# HM Government response to the

# House of Lords Select Committee on the Constitution

# 3rd Report of Session 2012-13: The Justice and Security Bill

**July 2012**

**HM Government**


**HM Government Response to the House of Lords**

**Select Committee on the Constitution**

**3rd Report of Session 2012-13: The Justice and Security Bill**

Presented to Parliament
by the Justice Secretary
by Command of Her Majesty

July 2012

Cm 8404 £6.25

Any enquiries regarding this publication should be sent to us at justiceandsecurity@cabinet-office.x.gsi.gov.uk

This publication is available for download at www.official-documents.gov.uk and from our website at http://consultation.cabinetoffice.gov.uk/justiceandsecurity

ISBN: 9780101840422

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2500903 07/12

Printed on paper containing 75% recycled fibre content minimum

# The House of Lords Select Committee on the Constitution 3rd Report of Session 2012-2013: the Justice and Security Bill

The Government is grateful to the House of Lords Constitution Committee for its timely report on the Justice and Security Bill ("the Bill"). The Bill is the culmination of a programme of work begun with the Justice and Security Green Paper (Cm 8194) of October 2011. We welcome the Committee's observation that the closed material procedure ("CMP") scheme set out in the Bill "is a significant improvement on the proposals contained in the Green Paper". We have sought to respond rapidly to the Committee's report in order to help inform the debates on the Bill.

***This is a constitutionally significant reform, challenging two principles of the rule of law: open justice and natural justice.***

The Government shares the Committee's view of the importance of open justice and procedural fairness in all court proceedings. However, the courts have long accepted that there are times when certain material cannot be heard openly in court, because to do so would harm the national security of the United Kingdom. It must be a concern when, in a small, but significant set of circumstances, the necessity of protecting the United Kingdom's national security means that some civil proceedings are not being heard at all, meaning in these circumstances that the state is out of reach of judicial scrutiny.

In this narrow group of circumstances, the Government share's Viscount Haldane's view in the case of *Scott v Scott* that, "[a]s the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield". In the limited number of cases where there is highly relevant material which it would be damaging to national security to hear in open court, the choice is not between open justice or closed justice. This is a choice between justice through a closed material procedure or no justice at all.

***While the principles of open justice and natural justice are neither absolute nor inflexible, exceptions to constitutional principles such as these should be accepted only where they are demonstrated on the basis of clear evidence to be necessary.***

We are convinced that the case for change is made. The Government believes that CMPs are the right way of treating certain cases involving relevant national security material which the courts recognise is too sensitive to disclose. In those cases, the alternative is simply silence: no final judgment from a judge, none of the questions posed by the claimant answered.

As David Anderson QC, the independent reviewer of terrorism legislation, has made clear having reviewed some of the cases,

he believes there to be *"a small but indeterminate category of national security-related claims, both for judicial review of executive decisions and for civil damages, in respect of which it is preferable that the option of a CMP – for all its inadequacies – should exist."*

At the time of the Green Paper the Government estimated that around 27 current cases were posing difficulties. The Green Paper indicated that this figure excluded both the 16 Guantanamo cases and a significant number of appeals against executive actions. In addition, it made clear that since 2010 no less than seven Norwich Pharmacal applications had been made.

As can be expected with litigation, since then, the number of cases has fluctuated. Therefore, at Second Reading of the Bill we gave the estimate of 29 live cases as of 18 June 2012, based on current cases handled by the Treasury Solicitor. What is clear is that CMPs are important for those affected by any case that can not be properly considered by the courts.

***It is in the light of the values of fairness, therefore, that these provisions of the Bill should be scrutinised.***

The Government is clear that civil proceedings are best heard in an open and transparent way. However, it also considers that in the narrow range of cases contemplated by this Bill, justice cannot be delivered in open court. In such circumstances, the Government considers that outcomes secured through closed procedures, which have been found to be capable of fairness by both international and domestic courts, are better than no outcomes at all.

Lord Woolf said (in *Secretary of State for the Home Department v M* [2004] EWCA Civ 324)

> *"(i) Having read the transcripts, we are impressed by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC. (ii) We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process*."

It is also notable that, both the JCHR and the Special Advocates have recommended that naturalisation and exclusion cases should be added to the existing jurisdiction of the Special Immigration Appeals Commission (SIAC), where closed procedures are already available.

