



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# **Legislative Scrutiny: Justice and Security Bill (second Report)**

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**Eighth Report of Session 2012–13**





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*Report, together with formal minutes and  
written evidence*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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### Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at <http://www.parliament.uk/jchr>

### Current Staff

The current staff of the Committee is: Mike Hennessy (Commons Clerk), Mark Davies (Lords Clerk), Murray Hunt (Legal Adviser), Natalie Wease (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Holly Knowles (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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## Summary

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This is our second Report on the Justice and Security Bill. In our first Report we were unpersuaded that the Government had demonstrated by reference to evidence that there are a significant and growing number of civil cases in which a closed material procedure (“CMP”) is essential for the issues in the case to be determined. However, in view of the likelihood of the measure becoming law, we went on to recommend a number of amendments to the Bill in order to address concerns we had about the Bill’s compatibility with the UK’s constitutional tradition of open justice and fairness.

Some of those recommended amendments were made to the Bill by the House of Lords. In Public Bill Committee in the House of Commons the Government replaced the Lords amendments with its own amendments which it says reflect our recommendations. The main purpose of this Report is to scrutinise the extent to which the Government’s amendments reflect the recommendations in our first Report. To the extent that we are not satisfied that they do so, we recommend further amendments to the Bill for consideration at Report stage. We also revisit two recommendations made in our first Report which have not yet been reflected in the Bill: a requirement of judicial balancing within the CMP and a “gisting” obligation.

This is a controversial Bill which has raised concerns across party-political boundaries and across both Houses of Parliament. There were therefore some reasonable differences of opinion expressed during our consideration of the Bill which echoed those concerns.

### **Scope of the Bill**

We welcome the Government’s amendment of the Bill to remove the power to extend the scope of the Act by order. We also welcome the Government’s clarification that the CMP provisions in the Bill apply only to material the disclosure of which would be damaging to national security, and not to international relations.

We would prefer to see the Bill amended to include an express reference to the type of material that the Intelligence and Security Committee considers would be really damaging to the interests of national security if disclosed. We recommend that the definition of “sensitive information” in clause 6(11) of the Bill be amended to confine it to the wording suggested by the ISC.

We accept in principle that, if CMPs are to be available in civil proceedings before lower courts, they ought also to be available before the Supreme Court; but we envisage that they only be very rarely used, in proceedings where a CMP was used below and where it is absolutely necessary for the determination of the issues in the appeal. We recommend that the Government make clear the sorts of circumstances in which a CMP may be appropriate in civil proceedings before the Supreme Court.

### **Judicial discretion**

We welcome the Government’s acceptance of the importance of ensuring that the decision as to whether there should be a CMP is made by an independent court and not the Government. We also welcome the express provision of an opportunity for the court to

revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins.

### **Equality of arms**

In our view the Government's amendment enabling all parties to proceedings to apply for a CMP does not provide for equality of arms in litigation because it would unfairly favour the Secretary of State. This is a real practical problem. Victims of torture or rendition whose claims may turn on sensitive material in the possession of the Secretary of State might prefer the option of a CMP to the exclusion of that material under PII. Under the Bill as it stands, such claimants may never know that material which assists their case has been excluded from the proceedings under PII. In this important respect, the Bill neither enhances the accountability of the security and intelligence agencies, nor does it enhance fairness in litigation. We recommend that the Bill be amended to restore equality of arms in the ability to apply for a CMP, or that an appropriate mechanism be found to ensure equality of arms between the Government and other parties to civil proceedings in their ability to apply for a CMP.

### **Judicial balancing at the "gateway"—the *Wiley* balance**

The Government's amendments remove from the Bill the so-called *Wiley* balance between the degree of harm to national security on the one hand and the public interest in the fair and open administration of justice on the other. The purpose of our recommended amendment inserting the *Wiley* balance into the Bill was to ensure that the court considers the public interest in the fair and open administration of justice when deciding whether to order a CMP. That purpose is not served if the Bill does not contain any express requirement that the court conduct such a balancing exercise before deciding whether to allow a CMP to be used. We recommend that the Bill be amended to delete the Government's new condition that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration and to reinstate the *Wiley* balance as a precondition of a CMP.

### **Strict necessity—CMPs only as a last resort**

We do not accept the Government's reasons for removing the "last resort" amendments made to the Bill by the House of Lords, which are based on a misunderstanding of the effect of the provisions. We welcome the Government's commitment to ensuring that CMPs are only available in those cases where they are necessary. To give effect to that intention we recommend that the Bill be amended so as to reinstate the condition that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means and the requirement that the court "consider" whether a claim for PII could have been made, both of which have been removed by the Government's revised clause.

We welcome the Minister's unequivocal reassurance that the Bill as it stands makes no difference to confidentiality rings, which will remain available under the Bill as they are now, and that the Government has no intention of taking away the possibility of such arrangements as an alternative to CMPs. Under the last resort condition which we recommend, the court will be required to consider whether the case is suitable for a confidentiality ring rather than a CMP, as part of the court's consideration of whether a fair

determination of the proceedings is not possible by any other means.

We also welcome the express provision in the Bill of an opportunity for the court to revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins, as this should make it less likely that a CMP will be used when it is not necessary. However, it is no substitute for a “last resort” condition such as that inserted by the Lords, because the test to be applied by the court on the review is whether a CMP is in the interests of the fair and effective administration of justice in the proceedings – the condition we recommend should be deleted from the Bill. We recommend that the Government’s new clause providing for review and revocation of a CMP declaration be amended so as to provide for revocation if the court considers that any of the preconditions for a CMP are no longer met.

### **Judicial balancing in the CMP**

We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session.

### **“Gisting” obligation**

We agree with the Special Advocates that if there is to be a power to hold a CMP in civil proceedings, there should be an express statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. We recommend that the Bill be amended to impose a gisting obligation in all cases in which a CMP is to be held under the provisions of the Bill. Such an amendment does not risk disclosures damaging to national security but preserves the Secretary of State’s right to elect between providing a summary of material and ceasing to rely on it in the case, as is already the case where the gisting obligation applies under Article 6 of the European Convention on Human Rights.

### **Annual renewal**

We also reiterate the recommendation in our first Report that the Bill provide for annual renewal, in view of the significance of what is being provided for and its radical departure from fundamental common law traditions.



# 1 Background

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Date introduced to first House	28 May 2012
Date introduced to second House	28 November 2012
Current Bill Number	HC Bill 134
Previous Reports	24 <sup>th</sup> Report of Session 2010–12 4 <sup>th</sup> Report of Session 2012–13

## Introduction

1. The Justice and Security Bill received its Second Reading in the House of Commons on 18 December 2012, completed its Committee Stage on 7 February and is currently awaiting a date for its Report Stage.

2. We held an inquiry into the Green Paper which preceded the Bill and published our Report on it in April 2012.<sup>1</sup> On 13 November 2012 we reported on the Bill as introduced in the House of Lords.<sup>2</sup> In that Report we recommended a number of amendments in order to address concerns we had about the Bill's compatibility with the UK's constitutional tradition of open justice and fairness. Some of those recommended amendments were made to the Bill by the House of Lords at Report stage.

3. At the Bill's Second Reading in the Commons, on 18 December 2012, the Minister without Portfolio, the Rt. Hon. Kenneth Clarke QC MP (who leads for the Government on the Bill), explained that the Government was still considering carefully the recommendations in our Report as well as the significant changes made to the Bill in the Lords. On 11 January 2013, the Minister wrote to us regretting that he was still not in a position to respond in full to our Report but stating that he intended to do so very shortly and before the Bill's Committee Stage.<sup>3</sup>

4. The Government published its response to our Report on the Bill on 29 January.<sup>4</sup> On the same date it also tabled a number of amendments to the Bill to be considered in Public Bill Committee. These included amendments which proposed to remove amendments made by the House of Lords to give effect to some of our recommendations, and replace them with the Government's own amendments.

5. The Government amendments removing the Lords amendments were agreed to by 10 votes to 9 in Public Bill Committee.<sup>5</sup> Two further amendments proposed by members of

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1 Twenty-fourth Report of Session 2010–12, *The Justice and Security Green Paper*, HL Paper 286/HC 1777 (hereafter "JCHR Report on the Green Paper"). See for the Government's Response, *Response to the Twenty-Fourth Report from the Joint Committee on Human Rights 2010–12: The Justice and Security Green Paper*, CM 8365 (May 2012).

2 Fourth Report of Session 2012–13, *Legislative Scrutiny: Justice and Security Bill*, HL Paper 59/HC 370 (hereafter "First JCHR Report on the Bill").

3 Ev 1

4 *HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012–13: Legislative Scrutiny: Justice and Security Bill* (Cm 8533) (hereafter "Government Response").

5 PBC 5 February 2013 col 197.

the Public Bill Committee, which would have given effect to recommendations in our earlier Report, were negated on the casting vote of the Chair following a tied vote.<sup>6</sup>

6. We then wrote to the Minister on 5 February asking a number of detailed questions about certain aspects of the Government's amendments.<sup>7</sup> The Minister replied by letter dated 11 February,<sup>8</sup> offering to make himself available at short notice to give oral evidence. He appeared before us on 12 February when we were able to discuss some of our questions directly with him. A transcript of his evidence is available on the Committee's website.<sup>9</sup> We are grateful to the Minister for volunteering to give oral evidence to us and for doing so in time to inform our scrutiny of the Government's amendments.

7. On 18 February we also received a detailed written response from the Minister to the questions raised in our letter of 5 February.<sup>10</sup>

### The opportunity for proper scrutiny

8. We are grateful to the Government for its engagement with us and we welcome some aspects of the Government's amendments. We regret, however, that the Government's response to our Report and amendments to the Bill were not published until 29 January, on the eve of the Bill's Committee Stage. Our Report on the Bill was published on 13 November 2012 and the House of Lords amendments to the Bill were made at Report stage in that House on 21 November. Publication of the Government's amendments to coincide with the Public Bill Committee's consideration of the Bill did not provide a proper opportunity for us to scrutinise the Government's amendments and report our views to the House before the next stage of its consideration by Parliament.

9. This is particularly regrettable when the purpose of the Government's amendments is to remove from the Bill some of the significant amendments made by the House of Lords on our recommendation and to substitute different amendments which the Government says are intended to reflect our recommendations. It is in the interests of proper scrutiny that the House of Commons should have the benefit of our views as to whether the Government's amendments do in fact give effect to our recommendations as the Government asserts.

10. We asked the Government for its assurance that the Bill's Report stage would not be scheduled until we had had a reasonable opportunity to report to Parliament our views about the Government's amendments, but this assurance was not forthcoming.<sup>11</sup> In the event, we hope that our Report will be able to inform the Bill's Report Stage nevertheless. **We find it unsatisfactory that there may not be an opportunity for this Committee to be able to inform proper parliamentary scrutiny of Government amendments that are asserted to give effect to recommendations that we have made. We recommend that where the Government amends a Bill in response to specific recommendations from a**

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6 PBC 5 February 2013 col 228–9.

7 Ev2.

8 Ev 3

9 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/>.

10 Ev 4.

11 Q87.

parliamentary committee, that committee be given a reasonable opportunity to scrutinise the Government's amendments and report their views to Parliament before the amendments are debated.

## Information considered in our scrutiny of the Government's amendments

11. We have continued to receive submissions about the Bill and we have taken these into account. We were sent a copy of *Neither Just Nor Secure*, a publication for the Centre for Policy Studies by Andrew Tyrie MP and Tony Peto QC. We have also received a Supplementary Memorandum dated 18 February 2013 from 19 Special Advocates, comprising "almost all currently active Special Advocates".<sup>12</sup> We refer to this supplementary evidence where relevant in this Report. We are grateful to those who have continued to assist us in our ongoing scrutiny of the Bill.

