. There is no process for reviewing a judgment or for opening it, even when the danger to national security has passed.

85. This poses a fundamental rule of law challenge because it is profoundly at odds with principles of open justice and natural justice. The workings of the courts cannot be scrutinised nor the reasoning in judgments, even where there is no reason of principle for secrecy to be maintained.

86. This was recognised during the passage of the Justice and Security Bill in 2012. Amendments were considered that would have required a later review of judgments.²⁹ Several peers spoke in favour of the amendment and, significantly, Lord Wallace for the government indicated that the issue was important, albeit too difficult to resolve at that time. Lord Wallace put the government's position:

I heard what was said by my noble friends and by the noble Lords, Lord Beecham and Lord Pannick, about when the national security considerations have in some respects flown off. I want to revisit this matter and discuss it with officials because I recognise the point that has been made. I am not going to pretend that there may be an easy answer to it, but if there is no longer a national security consideration, I see the force of what has been said.³⁰

With Government, Opposition and Crossbench peers having recognised the issue at the time, it is appropriate that this current review address that concern now.

87. The 'Opening Up Closed Judgments' project aimed to address this directly by devising a practical evidence-based system that will enable closed judgments to be reviewed and if there is no longer a danger to national security for those judgments to be opened. The intention is to do this in a way that will be informed by key stakeholders and in a way that takes account of and might best serve and balance the complex spectrum of public interests in national security, scrutiny of government, open justice, and maintenance of the rule of law. The proposals that follow derive from that work.

A spectrum of views

88. In consultations and roundtables the views expressed covered a wide range of points on the spectrum, such as the following (moving along the spectrum with each):

- A. There are no good reasons of principle why judgments should later be reviewed, other than on application by a party. The procedures are Article 6 compliant. Certainty and finality are important and judgments cannot be continually revisited. A review is not warranted. Moreover, CMPs are a vital component of the legal process that enables the fair resolution of disputes in ways that manage national security suitably.

- B. There may be reasons of principle why judgments should be reviewed. This might lie either in natural justice (as the special advocate system is a protection but it cannot provide for equality of arms) and/or an open justice basis. These reasons may even be very weighty. However, a review is not warranted because there is little benefit and great cost in doing so.

²⁹ By way of disclosure, the relevant amendments derived from my own submissions in relation to the Bill, as indicated in Hansard: , HL Deb, Vol 739, Col 206 (Lord Beecham), 17 July 2012

³⁰ HL Deb, Vol 739, Col 210-211 (Lord Wallace of Tankerness), 17 July 2012 (emphasis added). The High Court in *Evans* EWHC [2013] 3068 (Admin) was later asked to provide guidance but declined, indicating it was a matter for parliament.

- C. There are reasons of principle why judgments should be reviewed (natural justice, open justice). These reasons may be very strong. A review is warranted because even though there is a cost in doing so, the benefits are significant. The benefits include: ensuring public confidence in the judiciary and the legal process, especially among marginalised communities who may feel unfairly targeted by counter-terrorism law and policy; providing some rebalancing of equality of arms, at least in knowing the case, even if the original substantive decision could not be re-visited; and in helping ensure accountability of the executive.
- D. There are very strong reasons of principle why judgments should be reviewed (natural justice, open justice). A review is warranted, though it is always a second-best outcome. The case for CMPs in civil cases still has not been made out and the preferable path is repeal.
89. Of these points on the spectrum, those in (C) are compelling. Evidence from Northern Ireland was compelling in this regard: as one senior participant put it in relation to the changes over time about how historical matters have been dealt with, being able to be open had been “transformative”. Children of people claiming to be victims carry the anger and resentment with them, so the need to give information doesn’t really go away.
90. That same rationale should apply more generally to approaches to CMP. While secrecy may be required at the time of judgment, when it can be dispensed with then it should be dispensed with. The Belhaj apology is illustrative of the power of truth and disclosure to confront the wrongs of the past and for the state to acknowledge responsibility. The same may be said with regard to disclosures about activities by individuals or groups that seek to harm communities. Even if it is a long time coming, openness is a force for justice.
91. Systems that ensure the possibility of disclosure give life to the rule of law and provide safeguards against the closure and secrecy and scepticism about the state that is engendered by the operation of sections 6 to 11.
92. While it has not been tested, it is also potentially arguable that what makes a system of CMP that applies across civil proceedings compliant with Article 6 is the possibility that, when national security no longer requires closure, judgments will be made open. However, even if that was not required by Article 6, the ECHR standard should be a minimum threshold; wise and desirable standards and practices may go beyond the minimum requirements of Article 6.
93. Whatever system could be adopted, it will be require resources. However, the alternative is the present one: judgments that engage and explain the substance of important issues of public interest and potential illegality by the state will *never* be disclosed. The possibility of disclosure also has a forward looking effect: it is the possibility that a judgment may later become open that helps ensure compliance with the law by the agencies of the state in the present.
94. There are, however, very substantial practical challenges involved in devising a system for review. Accordingly, the recommendations are separated into those of principle (there should be a system for review) and practice (the system should be designed following consultation).