***While we welcome these improvements, the scheme as presented in the Bill nonetheless contains three basic flaws.***

***The House may wish to consider whether clauses 6 and 7 of the Bill should be amended accordingly [that is, to permit other parties to the litigation to apply for a declaration under clause 6(1)].***

Protecting the United Kingdom's national security interests is one of the primary responsibilities of the Executive. So significant is this responsibility that the courts refer to the Government's functions to protect national security in the Public Interest Immunity (PII) context as a "*duty*". As Lord Mance JSC, in *Al Rawi* notes *"[a] claim to PII is a duty, not an option, on the part of the state*". For this reason, the Bill does not upset the established position that it is for Ministers to decide how to protect national security and whether to claim PII; nor does it seek to extend PII so that a claimant can apply for it.

In addition, whereas PII can be claimed 'in the public interest,' the Bill makes clear that a closed procedure could only be applied for in the much narrower category of cases where damage to national security is in issue. In practice, it is the Secretary of State who will be in the best position to judge the scope and nature of the national security sensitive material; despite the fact that the absence of a CMP might be detrimental to their interests. Other parties may not even be aware that relevant national security information exists and in any event would not be able fully to judge what damage there might be if the information was released.

It is therefore clear that the argument for the Secretary of State making the application for a CMP is a strong one. Nevertheless, it will remain open to a third party to approach the Secretary of State and request an application for a CMP should they require one.

***Judged against this standard it is difficult to see the justification for removing the Wiley balancing exercise.***

It is important to acknowledge that in reality the Bill contemplates a two stage test to any application for a CMP. The result is that CMPs are available in tightly defined circumstances in which the judge is given the final say over the use of a CMP and a similar level of flexibility to that available to the judge under PII.

The first test is upon application by the Secretary of State to the judge for a CMP based on the existence of material, the disclosure of which would damage the interests of national security. The only circumstance in which the judge can grant this application is where disclosure into open session of material relevant to the case would damage those interests.

There is then a second stage test where the judge has a number of important tools with which to ensure that proceedings are held fairly. The sole ground on which material may be heard in a closed hearing is where the court accepts that disclosure would damage the interests of national security. Where the court permits the material to be heard in closed, the court must consider ordering summaries to be given to the claimant or to permit only parts of documents to be heard in closed (redaction). If the court refuses the application for material to be heard in closed,

the relevant person is required either to disclose the material or the judge can direct the relevant person not to rely on that material (in which case it will be excluded from the proceedings); make concessions; or take such other steps as the court may specify. This is a similar level of flexibility to that which is available to the judge under PII and ensures that in practice the amount of material heard in open session where a closed material procedure is available will not be less than had a PII exercise occurred instead. At all stages, the court will make the necessary orders to ensure that the proceedings are conducted in a manner which complies with article 6 of the European Convention on Human Rights.

The Government considers that, aside from fair trial issues which are dealt with explicitly in the Bill, it would be truly exceptional for a different aspect of the public interest to outweigh the public interest in preventing damage to the interests of national security. The Government considers therefore that the approach in the Bill is the right one in the national security context. In any case, in practice, under current arrangements, if on the basis of its balancing test the court rejects a PII claim (in whole or in part) the Government uses every tool available to it to ensure that that material remains protected – including withdrawing from the proceedings or settling.

***In our view, the court should be required, for example, to consider whether the material could be disclosed to parties' legal representatives in confidence and whether the material could be disclosed in redacted form.***

It will clearly be an option in a CMP under the Bill for the court to permit only parts of documents to be heard in closed session. In such circumstances, the rest of the document will be heard in open session with the parts which are damaging to the interests of national security redacted. Another feature of the new CMP under the Bill will be that where material is withheld from open session on national security grounds, the court must consider whether a summary of the withheld material can be provided openly without damaging national security. In reaching these decisions, the court is assisted by special advocates, lawyers who represent the interests of the excluded parties.

However, the Government considers that disclosure to the parties' legal representatives in confidence is not an appropriate option for a closed material procedure in the national security context. First, the Government does not consider that an obligation of confidence provides sufficient safeguards where the danger is damage to the interests of national security. Second, the concept of a party's legal representatives being privy to information which is not disclosed to their clients is very problematic. There is the danger of both inadvertent disclosure and, professional difficulties, with it being difficult for such legal representatives to take instructions from their clients.

These difficulties are among the reasons for the special advocate system where the advocate represents the excluded party's interests without being responsible to him or her.

***The House may wish to ascertain how, precisely, the Government consider that this [that is, the possibility of both PII and CMP being available] would work in practice.***

The Committee asks about how the relationship between a PII claim and a CMP may operate in practice. The first point is that before making an application to the court for a declaration that a CMP may be used, the Secretary of State must first consider whether a PII claim should be made, clause 6(5). The Secretary of State would consider a variety of factors as part of this consideration, for example, the amount of national security sensitive material or how relevant the national security material might be to the case.