12. We have also taken into account the debates which took place on the Bill in Public Bill Committee.

## The purpose of this Report

13. In his foreword to the Government response, the Minister stated his belief that the Government response and its amendments to the Bill "demonstrate that there is nothing between the Committee and the Government on the major principles at issue. The approach we are taking reflects their recommendations on these principles of justice very closely." He reiterated that view in his oral evidence, saying that there is no division of principle between the Government and this Committee, and that, with its amendments, the Government has moved entirely in line with our recommendations.<sup>13</sup>

14. The main purpose of this Report is to subject to careful scrutiny the claim that the Government's amendments reflect our recommendations in our first Report on the Bill. To the extent that we are not satisfied that they do so, we recommend further amendments to the Bill for consideration at Report stage. This is a controversial Bill which has raised concerns across party-political boundaries and across both Houses of Parliament. There were therefore some reasonable differences of opinion expressed during our consideration of the Bill which echoed those concerns.

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12 Ev 5

13 Q88.

## 2 The scope of the Bill

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15. We welcome the Government's acceptance of a number of our recommendations about the scope of the Bill.

### Power to add courts or tribunals by order

16. In our first Report on the Bill we recommended that the power it proposed to give to the Secretary of State to amend the scope of the Act in the future by order, by amending the definition of "relevant civil proceedings" in which closed material procedures ("CMPs") are to be available, be deleted from the Bill.<sup>14</sup>

17. The Government has accepted this recommendation, and tabled an amendment at Lords Report stage removing the order-making power. **We welcome the Government's amendment of the Bill to remove the power to extend the scope of the Act by order.**

### Damage to international relations

18. The Government response has confirmed, as we requested,<sup>15</sup> that CMPs under the Bill will only be available in relation to material which the court is persuaded would damage the interests of national security if it were openly disclosed, and will not be available in relation to material the disclosure of which would be damaging to international relations or to the prevention or detection of crime.

19. In the amended Bill this is achieved by making the CMP provisions apply to "sensitive material" which is defined to mean "material the disclosure of which would be damaging to the interests of national security."<sup>16</sup>

20. **We welcome the Government's clarification that the CMP provisions in the Bill apply only to material the disclosure of which would be damaging to national security. We are satisfied that this lays to rest any uncertainty about whether the scope of the Bill's provisions on CMPs extends to damage to international relations.**

### Definition of material disclosure of which would damage national security

21. In our Report we did not recommend that the Bill should define the meaning of "national security" in this context. However, we did ask the Government to confirm to Parliament that the material which is intended to be protected from disclosure by the CMP provisions in the Bill is confined to the two narrow categories of information identified by the Intelligence and Security Committee as posing a real risk to national security if disclosed, namely:

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14 First Report on the Bill, para. 33.

15 First Report on the Bill, para. 31.

16 Clause 6(11).

- UK intelligence material which would, if publicly disclosed, reveal the identity of UK intelligence officers or their sources, and their capability (including techniques and methodology); and
- Foreign intelligence material provided by another country on a promise of confidentiality (“control principle” material).<sup>17</sup>

22. The Government in its response has refused to provide that confirmation. It agrees that a statutory definition of national security should not be included in the Bill, but it says attempts to define the types of material that would damage the interests of national security if disclosed would also be “unhelpful” because it risks leaving a “shortfall” in the scope of the legislation. The Government criticises the language suggested by the ISC for being too narrow, arguing that it would not include, for example, material that is sensitive because its disclosure would jeopardise an ongoing national security intelligence operation. The Government prefers not to narrow the scope of the Bill in this way but to leave it to the judge to decide whether or not the Minister’s assessment that there would be genuine damage to the interests of national security is correct.

**23. We would prefer to see the Bill amended to include an express reference to the type of material that the Intelligence and Security Committee considers would be really damaging to the interests of national security if disclosed. We recommend that the definition of “sensitive information” in clause 6(11) of the Bill be amended to confine it to the wording suggested by the ISC.** The following amendment would give effect to this recommendation:

Clause 6(11), Page 6, line 24, after ‘security’ insert ‘because it is:

- (a) UK intelligence material which would reveal the identity of UK intelligence officers or their sources, and their capability (including the techniques and methodology that they use); or
- (b) foreign intelligence material, provided by another country on a promise of confidentiality.’

## Availability of CMPs in Supreme Court

24. The Bill provides for CMPs to be available in proceedings before the Supreme Court, as a result of a Government amendment to the Bill at Report stage in the House of Lords.<sup>18</sup> This amendment came after the publication of our Report on the Bill and we therefore have not yet had the opportunity to consider this issue.

25. Neither the Supreme Court nor the House of Lords before it have, to date, made use of a CMP, even when considering appeals in proceedings in which CMPs have already been made available by statute and have been used by the courts below in the proceedings in question (eg. in appeals from SIAC or in control order or terrorist asset-freezing cases). In a case pending before the Supreme Court, however, concerning financial restrictions imposed on an Iranian bank by the Treasury, the Government is asking the Supreme Court

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<sup>17</sup> First Report on the Bill, para. 30.

<sup>18</sup> Clause 6(9)(d).

to consider a closed judgment of a lower court following a closed material procedure during which intelligence material was shown to the court but not to the bank or its legal representatives.<sup>19</sup>

26. We asked the Government whether the President of the Supreme Court has been consulted about adding the Supreme Court to the list of courts in clause 6(9) of the Bill in which CMPs are to be made available in civil proceedings and, if so, what was his view. The Government replied that the Ministry of Justice discussed the matter with UK Supreme Court officials, but the Supreme Court Justices did not consider it necessary or appropriate to comment.

27. We also asked the Government why it considered it necessary to provide for CMPs before the UK's highest court, the function of which is to hear appeals on points of law of general public importance. The Government's concern is to make sure that CMPs are available in appeals in proceedings in which a CMP has been used in a court below, because it is conceivable that a CMP might also be necessary on appeal, for example if factual material is relevant to the issues on appeal. Although the Government is not aware of any case before the Supreme Court in which a CMP has been used, it points out that the Supreme Court Rules already make provision for such a procedure.

**28. We accept in principle that, if CMPs are to be available in civil proceedings before lower courts, they ought also to be available before the Supreme Court. However, we would envisage that a CMP would only be very rarely used in the Supreme Court in proceedings where a CMP was used below and where it is absolutely necessary for the determination of the issues in the appeal. We recommend that the Government make clear the sorts of circumstances in which a CMP may be appropriate in civil proceedings before the Supreme Court.**

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<sup>19</sup> *Bank Mellat v HM Treasury* (hearing before UK Supreme Court expected in March 2013).

## 3 Extension of CMPs to all civil proceedings

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### Evidence of the need for change

29. In our first Report on the Bill we concluded that “we remain unpersuaded that the Government has demonstrated by reference to evidence that there exist a significant and growing number of civil cases in which a CMP is ‘essential’ in the sense that the issues in the case cannot be determined at all without a CMP.”<sup>20</sup> In view of the likelihood of the measure becoming law, however, our Report went on to focus on how to ensure that the safeguards for open justice and fairness in the legislation were as strong as they could be.

30. We do not revisit in this Report the question of whether the Government has yet produced the evidence to demonstrate the need to extend the availability of CMPs into civil proceedings generally. We have not seen anything to change the view we expressed on this issue in our First Report on the Bill. We note in passing, however, the breadth of opposition to Part 2 of the Bill in principle. In addition to human rights NGOs,<sup>21</sup> both the Special Advocates who gave evidence to us<sup>22</sup> and the Centre for Policy Studies’ publication *Neither Just Nor Secure*<sup>23</sup> favour removal of Part 2 of the Bill, and only advocate stronger safeguards as a second-best solution. This opposition provides an important backdrop to the debate about the adequacy of the safeguards in the Bill for open justice and fairness.

### Judicial discretion

31. In both our Report on the Green Paper<sup>24</sup> and our first Report on the Bill,<sup>25</sup> we emphasised the critical importance of genuine judicial discretion in any legal framework making CMPs available in civil proceedings. That judicial discretion, we recommended, should be untrammelled by any statutory language constraining the scope for judicial balancing where the Government asserts that there is relevant evidence in the case the disclosure of which would be damaging to the interests of national security.

32. In our first Report on the Bill, we therefore recommended that the decision as to whether there should be a CMP should not be the subject of a statutory duty on the court to direct one where there is material relevant to the proceedings that would damage national security if disclosed. Rather, the decision as to whether there should be a CMP should be the product of a full judicial balancing exercise in which the court first weighs all the competing public interests. We recommended that an important step towards achieving this would be by substituting “may” for “must” in the relevant part of clause 6. The House of Lords agreed and amended the Bill accordingly.

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20 JCHR First Report on the Bill, para. 46.

21 Liberty, JUSTICE, Reprieve, Redress, Amnesty International, and Human Rights Watch for example are all opposed in principle to Part 2 of the Bill.

22 Special Advocates’ Supplementary Memorandum, paras 9–17.

23 See Andrew Tyrie MP and Tony Peto QC, *Neither Just Nor Secure*—[www.cps.org.uk](http://www.cps.org.uk).

24 JCHR Report on the Green Paper, paras 99–103.

25 JCHR First Report on the Bill, paras 54–61.

33. At Second Reading in the Commons, the Minister without Portfolio announced that the Government had accepted that there should be much greater discretion for the judge about whether and when a declaration for a CMP should be issued. The Government response to our Report agrees that the judge's role is "absolutely critical." It also agrees that the court should have a clear discretion about whether or not to make a declaration that proceedings are those in which a CMP application may be made to the court. It therefore accepts the Lords amendment which changes "must" to "may" in clause 6(3) of the Bill, so that the court has a discretion rather than a duty to make a declaration if the appropriate conditions are met. The Government's revised clause 6 also makes it a precondition of a CMP that the court considers that it is in the interests of the fair and effective administration of justice in the proceedings.<sup>26</sup>

34. The Government's amendments include a new clause the effect of which is to require a court which makes a CMP declaration to keep the declaration under review and enabling it to revoke the declaration if it considers that it is no longer in the interests of the fair and effective administration of justice in the proceedings.<sup>27</sup> The new clause also requires the court to carry out a formal review of the declaration once the pre-trial disclosure exercise has been completed, and requires it to revoke the declaration if it considers that it no longer satisfies the test of being in the interests of the fair and effective administration of justice in the proceedings. The Government response explains that the purpose of this new clause is to enhance the court's discretion.

**35. We welcome the Government's acceptance of the importance of ensuring that the decision as to whether there should be a CMP is made by an independent court and not the Government. It represents both an important change from what was proposed in the Green Paper and a significant improvement to the Bill as introduced. We also welcome the express provision of an opportunity for the court to revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins.**

36. We note, however, that this appears to be as far as the Government's acceptance of the Lords' amendments to clause 6 goes. The Government's revised clause 6 has removed four of the other substantive amendments to that clause made by the Lords:

- (1) the equality of arms amendment enabling parties other than the Secretary of State to apply for a CMP in respect of any material relevant to the issues in the proceedings;
- (2) the *Wiley* balancing amendment ensuring that full judicial balancing of the competing interests takes place when deciding whether there should be a CMP;
- (3) the last resort amendment ensuring that a CMP is only resorted to when strictly necessary; and
- (4) the Public Interest Immunity ("PII") amendment ensuring that the court considers whether a claim for PII rather than CMP could have been made.

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<sup>26</sup> Clause 6(6) of the Bill as amended in Public Bill Committee.

<sup>27</sup> Clause 7.

37. The Minister's evidence on these points was clear: in the Government's view it is sufficient to meet the concerns which lay behind these amendments by leaving it to the judge to decide whether it is in the interests of the fair and effective administration of justice in the proceedings for there to be a CMP. So long as that judicial discretion is assured, debate about more detailed safeguards is, in the Minister's view, "legalistic hair-splitting"<sup>28</sup> and semantics.<sup>29</sup> We next consider whether the Government's reasons for that assertion in relation to each of the four Lords amendments outlined above are sufficient.