95. **Recommendation 12:**

- *A system should be created that enables closed judgments to be reviewed periodically so that they can (either fully or in part) be made open if publication would not pose a risk to national security.*

Systems: what would a periodic review process look like?

96. Notwithstanding the challenges, the following proposals and considerations represent key features that could meet the demands of review. Based on the research for the Opening Up Closed Judgments project, there is no reason to see practicalities as being insurmountable.

97. Key features of a periodic review process would include:

- (1) The review of a judgment and the decisions about what is to remain closed and what will be disclosed will always lie with the courts. This view was very strongly held by a number of participants.
- (2) The reviewer would ideally be the judge who heard the matter but this may not be possible as time passes. A matter could be reviewed by another judicial officer.
- (3) A review should be triggered based on the passage of time. The appropriate period may be ten years. The view was expressed that five years may be too short to make it likely things have changed. Twenty years may be unnecessarily long.
- (4) A review should use a process that is submission based and essentially adversarial. For instance, a Special Advocate might be appointed as a Disclosure Advocate (or similar) reviewing the judgments and making submissions with regard to what, if anything, might be suitable for disclosure. Where a reviewing judge is persuaded that there may be a case for publishing parts or all of the judgment then submissions would be invited from the relevant government agency.
- (5) A decision on publication would be made by the reviewing judge and could be appealed.

Standards: what might be disclosed as a result of a period review?

98. The standard for whether content of a judgment should be disclosed would most likely be the standards associated with the decision to make a judgment closed in the first instance.

99. Examples of circumstances where a judgment might be opened could include where material has since entered the public domain (eg, in another judgment) or where technological capacity was in issue that has since become commonplace and its use at the time has either since been publicly confirmed or would obviously be presumed. However, it may be important to distinguish between revelation and confirmation; even if a revelation has been made and common opinion is that

revealed information is true, that does not constitute confirmation. A 'neither confirm nor deny approach' has meaningful value for agencies.

100. Some material would not be suitable for disclosure. The most obvious and widely agreed ground is that no disclosure should be made that would identify informants. Whether this should run in perpetuity might be contested but there are strong arguments advanced that it should do. A second category of material where disclosure is unlikely is in certain areas methods (eg, around recruitment of human intelligence sources). Whether substantive exceptions or guidance is warranted in statute may warrant consideration.

Outcomes: what might be the consequences of disclosing the content of a judgment?

101. If a judgment is opened and reveals material that could have been effectively challenged by a claimant, what is the appropriate position? There was considerable disagreement about this. On one view there must be limits to a claimant's rights to re-visit a determination.³¹ However, if a claimant's rights are to be denied then a clear case must be made.

102. **Recommendation 13:**

- A review system should ensure the courts are the decision-makers about what is published and what is kept closed. Further specifics of a review system should be the subject of consultation with a wide range of stakeholders.

(vii) Family proceedings and the JSA

103. In addition to Review Question 16, this also engages **review question 15**: *Are there any changes to the CPR Part 82 which should be made?*

104. The extent to which CMPs apply in family proceedings warrants attention. In particular, the basis on which CMPs might be used in family proceedings needs consideration. Should family proceedings use the JSA as the basis for CMP where national security is in issue, or should the inherent powers of the court be relied on for CMP in family proceedings? What are the implications of the choice?

105. The Supreme Court has indicated that in children's cases CMP may be permissible under the inherent power of the court. This was apparent in *Al Rawi*.³² In 2012 in *Re A (Sexual Abuse:*

³¹ The Investigatory Powers Act 2016 is an example of a statute that limits rights and information in relation to state errors.

³² *Al Rawi v The Security Service and others* [2011] UKSC 34, [63] (Lord Dyson), citing Baroness Hale in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [58].