If, after this consideration, the Secretary of State applies for a declaration that a CMP may be used and the court grants this declaration, the possibility of a PII claim will remain available, as made clear in clause 11(5)(b). Equally importantly, as mentioned above, the powers that the judge has in a CMP could result in the claimant receiving summaries of the closed material, receiving partial disclosure of the material (through redactions). If the court refuses the application for material to be heard in closed, the relevant person is required either to disclose the material or the judge can direct the relevant person not to rely on that material (in which case it will be excluded from the proceedings); make concessions; or take such other steps as the court may specify. As previously mentioned, this provides the judge with a similar level of flexibility to that available under PII.

A PII claim in a case where the court has declared that a CMP may be used remains a very real possibility where the proceedings concern information which is sensitive for reasons which are wider than national security considerations. For example, a case may contain sensitive information about the intelligence services and also sensitive information about a police investigation. It would be possible for the material which related to the intelligence services to be heard in closed session (provided disclosure would damage the interests of national security) while PII may be claimed in relation to the information which ought not to be disclosed because it would impede the detection or prosecution of criminal activity.

***We welcome the fact that the Bill preserves the PII process in cases involving national security where, in the Government's words, "it is more appropriate." Reserving the matter to the exclusive discretion of the Secretary of State is however inherently unfair. Determining which of PII or CMP the more appropriate route to adopt in any is particular litigation is essentially a case-management issue and so, constitutionally, is the proper preserve of the court.***

The Committee suggests that the Government may choose between claiming PII and applying for a closed material procedure opportunistically. It is said that the Government would apply for a closed material procedure where the material was helpful to the Government on the basis that the material could be considered by the court. The Government would claim PII

where the material was unhelpful and so, if successful, the PII claim would exclude that material from consideration.

The Government does not consider that this is a realistic concern, and indeed has taken a number of steps to ensure that the risk of this is substantially removed.

First, the intention behind the closed material procedure proposals is precisely so that allegations made against the Government are fully investigated and scrutinised by the courts. The intention is that all relevant material – helpful or unhelpful – will be before the courts.

Second, though it is the duty of the Secretary of State to instigate the applications, the power to order a CMP or to accept a PII certificate both rest solely with the judge.That judge would be alert to any unfairness to the non-government party, and within the CMP would have the case management powers to be able to ensure that individual pieces of evidence are treated fairly, including through requiring disclosure or exclusion. In particular, it is hard to see that a judge assessing a PII claim would conclude that the public interest in excluding the material outweighed the public interest in its disclosure if the Government were seeking cynically to use PII to exclude material which undermined its case when the court had declared that a closed material procedure could be used in the case.

The Committee also state that no Justice of the Supreme Court was prepared to countenance the idea that, in a civil action for damages, resort could be had to a closed material procedure before the PII process had been completed. The Bill is therefore said to be going further than any member of the Supreme Court was prepared to go in *Al Rawi*. The important point to note here is that the Supreme Court in *Al Rawi* were considering whether, under the law as it currently is, a closed material procedure was available. Accordingly, the Supreme Court was not deciding – as a matter of policy – whether such a PII exercise should be exhausted. As it happens, the Government notes that some scepticism about requiring a full PII exercise was expressed by one justice. Lord Brown of Eaton-under-Heywood JSC stated that:

> *"For my part, however, I am unpersuaded of this [Lord Clarke JSC's suggestion that a CMP may be available after a PII exercise]. In the first place, it offers no solution at all to the very real problems of having to conduct a conventional PII process in a case like this. To my mind there need to be compelling reasons to justify the enormous expense, effort and delay involved in such a process here."* (paragraph 82)

In any event, the Committee comments that "[w]e can see the force in the argument that it will sometimes be otiose to push the PII process to its completion before turning to CMP" (paragraph 30) and the Government welcomes this comment which concurs with David Anderson QC's view that "*there is no point in banging your head against a brick wall…if the exercise is plainly going to be futile."*

***Given the sensitivity of the subject-matter the House may consider that this [that is, the affirmative procedure for the power to amend the definition of "relevant civil proceedings"] is an insufficiently robust safeguard and that a super-affirmative procedure should be adopted.***

The Government considers that the affirmative procedure provides sufficient safeguards in this case. The affirmative procedure will mean that each House of Parliament will have to approve a draft of the instrument before it is made. Additionally, detailed Rules would need to be made following the extension of CMPs to other civil proceedings. These would themselves be subject to the normal scrutiny procedures in place, providing an extra layer of scrutiny.