### Equality of arms in the ability to apply for a CMP

38. In the Bill as introduced only the Government could apply for a declaration that a CMP could be used in the proceedings in question. In our first Report on the Bill we recommended that the Bill be amended to grant the court the power to make a CMP declaration, on the application of either party or of its own motion.<sup>30</sup> In our view, this was necessary in order to make the Bill compatible with the requirement of "equality of arms", which is a feature both of the common law right to a fair hearing and the equivalent right in Article 6(1) ECHR. This was also the view of the Special Advocates who provided written evidence, the Independent Reviewer of Terrorism Legislation and the House of Lords Constitution Committee.

39. The House of Lords agreed and amended the Bill accordingly. The Government in its response to our Report accepted our recommendation, but said that it is necessary to bring forward "technical amendments" to ensure that "any party" rather than "either party" can apply for a CMP, and to deal with circumstances where the Secretary of State is not a party to proceedings but may want to apply for a CMP declaration nonetheless.

40. The Government therefore tabled an amendment during the Public Bill Committee which removes the Lords "equality of arms" amendment and replaces it with a new provision. The Government's amendment was agreed to by 10 votes to 9 in the Public Bill Committee.<sup>31</sup> The Bill now provides that any party to proceedings can apply for a CMP declaration as well as the Secretary of State (who can do so whether or not a party to the proceedings),<sup>32</sup> but it defines differently the conditions to be met, according to whether the application is made by the Secretary of State or any party to the proceedings.<sup>33</sup>

41. The Secretary of State can apply for a CMP where any party to the proceedings would be required to disclose sensitive material in the course of the proceedings. However, any other party to the proceedings who is not the Secretary of State can only apply for a CMP where that party would itself be required to disclose sensitive material in the course of the proceedings.<sup>34</sup> They cannot apply for a CMP in relation to material held by the Secretary of State. The effect of the Government's amendments to clause 6 is that where the Government seeks to have relevant material excluded under PII on national security

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28 Q89.

29 Q97.

30 First JCHR Report on the Bill, paras 47–53.

31 PBC 5 February 2013, col 197.

32 Clause 6(2).

33 Clause 6(4) and (5) of the Bill.

34 Clause 6(5)(a).

grounds, the other parties to the proceedings cannot ask for the material to be considered by the court in a CMP even if it would assist their case.

42. We asked the Minister to explain the Government’s justification for amending the Bill so as to remove the possibility of a party other than the Government applying for a CMP in relation to sensitive material which is relevant to the issues in the case but in the possession of another party. The Government’s answer is that the Bill does not provide for the claimant himself to apply for a CMP for the simple practical reason that the claimant would have difficulty demonstrating the risk to national security arising from the disclosure of information which, by definition, he has never been allowed to see.<sup>35</sup>

43. In any event, the Government says, it is of no practical consequence for two reasons. Firstly, where the Secretary of State applies for certain national security sensitive material to be excluded under PII, the judge can be relied upon to consider, of his or her own motion, whether the material in question should be considered by the court in a CMP, rather than excluded altogether, having regard to fairness for the claimant. Second, the Minister said,

As things stand at the moment, the Bill would allow the claimant to ask the court—the judge—to exercise the power, which Government amendments have now given to the judge, to order a closed material procedure of his own volition.

44. The Minister’s written response to our questions made a similar point:<sup>36</sup>

[...] we have therefore provided for the claimant to ask the court to order a CMP of its own motion. Unlike the claimant, the court will be in a position to examine the national security information and make the detailed application itself (*sic*).

45. We find the Government’s explanation both confused and confusing. It is confused because the Bill as currently drafted does not in fact provide for or allow the claimant to ask the court to order a CMP of its own motion. That would be an “application” by the claimant and the Bill, we are told, deliberately does not provide for that. It is confusing because it appears that the Government does not in fact have any principled objection to the claimant being able to ask the court for a CMP, yet the Bill does not make such provision.

46. There is also a further problem of which the Government does not seem to be aware. It asserts that the claimant’s Special Advocate would be able to ask the court to order a CMP in relation to material which assists the claimant’s case. However, this proceeds on two incorrect assumptions.

47. Firstly, it assumes that the claimant will be represented by a Special Advocate in the determination of the Government’s PII claim. While Special Advocates might normally expect to be appointed where a claim is made for PII on national security grounds, this is merely a matter of practice and expectation, rather than a requirement or rule, as the Minister himself accepts in his letter when he says that “the use of Special Advocates in PII applications is still a very rare occurrence.”

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<sup>35</sup> Q88.

<sup>36</sup> Letter from the Minister dated 18 February.

48. Second, the Government assumes that it is open to the Special Advocate to apply to the court for a CMP, not the claimant. In fact, just as the decision to appeal against a closed judgment is a decision of the party concerned not the Special Advocate, so the decision to apply for a CMP is a decision for the party not their Special Advocate. The Special Advocate is not at liberty to communicate to the excluded party the fact that material excluded under PII assists their case, because such communications require the court's permission. The Bill contains no mechanism to ensure that the other parties are aware that the excluded material would assist their case. The Bill as currently drafted therefore gives the Government a litigation advantage by preserving the Government's ability to pick and choose between a CMP and PII, without affording the same choice to claimants against the Government.

49. We are therefore unpersuaded by the Government's argument that its amendments to clause 6 of the Bill guarantee equality of arms between the Government and other parties to litigation. Under the Bill as it came from the Lords, with the amendment we had recommended, a party to civil proceedings in which the Government claims PII in respect of sensitive material would be able to apply to the court for a CMP. The effect of the Government's amendments, however, is that this will not be possible: a party other than the Secretary of State can only apply for a CMP in relation to material which it would be required to disclose, and not material which, but for PII, the Secretary of State would be required to disclose. **In our view the Government's amendment enabling all parties to proceedings to apply for a CMP does not provide for equality of arms in litigation because it would unfairly favour the Secretary of State.**

50. In our view this is a real practical problem, not merely legalistic hair-splitting or a fanciful theoretical possibility as the Minister appeared to envisage.<sup>37</sup> **Victims of torture or rendition whose claims may turn on sensitive material in the possession of the Secretary of State might prefer the option of a CMP to the exclusion of that material under PII. Under the Bill as it stands, such claimants may never know that material which assists their case has been excluded from the proceedings under PII. In this important respect, the Bill as currently drafted fails both key tests by which the Minister is content for it to be judged: it neither enhances the accountability of the security and intelligence agencies, nor does it enhance fairness in litigation. We recommend that the Bill be amended to restore equality of arms in the ability to apply for a CMP.**

51. One way of addressing this equality of arms concern would be to amend the Bill to make the condition to be satisfied the same whether the application is made by the Secretary of State or any other party to the proceedings. The following amendment would have this effect:

Clause 6(4), Page 4, line 41, leave out 'in a case where the court is considering whether to make a declaration on the application of the Secretary of State or of its own motion'

Clause 6, Page 5, line 18, leave out paragraph (5).

52. Alternatively, a mechanism could be introduced to ensure that other parties are made aware if material which would assist their case is being excluded from consideration under PII. This would require at least two changes from current arrangements. First, there would need to be a legal requirement that Special Advocates are appointed to represent the interests of the excluded party whenever PII is claimed on national security grounds. And second, it would be necessary to impose a duty on the Special Advocate to notify the party whose interests they represent that material which would otherwise be excluded under PII assists their case (without reference to the content of the material), to enable the claimant to consider whether to ask the court to order a CMP.

**53. We note that the Minister promised to reflect further on this issue, and we recommend that he consider these practical proposals as a way of ensuring equality of arms between the Government and other parties to civil proceedings in their ability to apply for a CMP.**

### Judicial balancing at the “gateway”—the *Wiley* balance

54. The Bill as it came from the House of Lords provided that one of the conditions that must be satisfied before the court can make a declaration that a CMP can be used is that the court considers that “the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice”—the so-called “*Wiley* balance.” We recommended this in our Report on the Bill in order to ensure that there is full judicial balancing of the competing public interests in play at the “gateway” stage of deciding the appropriate procedure.<sup>38</sup> The House of Lords agreed and amended the Bill accordingly.

55. The Government’s amendments remove the *Wiley* balance amendment and there is nothing in the Government’s revised clause 6 which replaces it with anything requiring the court to balance the degree of harm to the interests of national security on the one hand against the public interest in the fair and open administration of justice on the other. The Government response did not explain its reason for removing without replacing the judicial balancing condition inserted in the Bill by the Lords, so we asked the Government to explain its justification for doing so.

56. The Government’s explanation is that it considers the *Wiley* balancing test is appropriate for determining whether to take material out of consideration under PII, but is not appropriate when the court is considering whether material should be allowed to be considered by the court in a CMP. We were puzzled by the assertion that *Wiley* balancing is appropriate for one type of application (for PII) but not the other (for CMP), so we pressed the Minister for a more detailed explanation of the essential difference between the two types of application which would justify a difference of approach.

57. The Government’s response was that it did not consider the public interest in open justice to be a relevant consideration at all in cases where there is material relevant to the issues in the proceedings, the disclosure of which would be damaging to national security,

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38 First JCHR Report on the Bill, paras 54-63.

and where a CMP would be a fairer or more effective way of trying the case than not having one. In the Minister's words:<sup>39</sup>

A balancing act in those circumstances is rather odd. "Yes, this is relevant to the issues I have to decide. Yes, national security interests are involved and would be damaged if we handled this in the normal way. Yes, I think it is in the interests of the fair and effective administration of justice that we have a CMP". It seems odd to add to that the *Wiley* test. You have decided that it is relevant, national security is threatened, and fair and effective administration of justice would be served by having a CMP; then we are saying the judge applies the *Wiley* test and says, "What a pity. Never mind. It satisfies all those three tests, but for some reason I still think there are overriding interests of justice that mean I should refuse a CMP, so it is either open court or nothing".

58. The Government's amendments to the Bill have therefore replaced the *Wiley* balancing test inserted by the Lords with an alternative scheme. This, the Government says, requires a different balancing exercise which better reflects the nature of the question for the court: namely, whether a CMP would be a fairer or more effective way of trying the case than not having one. The Government believes that its balancing test is more appropriate, and it would be "odd" and "simply bad law" to have a *Wiley* balancing test in addition, if the outcome of its balancing test suggests that there should be a CMP.

59. We also asked the Minister why the Government has removed all reference to "open justice" from the face of the Bill. The Minister's answer, in effect, was that openness is not a consideration that can be relevant because once an application is made for a CMP the only issue is closed proceedings, not open justice:<sup>40</sup>

We are not talking about open justice. There would not be a problem if you could just have open justice. [There is no reference to open justice in the Bill] because it is a slight non sequitur, it seems to me. By definition, if one is forced to apply for a closed material procedure, because of the threat to national security, sadly, you are saying we have to do the second best. We are not going for open justice. If open justice overrules everything else then we are all wasting our time because it is either open or nothing.

60. The written response to our letter makes a similar point: "It would be a misnomer to require the judge to decide whether it would be in the interests of open justice for a Closed Material Procedure to be held."<sup>41</sup>

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

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39 Q90.

40 Q91.

41 Letter from the Minister dated 18 February.

62. It is highly significant, in our view, that the balancing test preferred by the Government is not a test which involves the balancing of public interests at all. The reference to “the public interest in the fair and open administration of justice” in the *Wiley* balance condition inserted by the Lords has been replaced by a test of whether it is “in the interests of the fair and effective administration of justice in the proceedings” in the Government’s amended version.

63. The question for the court on that approach is simply whether it is better that the claim is determined, with the material considered in a CMP, than not determined at all. If the court is not required or even permitted to consider the public interest in open justice when deciding whether to allow a CMP, it is difficult to envisage the circumstances in which an application for a CMP by the Secretary of State could be resisted by the court, even though on the face of it the court has a discretion as to whether to permit it.