Disclosure), Baroness Hale expanded on this, though with caution that a trial needed to be fair.³³ In 2017 in the Family Division of the High Court the authorities were reviewed by Cobb J who found that:

*It is only reasonably exceptionally that a family court will consider it appropriate to hold closed material hearings and invite the appointment of Special Advocates This point was emphasised by Sir Nicholas Wall P, in describing the closed material procedures (similar to those engaged here) as "a matter of last, as opposed to first resort"*³⁴

It seems clear then that CMP can be used under the inherent powers of the court can be used.

106. Can the JSA provide an avenue for CMP? It is common ground that, as Cobb J made clear: *Currently, there are no family procedural rules equivalent to Part 82 of the Civil Procedure Rules 1998 ('CPR') dealing with these situations in family cases ...*³⁵

McDonald J had earlier raised the possibility (emphasis in original) that "there *may* remain an argument to be had as to whether the use of some species of closed procedure [is permissible] ... in family proceedings in the High Court pursuant to the Justice and Security Act 2013 absent any rules of procedure governing the same having been promulgated."³⁶

107. With the option of using the inherent powers of the court, and the absence of FPR provisions, the better position seems to be that the JSA does not provide the basis for CMPs in family proceedings.³⁷

108. However, should there be amendments to the FPR so that the JSA becomes the basis for CMP? This is unclear and the potential effects of retaining the current position or moving to the JSA are significant, and include the potential for changes to the CPR.

Should the JSA become the basis for CMP in family proceedings?

109. If Family Courts can use CMPs then does it matter what the basis is for CMPs? The answer is yes, it matters a great deal. Among the reasons:

- If the inherent powers of the court are used then the court can determine which of the parties will be notified of an application. If the JSA is used then under CPR R82.7 all parties must ordinarily be notified of a CMP application.

³³ *Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60 [34].

³⁴ *Re R (Closed Material Procedure: Special Advocates Funding)* [2017] EWHC 1793 (Fam), [16] (references omitted); see further [16]-[18].

³⁵ *Ibid*, [17].

³⁶ *Re X, Y and Z (Disclosure to the Security Services)* [2016] EWHC 2400 (Fam), [95].

³⁷ For a detailed review of CMP and the radicalisation cases see Jessie Blackburn, 'Closed Material Procedures in the Radicalisation Cases' (2020) 32(4) *Child and Family Law Quarterly*

- If the JSA is used then the application must be included in reporting by the Secretary of State.
- If the JSA is used then it is more likely that that a judgment should be recorded in the Court's closed judgments library (and see further the other recommendations in this submission).

110. The first of those may be the most important. If, for example, a parent is an informant for the security services then it may be very significant for all parties and for the best interests of the child as to which parties are notified. This is in part because notification of a CMP application may confirm existing suspicions of family members. In either case – notification or the absence of notification – there will be very significant decisions to be made about what is in the best interests of the child. If the CPR 82.7 were to be transplanted into the FPR then the “unless the court directs otherwise” provision would allow for notification to be withheld, but it does not avoid the substantial decisions to be made with the child's best interests in mind.

111. The Family Courts are also alert to the issues of fairness, as Baroness Hale made clear in the cases cited earlier. Recently the Court of Appeal in a family case noted that “it is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party.”³⁸

112. **Recommendation 14:**

- The significance of these points for this review is that:
 - (a) It is desirable to have certainty in relation to the status of the JSA in relation to family proceedings in the High Court. The current position is not satisfactory because it appears from the primary legislation – the JSA – that the JSA would apply to such proceedings. Only the absence of FPR provisions seems to prevent this and the absence of those provisions has not been explained.
 - (b) The JSA should become the basis for CMP in family proceedings in the High Court where a CMP is used for national security reasons. This would bring the Family Court in line with the other divisions of the High Court, providing a clearer statutory basis and ensuring reporting by the Secretary of State. That enhances transparency around the activities of the state.
 - (c) There should be no amendment to the CPR to accommodate this. The CPR provisions could be transplanted into the FPR, with room for family proceedings to exercise discretion according to the demands of that jurisdiction.

³⁸ *S (A Child)* [2021] EWCA Civ 605, [37], citing *Re D (Minors Adoption Reports: Confidentiality)* (1995) 2 FLR 687.

Confidential annex: submitted separately

113. The confidential annex pertaining to the Closed Judgments Library has been submitted separately.