The Government does not consider that a super-affirmative procedure is necessary, such as one that is contained in Part 1 of the Legislative and Regulatory Reform Act 2006 ("the 2006 Act"). A super-affirmative procedure Part 1 of the 2006 Act contains wide-ranging powers concerning the making of provisions about removing or reducing regulatory burdens or to promote regulatory principles, including the power to impose criminal penalties. In contrast, the power in the Bill is to amend a definition and is clearly constrained concerning the matters which such an order could deal with. For this reason, the order-making power seems to the Government to be well within what might be regarded to be appropriate for the affirmative procedure. The Government provided a Delegated Powers memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee on introduction of the Bill. The Government will consider carefully any recommendations on this matter which are made by that Committee.

***The House may wish to ascertain whether the Government consider that the power in clause 11(2) could be used to add inquests to the definition of "relevant civil proceedings" for the purposes of clause 6.***

The Government has made clear that it does not intend to extend CMPs to inquests in this Bill. Clause 11(2) could not be used for this purpose, because inquests do not fall within the definition of 'relevant civil proceedings'. An inquest is a limited form of a public inquiry to determine who the deceased was and when, where and how the deceased came by his or her death; there are no parties, only properly interested persons who are entitled to examine witnesses. Government policy is also to exclude Fatal Accident Inquiries from the scope of Clause 11 (2).

***The House may wish to consider whether the Government should be required to maintain consolidated records.***

CMPs are currently available in a wide range of statutory and non-statutory contexts throughout the UK (**annex A**), including some contexts where the Government is not a party to proceedings (for example, some wardship proceedings). This has made the central collection of information challenging. The Government has sought to make available as much information as it can on the use of closed material procedures, (**Annex B**) and is the process of developing a searchable database of all closed judgements that have been handed down in previous closed proceedings.

***The House may also wish to consider whether the Government should report annually to Parliament on the use made of CMP under the Bill and whether the Bill should be independently reviewed five years after it comes into force.***

The Government is strongly committed to post-legislative scrutiny. Accordingly, the Government will report on the Bill no later than five years after its enactment. In doing so, the Government will produce a publicly available memorandum with a preliminary assessment of how the Bill has worked in practice, relative to the objectives identified during the passage of the Bill. Outside of the context of the formal post-legislative review process, the Government will clearly keep these proposals under close and careful review and will participate in any scrutiny work conducted by any Parliamentary Committees.

# ANNEX A - CURRENT CLOSED MATERIAL PROCEDURES

| **Purpose of proceedings** | **Statutory provision** |
|---|---|
| Terrorism Prevention and Investigation Measures Act 2011 | Schedule 4 to the TPIM Act 2011 and Part 80 of the CPR |
| High Court reviews of control orders | Schedule to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules |
| Special Immigration Appeals Commission (SIAC) hearings | Sections 5 and 6 of the Special Immigration Appeals Commission Act 1997 and Part 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003. |
| Financial restrictions<br>- freezing order under ATCSA 2001<br>- direction under Sch 7 CTA 2008<br>- HMT decisions under asset freezing legislation | Sections 66 and 67 of the Counter-Terrorism Act 2008 and Part 79 of the Civil Procedure Rules |
| Proscribed Organisations Appeals Commission | Schedule 3 to the Terrorism Act 2000 and Part 2 of the Proscribed Organisations Appeal Commission (Procedure) Rules 2007 |
| Pathogens Access Appeal Commission (Proscribed chemicals) | Schedule 6 to the Anti-terrorism, Crime and Security Act (ATCSA) 2001 and Pathogens Access Appeal Commission (Procedure) Rules 2002 |
| Employment Tribunal / Employment Appeal Tribunal | Section 10 of the Employment Tribunals Act 1996 and Schedules 1 and 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 |