64. As the Special Advocates’ Supplementary Memorandum points out, the *Wiley* balance ensures that one of the interests that the court weighs in the balance is the public interest in open justice,<sup>42</sup> which includes important considerations such as the media’s access to information, the desirability of government wrongdoing being exposed to public view, and holding the Government publicly to account. Without a *Wiley* balancing test, there is nothing to require the court to weigh in the balance such public interest considerations of the desirability of openness when deciding whether or not it is appropriate to order a CMP.

**65. The purpose of our recommended amendment inserting the Wiley balance into the Bill was to ensure that the court considers the public interest in the fair and open administration of justice when deciding whether to order a CMP. In our view, that purpose is not served if the Bill does not contain any express requirement that the court conduct such a balancing exercise before deciding whether to allow a CMP to be used. We recommend that the Bill be amended to delete the Government’s new condition that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration and to reinstate the Wiley balance as a precondition of a CMP. The following amendment to clause 6 of the Bill would give effect to this recommendation:**

Clause 6(6), Page 5, line 36, leave out ‘it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration’ and insert ‘the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice.’

### **Strict necessity: CMPs only as a last resort**

66. The Bill as it came from the House of Lords also made it a precondition of a CMP declaration that the court is satisfied that “a fair determination of the proceedings is not possible by any other means”, and required the court to consider whether a claim for PII could have been made in relation to the material in question. We recommended these amendments in our Report so as to ensure that a CMP is only ever permitted as a last resort, after first considering the possibility of alternatives such as PII.<sup>43</sup> The Government’s

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42 Special Advocates’ Supplementary Memorandum, paras 23–24.

43 First JCHR Report on the Bill, paras 64–68.

amendments, however, have removed this condition and replaced it with a new condition, “that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration”,<sup>44</sup> and have also removed the requirement to consider the possibility of PII.

67. The Government response explains why the Government does not accept the “last resort” amendments recommended in our Report and agreed to by the Lords. The Government recognises the strength of feeling regarding the wish to ensure that CMPs in civil cases are a last resort. It also says that it agrees with the spirit of our amendments, because its intention in legislating is that CMPs would only be used in the small number of cases where they are necessary in the interests of the fair and effective administration of justice in the proceedings.

68. However, the Government are concerned that the “last resort” amendments would have the effect of requiring the court to exhaustively consider every other option for trying the case before granting a CMP declaration, “in particular requiring a full PII exercise to be conducted first in every case.” In the Government’s view, “the judge should have the freedom to make the appropriate decision whether a CMP should go ahead, without fear of having his decision appealed for having failed to adhere to restrictive process requirements set out in statute.” It prefers a condition that CMPs should only be used where they are in the interests of the fair and effective administration of justice, and considers that such a provision would go a long way towards ensuring that CMPs are only available in those cases where they are necessary.

69. In his oral evidence to us the Minister put the matter differently.<sup>45</sup> He said that the Government did not disagree with the House of Lords at all in its insertion of a “last resort” condition into the Bill. He said that the Lords wording had been removed because they might have had the unintended consequence that it would be “argued” (possibly successfully) that the court would first have to go through the full PII process before deciding whether to order a CMP, and that this could lead to unnecessary delay and expense if the argument were accepted:

The problem with putting into the legislation things like “in the last resort” and “having exhausted every other possible way of hearing it” is that we will get people arguing that that means in every case you have to go through the full process of PII before you move on to CMP, and that you consider confidentiality rings and all kinds of other things. Particularly PII, but all of these things are either not suitable or would take months of hearings if you were not careful.

70. This is a more tentative version of the argument contained in the Government’s response to our Report identifying a concern only that there was scope for litigants to argue for exhaustive consideration, rather than that such consideration would be required in every case.

71. In our view, even the Minister’s more tentative concern is wholly misplaced when the actual wording of the last resort amendments is considered. There is nothing in the Bill as it came from the Lords which makes it remotely arguable, let alone required, that a court

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44 Clause 6(6).

45 Q94.

has to go through a full PII process in every case before deciding that a CMP is appropriate. On the contrary, the Bill expressly acknowledged that this is not necessary, by providing that before a court makes a CMP declaration it must “consider” whether a claim for PII “could” have been made in relation to the material.

72. We note that the Special Advocates in their Supplementary Memorandum also disagree with the Government’s concern that the “last resort” amendments to the Bill made in the Lords would mean that courts would have to undertake a lengthy PII process before ordering a CMP.<sup>46</sup>

Whatever procedure is adopted, courts will have to subject to careful scrutiny any material said to be sensitive on grounds of national security. Our experience of disclosure processes under statutory CMPs suggests that they are no less time-consuming than PII procedures in non-statutory proceedings. The documents have to be examined anyway. There is no reason why, having examined them, the court should not be required to consider whether the claim could fairly be tried applying PII principles. In order to reach a view about this, it should not be necessary for the court to undertake a full PII exercise, in a case where the outcome of such an exercise is obvious and inevitable.

73. In the Special Advocates’ view, a requirement that CMPs should be a last resort is “the first and most important safeguard” that the Bill should contain.<sup>47</sup> They also consider that it is essential to spell this out in terms, rather than leave it to the discretion of the judge.<sup>48</sup>

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

We agree with the Special Advocates and the Independent Reviewer that there may be cases where it may not be necessary to conduct a PII exercise, but would expect this to be rare and a decision only arrived at after careful consideration by the court in exceptional cases.

74. We recommended this amendment to the Bill, which was inserted in the House of Lords, to make sure that the court actively considers whether a claim of PII could be made in relation to the material. The intention behind these amendments was to ensure that the judge has the freedom to make the appropriate decision as to whether a CMP should go ahead, but should only do so after having first actively considered whether the proceedings could otherwise be determined fairly, including through a claim for PII. This was a significant change from the recommendation we made in our Report on the Green Paper, in which we recommended that PII should be exhausted before resort could be had to a CMP.

75. This part of the Government response therefore appears to have survived from an earlier response to our Report on the Green Paper. It misunderstands the effect of the

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<sup>46</sup> Special Advocates’ Supplementary Memorandum, para. 22.

<sup>47</sup> *Ibid.* para. 19.

<sup>48</sup> *Ibid.* at para. 21.

relevant Lords amendments to the Bill. Those clauses were designed to ensure, not that a PII process always takes place before a CMP is contemplated, but that the court is satisfied that there is no other way of the proceedings being heard, and that it considers the possibility of PII when reaching that conclusion. Contrary to the Minister's fears, the language leaves no scope for argument that a full PII exercise is required to be conducted first in every case.

76. By comparison, the Government's proposed new condition—that a CMP is in the interests of the fair and effective administration of justice—is not a test of strict necessity, and may lead to CMPs being used in cases where the proceedings could still be heard sufficiently fairly by a claim being made for PII. We note with interest the Minister's candid observation that he would not object to a reference to PII, and his apparent acceptance of the importance of considering PII as an alternative to CMPs.

**77. We do not accept the Government's reasons for removing the "last resort" amendments made to the Bill by the House of Lords, which are based on a misunderstanding of the effect of the provisions. We welcome the Government's commitment to ensuring that CMPs are only available in those cases where they are necessary. To give effect to that intention we recommend that the Bill be amended so as to reinstate the condition that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means and the requirement that the court "consider" whether a claim for PII could have been made, both of which have been removed by the Government's revised clause. The following amendments would give effect to this recommendation:**

Clause 6(3), Page 4, line 39, leave out 'two' and insert 'three'

Clause 6, Page 5, line 38, insert '(6A) The third condition is that a fair determination of the proceedings is not possible by any other means.'

Clause 6(7), Page 5, line 38, leave out 'two' and insert 'three'

Clause 6, Page 5, line 45, insert '(8A) Before making a declaration under subsection (2), the court must consider whether a claim for public interest immunity could have been made in relation to the material.'

78. In Public Bill Committee concern was expressed that the effect of one of the Government's amendments to the Bill was to preclude the possibility of "confidentiality rings" being used instead of CMPs.<sup>49</sup> A "confidentiality ring" is an arrangement whereby material which would be damaging to national security if disclosed publicly is disclosed only to parties or their lawyers, but not more widely, on the basis of undertakings about its confidentiality. Their use in relation to commercially confidential information is well established, and the Court of Appeal recently approved their use in relation to national security material. A confidentiality ring is therefore a possible alternative to a CMP. We asked the Minister whether it was the Government's intention that, before a court makes a

<sup>49</sup> The concern arises from the Government's removal from the list of conditions that must be satisfied before a CMP is permitted the condition in the original Bill that "the court considers that [...] disclosure would be damaging to the interests of national security."

declaration that the proceedings are suitable for a CMP, the court should consider whether the case is suitable for a confidentiality ring.<sup>50</sup>

**79. We welcome the Minister’s unequivocal reassurance that the Bill as it stands makes no difference to confidentiality rings, which will remain available under the Bill as they are now, and that the Government has no intention of taking away the possibility of such arrangements as an alternative to CMPs. Under the last resort condition recommended above, the court will be required to consider whether the case is suitable for a confidentiality ring rather than a CMP, as part of the court’s consideration of whether a fair determination of the proceedings is not possible by any other means.**

**80. We also welcome the express provision in the Bill of an opportunity for the court to revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins, as this should make it less likely that a CMP will be used when it is not necessary.**

**81. However, that provision is no substitute for a “last resort” condition such as that inserted by the Lords, because the test to be applied by the court on the review is whether a CMP is in the interests of the fair and effective administration of justice in the proceedings—the condition that we have recommended should be deleted from the Bill. We recommend that the Government’s new clause providing for review and revocation of a CMP declaration be amended so as to provide for revocation if the court considers that any of the preconditions for a CMP are no longer met. The following amendments would give effect to this recommendation:**

Clause 7(2), Page 6, line 29, leave out ‘the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings’ and insert ‘any of the conditions in section 6(4) to (6A) is no longer met.’

Clause 7(3), Page 6, line 33, leave out ‘the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings’ and insert ‘any of the conditions in section 6(4) to (6A) is no longer met.’

Clause 7(5), Page 6, line 41, leave out ‘a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings’ and insert ‘any of the conditions in section 6(4) to (6A) is no longer met.’

## **Judicial balancing in the CMP**

**82. In our Report on the Bill we recommended that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed and which in open session.<sup>51</sup> The Bill does not currently provide for this because the relevant amendment to give effect to this recommendation was defeated at Report Stage in the Lords and by 10 votes to 9 in Public Bill Committee in the Commons.**

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<sup>50</sup> Q98.

<sup>51</sup> First JCHR Report on the Bill, paras 69–72.

83. The Government does not accept this recommendation, for essentially the same reasons summarised above in relation to the *Wiley* judicial balancing at the gateway stage of deciding whether there should be a CMP. It considers such an exercise appropriate for PII claims, where the relevant material is excluded from consideration by the court entirely if the balance is against disclosure, but not appropriate for CMPs, where the material within the CMP is fully taken into account. There is also said to be no precedent for *Wiley* balancing in any of the 14 different contexts in which CMPs have been introduced since 1997, which have been “upheld by the courts as being fair and compliant with Article 6 ECHR”.

84. The Special Advocates, on the other hand, consider that once a CMP is ordered, and the court has to decide which documents will be “open” (ie. disclosed to all parties) and which “closed”, the court should be required to perform the *Wiley* balance between national security on the one hand and the fair and open administration of justice on the other.<sup>52</sup>

85. We are not persuaded by the Government’s justification for resisting our recommendation that the Bill be amended to provide for judicial balancing within the CMP, for the same reasons as we are unpersuaded by the Government’s reason for resisting the *Wiley* balance at the gateway stage.

86. As the Government response acknowledges, a degree of judicial balancing already takes place within a CMP, where Article 6 ECHR requires disclosure notwithstanding damage to national security. Indeed, it is only by reading a balancing requirement into the statutory language that the statutory CMP regimes have been held to be compatible with the requirements of Article 6 ECHR. This shows that there is nothing inherent in the nature of a CMP that precludes the possibility of a balancing exercise. By choosing to resist the introduction of judicial balancing into the CMP except where it is required by Article 6 ECHR, the Government is treating common law fairness as being of lesser content than the right to a fair hearing in Article 6 ECHR.

**87. We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session.** The following amendment would give effect to this recommendation:

Clause 8(1)(c), Page 7, line 18, insert ‘and that damage outweighs the public interest in the fair and open administration of justice.’

**We also look forward to a draft of the rules of court to be made under the Bill being made available for scrutiny by both Houses.**

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52 Special Advocates’ Supplementary Memorandum, paras 25–26.

## “Gisting” obligation

88. “Gisting” is the term used to describe the disclosure to the excluded party in a CMP of sufficient material to enable that party to give effective instructions to their Special Advocate who represents their interests in the closed hearings.

89. The Bill provides that rules of court governing CMPs in civil proceedings must secure that, if the court gives permission to a party not to disclose material, the court must “consider requiring” the relevant party to provide a summary of the material to every other party to the proceedings and their legal representative.<sup>53</sup> There is no provision in the Bill for an obligation on the court to require such a summary to be provided when material is allowed to go into the CMP instead of being disclosed, even if fairness requires it (for example because, in the absence of such a summary, the excluded party has no idea from open material about the case against him).

90. In this respect the Bill is the same as other statutes which establish CMPs in particular contexts. In some of those contexts, however, (control orders, TPIMs, terrorist-asset freezing orders, for example) the courts have “read in” to the statutory language an obligation to provide the excluded party with a gist of the case against him sufficient to enable him to give effective instructions to his Special Advocate, in order to comply with the requirements of the right to a fair hearing in Article 6(1) ECHR as interpreted by the European Court of Human Rights.<sup>54</sup>

91. In our Reports on both the Green Paper and the Bill we recommended that the Bill should contain an express statutory requirement that in all CMPs in civil proceedings the excluded party must be provided with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate.<sup>55</sup> We were heavily influenced in making this recommendation by the evidence of the Special Advocates that the absence from the Bill of such a gisting obligation seriously limits the opportunities Special Advocates have to mitigate the inherent unfairness caused by the Bill’s departure from the principles of open and adversarial justice.

92. We recommended amendments to the Bill to give effect to those recommendations. The amendments were tabled but not voted on at Report Stage in the Lords, and were tabled again in Public Bill Committee in the Commons but were negatived on the casting vote of the Chair after a tied vote.<sup>56</sup>

93. The Government in its response to our Report points out that “wherever it is possible and practically feasible to provide gists and summaries of national security sensitive material without causing damage they will be supplied”. However, it continues to resist the introduction of a general gisting obligation, believing that this would undesirably reduce the court’s discretion and preferring to leave the question of gisting to be decided by the courts on a case by case basis.

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53 Clause 8(1)(d).

54 In *A v UK*, as applied by the House of Lords in *AF (No.3) v Secretary of State for the Home Department*.

55 Report on the Green Paper, paras 104-106; First JCHR Report on the Bill, paras 73-77.

56 PBC 5 February 2013 cols 228-9.

94. In their Supplementary Memorandum the Special Advocates single out for special emphasis the Bill's lack of a requirement to provide the excluded party with a gist of the evidence deployed against him.<sup>57</sup> They conclude:

[...] if CMPs are considered necessary, we think that there should be a requirement in all cases to give the excluded party a sufficient gist of the case against him to enable him to give effective instructions to his Special Advocate. Without such a requirement, it would remain possible for a court to decide a case entirely or mainly on the basis of evidence which one of the parties has had no chance to challenge. We do not think that CMPs could be described as even tolerably fair without this gisting requirement.

95. The Minister in his oral evidence described himself as “very sensitive to the Special Advocates’ complaints.”<sup>58</sup> The Government, however, has so far made no concession in the Bill to one of the complaints which has consistently been made most forcibly by the Special Advocates: the lack of a gisting requirement.

96. **We agree with the Special Advocates that if there is to be a power to hold a CMP in civil proceedings, there should be an express statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. We recommend that the Bill be amended to impose a gisting obligation in all cases in which a CMP is to be held under the provisions of the Bill.** The following amendments would give effect to this recommendation:

Clause 8(1)(d), Page 7, line 20, leave out ‘consider requiring’ and insert ‘require’

Clause 8(1)(d), Page 7, line 22, insert ‘sufficient to enable the party to whom the summary is provided to give effective instructions on the undisclosed material to their legal representatives and Special Advocates.’

97. We point out that these amendments would leave untouched the current provision in the Bill that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.<sup>59</sup> If the court decided, pursuant to the new gisting obligation recommended above, that fairness demands that a summary be provided to the excluded party but that certain material cannot be included within that summary because its disclosure would be damaging to the interests of national security, the Bill already makes provision enabling the court to resolve its apparently conflicting obligations: the court will be empowered to ensure that the Secretary of State does not rely on the material which he would be required to gist if its disclosure did not damage national security.<sup>60</sup>

98. In this way, fairness to the excluded party is secured but there is no disclosure damaging to national security: the Secretary of State is simply directed not to rely on the material which he would otherwise be required to summarise. **The amendments we have**

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57 Special Advocates’ Supplementary Memorandum, paras 5–8 and 27.

58 Q92.

59 Clause 8(1)(e).

60 Clause 8(3).

**recommended therefore do not risk disclosures damaging to national security and preserve the Secretary of State's right to elect between providing a summary of material and ceasing to rely on it in the case, as is already the case where the Article 6 ECHR gisting obligation applies.**

### **Annual renewal**

**99. We also reiterate the recommendation in our first Report that the Bill provide for annual renewal, in view of the significance of what is being provided for and its radical departure from fundamental common law traditions.**

# Conclusions and recommendations

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## Background

1. We find it unsatisfactory that there may not be an opportunity for this Committee to be able to inform proper parliamentary scrutiny of Government amendments that are asserted to give effect to recommendations that we have made. We recommend that where the Government amends a Bill in response to specific recommendations from a parliamentary committee, that committee be given a reasonable opportunity to scrutinise the Government's amendments and report their views to Parliament before the amendments are debated. (Paragraph 10)

## The scope of the Bill

2. We welcome the Government's amendment of the Bill to remove the power to extend the scope of the Act by order. (Paragraph 17)
3. We welcome the Government's clarification that the CMP provisions in the Bill apply only to material the disclosure of which would be damaging to national security. We are satisfied that this lays to rest any uncertainty about whether the scope of the Bill's provisions on CMPs extends to damage to international relations. (Paragraph 20)
4. We would prefer to see the Bill amended to include an express reference to the type of material that the Intelligence and Security Committee considers would be really damaging to the interests of national security if disclosed. We recommend that the definition of "sensitive information" in clause 6(11) of the Bill be amended to confine it to the wording suggested by the ISC. (Paragraph 23)
5. We accept in principle that, if CMPs are to be available in civil proceedings before lower courts, they ought also to be available before the Supreme Court. However, we would envisage that a CMP would only be very rarely used in the Supreme Court in proceedings where a CMP was used below and where it is absolutely necessary for the determination of the issues in the appeal. We recommend that the Government make clear the sorts of circumstances in which a CMP may be appropriate in civil proceedings before the Supreme Court (Paragraph 28)

## Extension of CMPs to all civil proceedings

6. We welcome the Government's acceptance of the importance of ensuring that the decision as to whether there should be a CMP is made by an independent court and not the Government. It represents both an important change from what was proposed in the Green Paper and a significant improvement to the Bill as introduced. We also welcome the express provision of an opportunity for the court to revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins. (Paragraph 35)

7. In our view the Government's amendment enabling all parties to proceedings to apply for a CMP does not provide for equality of arms in litigation because it would unfairly favour the Secretary of State. (Paragraph 49)
8. Victims of torture or rendition whose claims may turn on sensitive material in the possession of the Secretary of State might prefer the option of a CMP to the exclusion of that material under PII. Under the Bill as it stands, such claimants may never know that material which assists their case has been excluded from the proceedings under PII. In this important respect, the Bill as currently drafted fails both key tests by which the Minister is content for it to be judged: it neither enhances the accountability of the security and intelligence agencies, nor does it enhance fairness in litigation. We recommend that the Bill be amended to restore equality of arms in the ability to apply for a CMP. (Paragraph 50)
9. We note that the Minister promised to reflect further on this issue, and we recommend that he consider these practical proposals as a way of ensuring equality of arms between the Government and other parties to civil proceedings in their ability to apply for a CMP. (Paragraph 53)
10. The purpose of our recommended amendment inserting the Wiley balance into the Bill was to ensure that the court considers the public interest in the fair and open administration of justice when deciding whether to order a CMP. In our view, that purpose is not served if the Bill does not contain any express requirement that the court conduct such a balancing exercise before deciding whether to allow a CMP to be used. We recommend that the Bill be amended to delete the Government's new condition that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration and to reinstate the Wiley balance as a precondition of a CMP. (Paragraph 65)
11. We do not accept the Government's reasons for removing the "last resort" amendments made to the Bill by the House of Lords, which are based on a misunderstanding of the effect of the provisions. We welcome the Government's commitment to ensuring that CMPs are only available in those cases where they are necessary. To give effect to that intention we recommend that the Bill be amended so as to reinstate the condition that the court is satisfied that a fair determination of the issues in the proceedings is not possible by any other means and the requirement that the court "consider" whether a claim for PII could have been made, both of which have been removed by the Government's revised clause. (Paragraph 77)
12. We welcome the Minister's unequivocal reassurance that the Bill as it stands makes no difference to confidentiality rings, which will remain available under the Bill as they are now, and that the Government has no intention of taking away the possibility of such arrangements as an alternative to CMPs. Under the last resort condition recommended above, the court will be required to consider whether the case is suitable for a confidentiality ring rather than a CMP, as part of the court's consideration of whether a fair determination of the proceedings is not possible by any other means. (Paragraph 79)

13. We also welcome the express provision in the Bill of an opportunity for the court to revisit its decision to allow a CMP at the point when it has seen all the material, open and closed, before the trial of the issues begins, as this should make it less likely that a CMP will be used when it is not necessary. (Paragraph 80)
14. The provision allowing the Court to revisit its decision to allow a CMP is no substitute for a “last resort” condition such as that inserted by the Lords, because the test to be applied by the court on the review is whether a CMP is in the interests of the fair and effective administration of justice in the proceedings—the condition that we have recommended should be deleted from the Bill. We recommend that the Government’s new clause providing for review and revocation of a CMP declaration be amended so as to provide for revocation if the court considers that any of the preconditions for a CMP are no longer met. (Paragraph 81)
15. We recommend that the Bill be amended to ensure that a full judicial balancing of interests always takes place within the CMP, weighing the public interest in the fair and open administration of justice against the likely degree of harm to the interests of national security when deciding which material should be heard in closed session and which in open session. (Paragraph 87)
16. We also look forward to a draft of the rules of court to be made under the Bill being made available for scrutiny by both Houses. (Paragraph 90)
17. We agree with the Special Advocates that if there is to be a power to hold a CMP in civil proceedings, there should be an express statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate. We recommend that the Bill be amended to impose a gisting obligation in all cases in which a CMP is to be held under the provisions of the Bill. (Paragraph 96)
18. The amendments we have recommended do not risk disclosures damaging to national security and preserve the Secretary of State’s right to elect between providing a summary of material and ceasing to rely on it in the case, as is already the case where the Article 6 ECHR gisting obligation applies. (Paragraph 98)
19. We also reiterate the recommendation in our first Report that the Bill provide for annual renewal, in view of the significance of what is being provided for and its radical departure from fundamental common law traditions. (Paragraph 99)

# Formal Minutes

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**Tuesday 26 February 2013**

Members present:

Dr Hywel Francis, in the Chair

Rehman Chishti

Rt Hon Simon Hughes

Mr Virendra Sharma

Baroness Berridge

Lord Lester of Herne Hill

Baroness Lister of Burtersett

Baroness O'Loan

Draft Report (Legislative Scrutiny: Justice and Security Bill (second Report)), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 99 read and agreed to.