| | |
|---|---|
| Planning inquiries | Section 321 of the Town and Country Planning Act 1990:<br><br>paragraphs 6 and 6A of Schedule 3 to the Planning (Listed Buildings and Conservation Areas) Act 1990;<br><br>paragraphs 6 and 6A of the Schedule to the Planning (Hazardous Substances) Act 1990.<br><br>See also The Planning (National Security Directions and Appointed Representatives) (England) Rules 2006 (SI 2006/1284).<br><br>There are corresponding provisions for Scotland and Northern Ireland. |
| Pre-charge detention hearings | Part III of Schedule 8 to the Terrorism Act 2000 enables a party and their legal representatives to be excluded from hearings, though there is no express statutory provision for special advocates (the NI Court of Appeal found in *Duffy & Ors* [2011 NIQB 16], following on from *Ward v PSNI* [2007] UKHL 50, that it is for the court in each case to make a judgment about the extent of procedural protection required) |
| Parole Board hearings | The Parole Board Rules 2011 are a statutory instrument, issued by the Secretary of State for Justice under the powers conferred by section 239(5) Criminal Justice Act 2003.<br><br>Rule 8(1) empowers the Secretary of State to "withhold any information or report from the prisoner and their representative where the Secretary of State considers..." that such information falls into any one or more of the following criteria and that withholding the information is a "necessary and proportionate measure in the circumstances of the case". |

| | |
|---|---|
| | The criteria are where the Secretary of State considers that disclosure would adversely affect:<br><br>(I) national security;<br>(ii) the prevention of disorder or crime; or<br>(iii) the health or welfare of the prisoner or any other person. |
| Northern Ireland Parole Board hearings | Criminal Justice (Northern Ireland) Order 2008 [SI 2008/1216] and the Parole Commissioners' Rules (Northern Ireland) 2009 [SR 2009/82]. |
| National Security Certificate Appeals Tribunal Northern Ireland (deals with discrimination claims) | Section 90-91 of the Northern Ireland Act 1998 and the Northern Ireland Act Tribunal (Procedure) Rules 1999 [SI 1999/2131] esp Rule 3 |
| Release and recall of prisoners by the Sentence Review Commission | Northern Ireland (Sentences) Act 1998 and Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 [SI 1998/1859] |

Other proceedings conducted in a way which has some similarities to a CMP, in particular, with the applicant excluded. Proceedings are not conducted in the same way as clause 6 of the Justice and Security Bill. The main difference is special advocates are not appointed.

| | |
|---|---|
| Public Inquiries | Sections 18 and 19 of the Inquiries Act 2005 |
| First-tier Tribunal (Information Rights) | Tribunals, Courts and Enforcement Act 2007. Section 14 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 |
| Production Order hearings | Under Schedule 5 to the Terrorism Act 2000; |

In addition, there are non-statutory arrangements for closed procedures. These include:

- The Secretary of State for Northern Ireland has delegated his functions under the Northern Ireland (Remission of Sentences) Act 1995 to a Commissioner under arrangements set out in a written statement to Parliament on 13 January 2003.

- The Security Vetting Appeals Panel, which is an independent body sponsored by the Intelligence and Security Secretariat

- Family proceedings – closed proceedings have been adopted in some wardship proceedings by consent.

# ANNEX B - PARLIAMENTARY QUESTION FOR WRITTEN ANSWER ON MONDAY 25 JUNE 2012

**QUESTION:** **Lord Lester of Herne Hill**: To ask Her Majesty's Government how many judgments and decisions have been handed down following a closed material proceeding in the last 15 years by (1) the Employment Tribunal; (2) the Special Immigration Appeals Commission; (3) the High Court exercising its judicial review jurisdiction; and (4) any other court or tribunal empowered to use closed material proceedings.
(HL635)

**ANSWER:** **Lord McNally:** (1) The Employment Tribunal does not record the use of Closed Material Procedures (CMPs) centrally and this information could only be obtained at disproportionate cost.

(2) The Special Immigration Appeals Commission was created by the Special Immigration Appeals Commission Act 1997 and has decided 92 appeals that relied on evidence heard in closed proceedings. The earliest of these appeals was heard in 2002.

(3) The High Court does not record the use of CMPs in a readily available format and it could only be obtained at disproportionate cost.

(4) The Prescribed Organisations Appeals Commission has decided one appeal and this relied on evidence heard in closed proceedings in 2007.

The First-tier Tribunal (Information Rights) decided four appeals which considered evidence in closed hearings in the last 12 months. The Tribunal does not hold information on the use of closed hearings prior to this in a readily available format.

The Upper Tribunal (Tax and Chancery Chamber) decided one appeal in the last 18 months which considered evidence in closed hearing, but does not hold information on the use of closed hearings prior to this.

Her Majesty's Courts and Tribunals Service does not centrally record other uses of CMPs. It would only be possible to provide this information at disproportionate cost.


Published by TSO (The Stationery Office) and available from:

**Online**
**www.tsoshop.co.uk**

**Mail, Telephone, Fax & E-mail**
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries: 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

**The Parliamentary Bookshop**
12 Bridge Street, Parliament Square
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

**TSO@Blackwell and other Accredited Agents**

ISBN 978-0-10-184042-2