Several papers were appended to the Report.

*Resolved*, That the Report be the Eighth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 22 January and 5 February was ordered to be reported to the House.

[Adjourned till Wednesday 27 February at 3.00 pm]

## Declaration of Lords' Interests

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No members present declared interests relevant to this Report

A full list of members' interests can be found in the Register of Lords' Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

## List of written evidence

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# Written evidence

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## 1. Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Minister without Portfolio, Cabinet Office

I am grateful to the Joint Committee on Human Rights for their detailed report on the Justice and Security Bill. As I explained during Second Reading, shortly before Christmas, we are in the process of carefully considering the conclusions and recommendations made by the Committee as well as the significant changes made to the Bill in the Lords. Given the complexities and sensitivities of the issues at stake in this Bill, I hope the Committee will understand my desire to consider all the issues thoroughly and publish a full Government response. It is with regret that I am not in a position to respond in full to the Committee's report at this time; however I intend to do so very shortly, and before Committee Stage on the Bill commences.

Clearly the Bill deals with some extremely important and difficult issues, which the Supreme Court has asked Parliament to provide a view on. The Government has never claimed that Closed Material Procedures are ideal, but in very difficult and exceptional circumstances where national security is at stake, they offer a means to deliver justice where otherwise there would be none. It is vital that our courts have the tools to enable them to effectively oversee the full range of Government activity.

The Committee's report is an important contribution to the debate about how to frame those powers. I was pleased to be able to announce at Second Reading that the Government has accepted that there should be much greater discretion for the judge about whether and when a declaration for a CMP should be issued. The decision must be for the judge but any party will be able to apply for a CMP—not just the Secretary of State. We must ensure that we do not unintentionally fetter the judge's powers and discretion by over-prescribing process in the final wording of the Bill. I genuinely do not believe that there is now any significant difference of principle on these issues between the Government and your Committee. The Government also tabled amendments in the House of Lords in response to the Committee's recommendation to remove from the Bill the order-making power that would have enabled CMPs to be extended to other civil proceedings. The remainder of the Committee's drafting recommendations require further detailed thought before the Government is in a position to respond in full.

I appreciate the Committee's recognition of the need to reform the Norwich Pharmacal jurisdiction, which currently allows someone with no connection to the UK fighting a court case on the other side of the world to apply to a British court for sensitive information, the disclosure of which would be damaging to national security or international relations, which either belongs to the UK, or has been provided to us by our allies. No other country in the world allows this to happen. In the UK we are already seeing the consequences of the recent extension of this jurisdiction to the national security context, in terms of the damage to our intelligence-sharing relationships. We need robust legislative measures to restore the confidence of both our international partners and our agents that we can protect the material they share with us in confidence.

Together with the changes in Part 1 of the Bill, which seeks to make the intelligence services more accountable to Parliament for their actions, I believe that this Bill will significantly improve our Parliamentary and judicial scrutiny of the work of the intelligence services, whilst protecting our sensitive material and intelligence-sharing relationships, thus enabling both justice and security.

Thank you again for the Committee's scrutiny of the Bill.

*11 January 2013*

## 2. Letter from the Chair, to Rt Hon Kenneth Clarke QC MP, Minister without Portfolio, Cabinet Office

The Joint Committee on Human Rights is grateful for the Government's response to its legislative scrutiny Report on this Bill.

It regrets, however, that the Government's amendments to the Bill were not published until 29 January, on the eve of the Bill's committee stage. The Committee's Report was published on 13 November 2012 and the House of Lords amendments to the Bill were made at Report stage in that House on 19 November. Publication of the Government's amendments to coincide with the Public Bill Committee's consideration of the Bill does not provide a proper opportunity for the Committee to scrutinise the Government's amendments and report its views to the House.

This is particularly regrettable when the purpose of the Government's amendments is to remove from the Bill some of the significant amendments made by the House of Lords on the recommendation of the Committee and to substitute different amendments which the Government says are intended to reflect the Committee's recommendations. In the interests of proper scrutiny, the House of Commons should have the benefit of the Committee's views as to whether the Government's amendments do in fact give effect to the Committee's recommendations as the Government asserts. The Committee welcomes some aspects of the Government's amendments but wishes to ask you some detailed questions about certain other aspects of the amendments and to report again to both Houses in the light of your response, but the earliest it can consider such a draft report is on 26th February.

**Q1: Can the Committee have an assurance from the Government that the Bill's Report stage will not be scheduled until the Joint Committee on Human Rights has reported to the House its views about the Government's amendments, which it intends to do before the end of February?**

*Equality of arms in the ability to apply for a CMP*

Under the Bill as it came from the Lords, a party to civil proceedings in which the Government claims PII in respect of sensitive material would be able to apply to the Court for a CMP. The effect of the Government's amendment to clause 6 is that this will not be possible: a party other than the Secretary of State can only apply for a CMP in relation to material which it would be required to disclose, and not material which, but for PII, the Secretary of State would be required to disclose.

**Q2: What is the Government's justification for amending the Bill so as to remove the possibility of a party other than the Government applying for a CMP in relation to sensitive material which is relevant to the issues in the case but in the possession of another party?**

**Q3: Please explain precisely what is meant by the "declaration obligations" which a party is required to satisfy in order to make an application for a CMP, as referred to by the Parliamentary Under-Secretary of State for the Home Department, James Brokenshire MP, in the Public Bill Committee.<sup>1</sup>**

**Q4: Is it the Government's intention that, in civil proceedings in which it applies for PII in respect of sensitive material, no other party to the proceedings should be entitled to apply to the court for a CMP in respect of the same material?**

*Judicial balancing at the "gateway"*

The Committee welcomes the Government's acceptance of the court having a discretion as to whether there should be a CMP. However, the House of Lords agreed with the Committee's view that the Bill should ensure that there is full judicial balancing of the competing public interests in play at the "gateway" stage of deciding the appropriate procedure. The House of Lords accordingly amended the Bill to make it a precondition of a CMP declaration that the court considers that "the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice"—the so-called "Wiley balance". The Government's new clause 6 removes the judicial balancing condition and contains no replacement. The Minister told the Public Bill Committee that the Government's view is that the Wiley balancing test is about the court's decision-making on whether to take material out of

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<sup>1</sup> PBC 31 January 2013 col 133.

consideration under PII, and is not appropriate for when the court is considering whether material should be allowed to be considered by the court.<sup>2</sup>

**Q5: What is the Government's justification for removing from the Bill the judicial balancing condition inserted by the House of Lords?**

**Q6: Please explain in more detail the reasons for the Government's view that the Wiley balancing exercise is appropriate for determining whether material should be excluded under PII but not appropriate for determining whether there should be a CMP.**

**Q7: What is the Government's justification for removing from the Bill any reference to the fair and open administration of justice?**

*CMPs only as a last resort*

The Committee welcomes in principle the idea behind the Government's new clause requiring the court to keep a CMP declaration under review and enabling it to revoke the declaration if it considers it is no longer necessary. However, the effect of the Government's amendments appears to be to lower the threshold of what is "necessary". The House of Lords amended the Bill to make it a precondition of a CMP declaration that the court is satisfied that "a fair determination of the proceedings is not possible by any other means", as recommended by the Committee as a safeguard to ensure that CMPs are only ever used as a last resort. The Government's amendments would remove this condition and replace it with a new condition, "that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration." The Government's amendments also remove the Lords amendment which requires the court actively to "consider" whether a claim for PII could be made in relation to the material.

The Government's justification for removing the "last resort" condition inserted by the Lords is that it would have the effect of requiring the court to conduct a full PII exercise in every case.

**Q8: Please explain why the Government considers that the effect of the "last resort" condition inserted by the House of Lords is to require a full PII process to be conducted in every case, in the light of the requirement in clause 6(6) of the Bill that the court merely "consider" whether a claim for PII could have been made in relation to the material?**

**Q9: Does the Government accept in principle that CMPs should only be used where a fair determination of the proceedings is not possible by any other means?**

In addition to the questions above which arise directly from the Government's amendments to the Bill tabled for Committee stage in the Commons, I would be grateful for your response to the following questions which arise from the Government's response to the Committee's Report.

*Definition of material disclosure of which would damage national security*

The Government rejected the Committee's recommendation that the Bill should define the types of material that would damage the interests of national security by including the definition suggested by the Intelligence and Security Committee. The Government criticises the language suggested by the ISC for being too narrow.

**Q10: Has the Government asked the Intelligence and Security Committee whether it agrees that its suggested definition of the type of material that would be damaging to national security if disclosed would make the scope of the legislation too restrictive?**

*Availability of CMPs in Supreme Court*

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2 PBC 31 January 2013, col 129.

The Bill provides for CMPs to be available in proceedings before the Supreme Court as a result of a Government amendment introduced at Report stage in the House of Lords, after the Committee had reported on the Bill.

**Q11: Was the President of the Supreme Court consulted about adding the Supreme Court to the list of courts in clause 6(9) of the Bill in which CMPs are to be made available and, if so, what was his view?**

**Q12: Why does the Government consider it necessary to provide for closed material procedures before the UK's highest court, the function of which is to decide questions of law of general public importance?**

**Q13: Can the Government provide any examples of CMPs being used in the Supreme Court (or its predecessor the Judicial Committee of the House of Lords), the European Court of Human Rights, or any country's highest court?**

In view of the Committee's desire to report before Report stage, it would be helpful to receive your reply by 19 February 2013.

I look forward to hearing from you.

*5 February 2013*

### **3. Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Minister without Portfolio, Cabinet Office**

Thank you for your letter requesting some more information about the amendments which the Government tabled last week.

I would very much like to come and discuss these questions, as well as any others that may occur to you, with your Committee.

I gather that you are in fact holding a meeting this Tuesday. I would be prepared to make myself available at short notice to come to that, if you are willing.

*11 February 2013*

### **4. Letter to the Chair, from Rt Hon Kenneth Clarke QC MP, Minister without Portfolio, Cabinet Office**

Thank you for your letter of 5<sup>th</sup> February relating to the Justice & Security Bill and for allowing me to give evidence in person before you at such short notice. I hope members found this useful. I thought it would be useful to follow up in writing on your detailed questions.

**Q1. Can the committee have an assurance from the Government that the Bill's Report Stage will not be scheduled until the Joint Committee On Human Rights has reported to the house its views about the Government amendments, which it intends to do before the end of February**

The Committee has made a valuable input by reporting both on the Bill and also on the Green Paper that preceded it. I am not in a position to make a firm commitment on when Report Stage will take place. Scheduling remains a matter for the Business Managers.

**Q2. What is the Government's justification for amending the Bill so as to remove the possibility of a party other than the Government apply for a CMP in relation to sensitive material which is relevant to the issues in the case but in the possession of another party.**

This is quite simply because we cannot envisage a situation in which a claimant could be in a position to have the detailed knowledge of national security sensitive evidence that they would require in order to apply for a

CMP. For that quite practical reason we have therefore provided for the claimant to ask the court to order a CMP of its own motion. Unlike the claimant, the court will be in a position to examine the national security evidence and make the detailed application itself.

In the evidence session, Baroness Kennedy and Lord Lester both raised the example of a situation where a Special Advocate involved in determining a PII claim saw material that would assist the claimant, but would not be able to apply for a CMP. They were concerned that the court would not realise the significance of the material and would not think to order a CMP in those circumstances.

The use of special advocates in determining PII claims is still a very rare occurrence, but clearly, in a case where a Special Advocate was appointed, there would be nothing to stop him or her drawing the significance of the material to the court's attention and asking the Court to exercise its discretion to order a CMP.

Moreover, unless the PII claim was being made *ex parte*, the other party's open legal representatives would still be able to make submissions to the court that a CMP would be both fairer and more appropriate than permitting the evidence to be excluded via PII. The court would be bound to attach serious weight to any such submissions, whether made by the Special Advocate or by the other party's open legal representatives.

However, I promised to reflect further on this issue, and will do so.

**Q3. Please explain precisely what is meant by the “declaration obligations” which a party is required to satisfy in order to make an application for a CMP, as referred to by the Parliamentary Under-Secretary of State for the Home Department, James Brokenshire MP in the Public Bill Committee.**

The Bill is clear that any application for a CMP would need to persuade the court that the three distinct parts to the test for a CMP were satisfied:

- Firstly, that **material that could damage the interests of national security is relevant and would therefore have to be disclosed during the case.** The judge would base his assessment on a representative sample of evidence relating to the case.
- Secondly, **the nature of the damage that would be caused to the interests of national security if it were to be disclosed,** so that the court can assess whether the national security concerns are genuine ones; and
- Thirdly, whether a CMP would be in the **interests of the fair and effective administration of justice** in the proceedings. The questions the judge would take into account on this point would include the relevance of the sensitive material to the issues in the case, whether all parties consented to a CMP, the existence of material such as intercept material (which can only be dealt with in a CMP), whether alternatives to a CMP would enable the case to be effectively tried without damaging the interests of national security.
- Finally, the court would have to be persuaded to exercise the wide discretion to order a CMP that the Government's amendments now give it.

While claimants may be able to make submissions to the court on the third of these questions without having seen the detailed sensitive material, they would not be in a position to make detailed submissions to the court on the first two questions, nor would they be able to provide a sample of sensitive material they do not hold.

**Q4. Is it the Government's intention that in, civil proceedings in which it applies for PII in respect of sensitive material, no other party to the proceedings should be entitled to apply to the court for a CMP in respect of the same material.**

No, we have also provided for the court to order a CMP of its own volition. See the answer to Question 2.

**Q5. What is the Government justification for removing from the Bill the judicial balancing condition inserted by the House of Lords?**

The Government has replaced the judicial balancing consideration inserted by the House of Lords with an alternative scheme that it believes provides clear but rigorous conditions for the court to consider an application against. As explained in answer to Question 3 under the Government's amendments it will be open to the judge to consider all the factors relevant to whether or not a CMP is the right way of trying the issues in the case. He can set competing interests against each other in whatever way he thinks is most sensible in each particular case. It is simply bad law to provide that having set these interests against each other, the judge must then conduct another slightly different balancing exercise in his mind.

**Q6. Please explain in more detail the reason for the Government's view that the *Wiley* balancing exercise is appropriate for determining whether material should be excluded under PII but not appropriate for determining whether there should be CMP.**

The Wiley balance is appropriate for PII as the judge when considering a PII application must decide whether or not to exclude the material from being considered at all. In this context it is appropriate for him to consider whether the damage that would be caused by disclosure outweighs the public interest in it being taken into account in the case. Excluding highly relevant material from consideration can have a significant effect on the proceedings when that material might assist either the claimant's or the defendant's case, so it is right that it is not a step that is taken lightly.

The question that the judge must consider in a CMP application is a different one. In these circumstances, the judge is being asked whether to include, rather than exclude, relevant material from the proceedings. If a CMP is granted, all the evidence is considered and the CMP is capable of providing procedural fairness. The Government believes that the question for the court should therefore be a different one: whether a CMP would be a fairer or more effective way of trying the case than not having one. In this way, the court is focused on the circumstances of the particular case but has the discretion to consider a wide range of relevant factors in order to decide this.

**Q7. What is the Government's justification for removing from the Bill any reference to the fair and open administration of justice?**

The new clause 6 refers to the "fair and effective administration of justice". It would be a misnomer to require the judge to decide whether it would be in the interests of open justice for a Closed Material Procedure to be held. Having said that the desirability of "open justice" in every case where it is possible one aspect of fairness, so it is an integral part of the Government's new test.

**Q8. Please explain why the Government consider that the effect of the "last resort" condition inserted by the House of Lords is to require a full PII process to be conducted in every case, in light of the requirement in clause 6(6) of the Bill that the court merely "consider" whether a claim for PII could have been made in relation to the material?**

Both the obligation on the court not to order a CMP unless the case could not be tried by other means, and the requirement for the court to "consider" PII would have the effect of requiring the court to go through a PII exercise in every case.

Firstly, an obligation on the court not to order a CMP unless the case could not be tried by other means would clearly invite the court to exhaustively try all other options first. Only if those were insufficient could it then order a CMP, even if it had been apparent to it from the start that a CMP was the fairest and most effective way of trying the issues in the case.

Secondly, the requirement for the court to "consider" whether a claim for PII could have been made would also require the conduct of a PII exercise in every case. In a claim for PII, the Secretary of State is under a duty to make a claim for sensitive material, and the court's role is to adjudicate on that claim. Unless a claim is made, the court would not be aware of the nature of the material, or the damage that would arise from disclosure, and would not be able to take the balancing test. The only way the court could "consider" the question of PII would be by requiring the Secretary of State to make a full PII claim.

I know Robert Buckland MP asked whether the reference to merely “considering” PII would prevent the court having to exhaust PII in every case. In my view it would not, for the reasons I have outlined. It seems to me there would be scope for claimants to argue that PII should be exhausted for that requirement to be fulfilled. I think that confusion would be unhelpful.

At the root of the points made about ensuring CMPs are a last resort is a concern about potential over-use of CMPs. The Government amendments tackle this in a different way:

- there can only be a CMP if it is in the interests of the fair and effective administration of justice in the proceedings;
- even then, the judge has a discretion about whether or not to grant a CMP;
- the judge must keep the CMP under review and has the power to revoke it at any point; and
- the judge must revoke a CMP after the pre-trial disclosure exercise—once he has seen all the relevant material in the case, decided what must be in closed and what must be disclosed, considered summaries and gists, and decided what Article 6 requires—if one is no longer in the interests of the fair and effective administration of justice in the proceedings.

Together, those safeguards should ensure CMPs are not over-used.

**Q9. Does the Government accept in principle that CMPs should only be used where a fair determination of the proceedings is not possible by any other means?**

I only want CMPs to be used for that small category of cases that hinge on sensitive national security information where it is in the interests of the fair and effective administration of justice, and where that continues to be the case throughout the proceedings.

Baroness Kennedy and Lord Lester both questioned me during the evidence session about the desirability of a claimant being able to ask for a CMP rather than a PII. It therefore seems to me that they must agree with me that there are some circumstances in which a CMP can be fairer than a PII.

I remain concerned that seeking to write the aim of considering every alternative into the Bill will require resource intensive processes to be followed in every case—even if they were not sensible, proportionate or in the interests of justice.

**Q10. Has the Government asked the Intelligence and Security Committee whether it agrees that its suggested definition of the type of material that would be damaging to national security if disclosed would make the scope of the legislation too restrictive?**

The Government approached the Secretariat to the Intelligence and Security Committee (ISC), who confirmed that the Government understanding of the Committee's Annual Report 2011–2012 was correct. In relation to Norwich Pharmacal, the ISC's Annual Report expressed concerns that the proposals in the Green Paper did not go far enough in terms of our ability to protect foreign Intelligence material, and recommended that there should be a statutory presumption against the disclosure of intelligence material, which would have the advantage of providing a clear indication to judges of Parliament's Intentions in relation to such material.

The Bill as currently drafted achieves its aims and also meets the concerns mentioned in the ISC report. The Government believes that confining the definition of sensitive information worthy of statutory protection to the two narrow categories would be too restrictive. It would not provide the certainty we are seeking to legislate for, and therefore would not restore the confidence of our intelligence-sharing partners.

**Q11. Was the President of the Supreme Court consulted about adding the Supreme Court to the list of courts in clause 6(9) of the Bill in which CMPs are to be made available and if so, what was his view?**

The Ministry of Justice discussed the matter with UKSC Officials. The Supreme Court Justices did not consider it necessary or appropriate to comment.

**Q12. Why does the Government consider it necessary to provide for closed material procedures before the UK's highest court, the function of which is to decide questions of law and general public importance?**

The Government became concerned that omitting the UK Supreme Court from the list of courts in which the CMP provisions of the Bill can apply would mean that the lower courts would be able to rely on the procedures set out in the Bill but not the highest court of the land for civil cases. This would risk defeating one of the main objectives for extending the use of CMPs to civil proceedings, namely to empower higher courts to consider sensitive material which would otherwise have to be excluded altogether under an application for public interest immunity. It is likely that once Parliament enacts the Bill, the early uses of the procedure in the High Court will be appealed, and it seems probable that such appeals will make their way to the UK Supreme Court. Putting beyond doubt that the UK Supreme Court can apply the Bill's CMP provisions will avoid the situation of the highest court in the land not being able to adopt the same procedures adopted in the lower courts.

The UK Supreme Court hears appeals on points of law of public importance. However, the factual material may be relevant in proceedings before the UK Supreme Court.

**Q13. Can the Government provide any examples of CMPs being used in the Supreme Court (or its predecessor the Judicial Committee of the House of Lords), the European Court of Human Rights, or any country's highest court?**

The inclusion of the UK Supreme Court in clause 6 of the Bill was aimed at addressing the concerns identified above. The main concern is to ensure that the closed procedures under the Bill are available to that court. However, a closed procedure for the UK Supreme Court is not unprecedented. Rule 27 of the UK Supreme Court Rules already contains a procedure under which the UK Supreme Court may sit in private for part of an appeal hearing if this is in the public interest. This includes a power to exclude a party or that party's representative from the hearing or part of the hearing to secure that information is not disclosed contrary to the public interest, provided a special advocate is appointed (Rule 27(2)). Accordingly, the UK Supreme Court already has rules which set out a form of closed procedure. The inclusion of the UK Supreme Court in the Bill means that the specific closed procedure set out in the Bill will be available to the UK Supreme Court.

The Government is not aware of a UK Supreme Court case in which the court has used Its rule 27 procedure. It is however aware of a case where the possibility is presently being considered by the court Given that this is an ongoing case, it is not appropriate for the Government to comment further on it. Nevertheless, what can be said is that at the time of the creation of the Supreme Court Rules it was thought desirable to include in those rules provision setting out a type of closed procedure.

It is my belief that with the changes made the measures will increase both Parliamentary and judicial scrutiny of our Security and Intelligence Agencies, giving the public greater confidence in the vital work they carry out to protect this nations' security.

*18 February 2013*

## **5. Supplementary written evidence from Special Advocates<sup>1</sup>**

### **Introduction**

1. A group comprising nearly all Special Advocates with substantial experience of the role has previously commented on the proposals in the Green Paper and on the Bill as presented to the House of Lords.

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<sup>1</sup> The signatories to this memorandum comprise almost all currently active Special Advocates. Of those who have not signed none has expressed disagreement. Because of the need to produce this memorandum quickly, after the Committee stage of the Bill, it was not circulated to the entire body of counsel authorised to act as Special Advocates.

Individual special advocates have also given evidence in relation to the Bill to the Joint Committee on Human Rights on separate occasions.<sup>2</sup> Since then, the Bill has been amended in the House of Lords and, again recently, in the Public Bills Committee of the House of Commons.

2. We now submit this further memorandum, first to reaffirm our view that no compelling justification for the proposals in Part 2 of the Bill has been made out, notwithstanding the **Government's assertions to the contrary; and second** to comment on some of the recent amendments.

3. As previously, these views are given from our perspective as practising Special Advocates with extensive experience of closed material procedures (CMPs) in the various statutory contexts in which they currently operate. Independently of our role as Special Advocates, we also have substantial collective experience of acting as counsel in civil claims both for and against the Government.

### **CMPs are inherently unfair**

4. We have made very clear in our previous submissions that we consider CMPs to be inherently unfair and contrary to the common law tradition, because they allow the court to make its decision based on evidence which one party is unable to see or comment on or challenge.

5. We do not need to repeat what we have said before. But there is one point which deserves to be emphasised. It concerns the requirement to give the excluded party a “gist” of the evidence deployed against him. This requirement is imposed in certain cases by virtue of Article 6 of the European Convention on Human Rights. But in other cases, the Supreme Court has held that Article 6 does not require the provision of any “gist” whatsoever.<sup>3</sup> In these cases, there is no overriding requirement to tell the excluded party anything at all about the case against him.

6. The Government's stance in recent litigation indicates that it will seek to argue that the requirement to give a “gist” of the closed material is limited to a very narrow category of case where it is seeking to detain individuals or subject them to severe restrictions on liberty. If this stance is accepted by the domestic and European courts, it is quite possible that, in the majority of civil claims subject to a CMP, there will be no “gisting” requirement at all.

7. In this connection, it is important to emphasise that the requirement in clause 8(1)(d) to provide the excluded party with a “summary” of the closed material is subject to clause 8(1)(e), which provides that the summary must not contain material the disclosure of which would be damaging to national security. What this means is that it will be possible to have proceedings in which the court's decision is based entirely on evidence about which one of the parties has been told nothing at all.<sup>4</sup>

8. As we have said before, reforms with this effect would have to be very compellingly justified.

### **No case for CMPs**

9. The Government has repeatedly asserted the necessity for the measures in Part 2 of the Bill and claimed that, without them, the existing rules governing exclusion of sensitive material—public interest immunity or “PII”—mean that it has been or will be obliged to settle cases, paying large sums of money to undeserving claimants.<sup>5</sup>

2 Justice and Security Green Paper: Response from Special Advocates, 16 December 2011; Oral evidence to the JCHR of Angus McCullough QC and Jeremy Johnson QC, 31 January 2012; Special Advocates' Memorandum to the JCHR, 14 June 2012, Oral evidence to the JCHR of Angus McCullough QC and Martin Chamberlain, 26 June 2012; Letter to the JCHR from Angus McCullough QC and Martin Chamberlain, 2 October 2012

3 *Tariq v Home Office* [2012] 1 AC 452.

4 There are already cases like this in the Special Immigration Appeals Commission. One prominent one is *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110.

5 See e.g. the Foreword by the Rt Hon Kenneth Clarke to the HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill: “There is no doubt that the Justice and Security Bill is absolutely necessary. We find ourselves faced with an ever increasing number of

10. As we have previously stated, we do not accept this purported justification for the introduction of CMPs across all civil proceedings. Under existing law, in any case where the exclusion of sensitive material means that the Government cannot fairly defend itself, it is open to the Government to apply to strike the case out.<sup>6</sup> The unfairness to the claimant of cases being struck out in this way was identified in the Green Paper as part of the rationale for the expansion of CMPs.<sup>7</sup>

11. If, as the Government suggests, there were really a substantial number of cases where sensitive evidence made a fair trial impossible, one would expect there to have been a substantial number of applications to strike claims out on that basis, especially if the alternative was paying large amounts of taxpayers' money to undeserving claimants. In that regard, we find it striking that (as far as we are aware) there is no case involving material that is sensitive for reasons of national security in which the Government has ever sought to have the case struck out on the basis that it could not be fairly tried.

12. The one case in which the principle was established—*Carnduff v Rock*— was not a national security case. It was a case about a police informer claiming money said to be due to him from his handlers. The group of claims by former inmates at Guantanamo Bay (the *Al Rawi* litigation) did involve some evidence whose disclosure it was said by the Government would have been damaging to national security. Those cases were settled at great expense to the taxpayer, but no strike out application was made.<sup>8</sup> The implication must be that the Government recognised that the Court would consider that a fair trial of the issues would have remained possible, even after the application of the PII rules, and so an application to strike out the claims would not have succeeded.<sup>9</sup>

13. It is, therefore, right to say that there is to date no example of a case in which a fair trial has been shown to be impossible because of the application of existing rules to sensitive national security evidence. The case for this fundamental reform to our justice system therefore rests solely on what the Government says about pending cases involving sensitive national security evidence.

14. In response to a request from the JCHR, the Government has said this about pending cases:

“As of 31 October 2012, there were 20 live civil damages claims (including those stayed and at pre-action stage) in which sensitive national security information was centrally relevant. A number of these cases relate to several individuals.”<sup>10</sup>

These presumably include the three cases shown to David Anderson QC, the Independent Reviewer of Terrorism Legislation.

15. We note that it is not said is that it would be impossible for any of these cases to be tried fairly using existing procedures. If it were impossible for these cases to be tried fairly, we would expect the Government to apply to strike them out. We note that no such application has in fact been made.

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cases which cannot be properly adjudicated by the Courts. It also means the taxpayer is liable for substantial amounts of money in cases which the Government has not been able to defend.”

6 *Carnduff v Rock* [2001] 1 WLR 1786.

7 At §1.36 of the Green Paper, the Government said this: “The Supreme Court in *Al Rawi* did acknowledge that there could be cases that could not be tried at all consistent with the public interest. Although the approach taken in *Carnduff* remains an option that is open to the courts in England and Wales, the Government favours having as many cases as possible tried fully and fairly. To this end, the availability of a CMP in cases involving sensitive information would allow sensitive information to be considered by a court in a manner that is consistent with the public interest.”

8 Also, as we have previously noted, the Government chose to settle these claims before the Supreme Court had determined whether a CMP could be imposed under the common law, so at the time of settlement there remained a live possibility of a CMP being found to be available to the Government yet it nevertheless chose to settle the claims.

9 The same applies to the three further cases which the Government indicates that it has settled, which are referred to in the Government's Response to the Joint Committee on Human Rights, referenced in fn 9.

10 HM Government Response to the Joint Committee on Human Rights Fourth Report of Session 2012-13: Legislative Scrutiny: Justice and Security Bill, January 2013.

16. The Government has—rightly—never sought to suggest that the proposals in Part 2 of the Bill are impelled by a concern to protect sensitive information: such information is properly protected by the PII rules under the present system. The justification for the proposals is based squarely on considerations of fairness. For reasons set out above, we consider that it has not been shown in practice that the present system has led to any unfairness, as no case has been identified which could not be tried fairly under existing procedures. To the extent that there is any unfairness in principle, it is claimants, and not the Government, who bear the risks of such unfairness. It is they who risk their claims being struck out if they cannot be tried fairly under existing procedures.

17. We therefore remain of the view we previously expressed:

“that CMPs are inherently unfair and contrary to the common law tradition; that the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists.”<sup>11</sup>

### **If CMPs are introduced, they should be a last resort**

18. We recognise that some eminent people, including David Anderson QC, have concluded—contrary to our own view—that there is a case for CMPs in a narrow and exceptional category of cases. We have accordingly tried to address what safeguards we think are necessary if they are to be introduced.

19. The first and most important safeguard is that CMPs should be a last resort. The power to trigger them should, in our view, be exercisable only where a fair determination of the proceedings is not possible by any other means. This would limit the use of CMPs to the exceptional cases which, in the Government’s view, justify their introduction in the first place: cases where a fair determination is simply not possible using existing procedures.

20. The Government’s position on this, as we understand it, is that it is not necessary to spell this out legislatively: it is sufficient to give judges a broad discretion whether to order a CMP and leave it to them whether to exercise it in a particular case.

21. We disagree. If the true intention behind these reforms is to cater for the narrow and exceptional category of cases that cannot be tried using existing procedures, we can see no reason why CMPs should be available in a case which can be fairly tried under existing procedures. Moreover, we think it is essential to spell this out in terms. If it is not spelled out, there is a risk that the court will not address its mind to the question whether the case could be tried fairly under existing procedures. There is a risk that CMPs will become the default option and that what was justified as an exceptional procedure will come to be accepted as the norm.

22. The Government has suggested that spelling out that CMPs are a last resort would mean that courts would have to undertake a lengthy PII process before ordering a CMP. Again, we do not agree. Whatever procedure is adopted, courts will have to subject to careful scrutiny any material said to be sensitive on grounds of national security. Our experience of disclosure processes under statutory CMPs suggests that they are no less time consuming than PII procedures in non-statutory proceedings. The documents have to be examined anyway. There is no reason why, having examined them, the court should not be required to consider whether the claim could fairly be tried applying PII principles. In order to reach a view about this, it should not be necessary for the court to undertake a full PII exercise, in a case where the outcome of such an exercise is obvious and inevitable.

### **Balancing national security against fairness**

23. When considering whether to uphold a claim for PII, the courts are required to balance two competing interests: on the one hand, national security and, on the other, the fair and open administration of justice. This is known as the Wiley balance.<sup>12</sup> This is a very important feature of the existing rules. When the Government

<sup>11</sup> See SAs’ response to the Green Paper consultation of 16.12.11 and the SAs’ Memorandum to the JCHR of 14.6.12 (full references and links at footnote 2 above).

<sup>12</sup> *R v Chief Constable of the West Midlands ex p. Wiley* [1995] 1 AC 274.

assesses that disclosure of a particular piece of evidence would damage the interests of national security, judges usually accept that assessment and exclude the evidence from consideration in the proceedings. But the final decision is for the court. So, for example, if the Government tries to withhold a document which tends to show that they have been guilty of serious wrongdoing, whilst at the same time denying that very wrongdoing, the court may be sceptical. It may say that the damage to national security would be slight and the relevance of the document to the proceedings very great. Balancing these interests, the court might decide to reject the PII claim, thereby exposing wrongdoing by the Government.

24. In a CMP, as envisaged by the Bill, no such power is given to the courts. When deciding whether to order a CMP, there is no obligation on the court to consider the public interest in the fair and open administration of justice. We think this is wrong. We would favour an express requirement that, before ordering a CMP, the court should have to balance the degree of harm to national security that would be caused by disclosure of particular documents against the damage that a CMP would cause, in the circumstances of the case, to the public interest in the fair and open administration of justice.

25. Likewise, once a CMP is ordered, when the court decides which documents should be “open” (ie disclosed to all parties) and which “closed”, we think that the court should be required to perform the Wiley balance between national security on the one hand and the fair and open administration of justice on the other.

26. Take a case where a soldier (or his family) is suing the MOD for negligence in failing properly to equip him. The court might conclude that disclosure of documents relating to the equipment in question pose a very minor risk to national security. As the Bill stands, a judge would have no option but to order that these documents remain “closed”. We think the judge should be able to consider whether the minor risk to national security was outweighed by the public interest in having the issue of the safety of the equipment determined in a fair and open way, taking into account the lives that might be saved by doing so.

**A requirement to give the excluded party a gist of the case against him**

27. Finally, if CMPs are considered necessary, we think that there should be requirement in all cases to give the excluded party a sufficient gist of the case against him to enable him to give effective instructions to his Special Advocate. Without such a requirement, it would remain possible for a court to decide a case entirely or mainly on the basis evidence which one of the parties has had no chance to challenge. We do not think that CMPs could be described as even tolerably fair without this gisting requirement. As explained in para. 7 above, the provisions currently in the Bill do not include such a requirement.

*18 February 2013*

# List of Reports from the Committee during the current Parliament

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## Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810
Eighth Report	Legislative Scrutiny: Justice and Security Bill (second Report)	HL Paper 128/HC 1014

## Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140

Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777