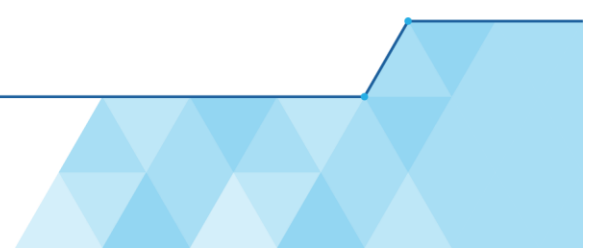




Ministry  
of Justice

# Call for evidence

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



## About this call for evidence

<b>To:</b>	All interested parties
<b>Duration:</b>	<b>From Wednesday 7 April 2021 to Wednesday 30 June 2021</b>
<b>Enquiries:</b>	JSA CMP review secretariat Email: <a href="mailto:JSA-CMP-statutoryreview@justice.gov.uk">JSA-CMP-statutoryreview@justice.gov.uk</a>
<b>How to respond:</b>	Please familiarise yourself with the sections “How to respond” and “Treatment of responses” further below.  Please email your response by <b>Wednesday 30 June 2021</b> to <a href="mailto:JSA-CMP-statutoryreview@justice.gov.uk">JSA-CMP-statutoryreview@justice.gov.uk</a>
	<i>Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or if you would prefer to mail a hard copy of your submission, please get in contact with the JSA CMP review secretariat using the email address above.</i>

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# Glossary

<b>CMP</b>	Closed Material Procedure
<b>CPR</b>	Civil Procedure Rules
<b>ECHR</b>	Council of Europe European Convention on Human Rights
<b>JSA</b>	Justice and Security Act 2013

## Background

1. Sections 6 to 11 of the JSA make provision about the disclosure of sensitive material in civil proceedings. In particular, section 6 of the JSA empowers senior courts across the UK (the Supreme Court, the Court of Appeal and the High Court (including in Northern Ireland), and the Court of Session (in Scotland)) to make a declaration that the case is one in which a closed material application may be made in relation to material, the disclosure of which would be damaging to national security. An application for such a declaration may be made by a Secretary of State, any party to the proceedings or a court of its own motion. Under section 9 of the JSA, a “special advocate” can then be appointed to represent the interests of the party prevented from seeing the sensitive material (‘the excluded party’). Generally, once the special advocate has seen the sensitive material, they are unable to consult further with the excluded party.
2. Section 13 of the JSA<sup>1</sup> contains a requirement to review the use of CMP under the Act, as soon as reasonably practicable, after 5 years from when the relevant section of the JSA came into force. The review must therefore cover the period from 25 June 2013 to 24 June 2018. In summary, a Secretary of State is required to appoint a reviewer and must lay the reviewer’s report before Parliament.
3. On 25 February 2021, the Lord Chancellor and Secretary of State for Justice made a Written Ministerial Statement to the UK Parliament to inform about the establishment of the review, its terms of reference, and the name of the reviewer, Sir Duncan Ouseley. More information of the review process is available on GOV.UK<sup>2</sup>.
4. The terms of reference of the review are:

*“1. In accordance with s.13(1) and (2) of the Justice and Security Act 2013 (“the Act”), to review the operation of the following sections of the Act covering the period from 25 June 2013 to 24 June 2018:*

- *Section 6 (declaration permitting closed material applications in proceedings)*
- *Section 7 (review and revocation of declaration under section 6)*
- *Section 8 (determination by court of applications in section 6 proceedings)*
- *Section 9 (appointment of special advocate)*
- *Section 10 (saving for normal disclosure rules)*
- *Section 11 (general provision about section 6 proceedings)*

*2. In relation to the above, to review the operation of section 17(3)(e) (disclosure proceedings) of the Act, and of those procedure rules relevant to sections 6-11 of the Act.*

*3. To report to the Secretary of State for Justice.*

*In accordance with s.13(5) and (6) of the Act, the Secretary of State must lay a copy of the reviewer’s report before Parliament. Before doing so, the Secretary of State may, after consulting the reviewer, exclude from the copy any part of the report that would, in*

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2013/18/section/13/enacted>

<sup>2</sup> <https://www.gov.uk/guidance/review-of-closed-material-procedure-in-the-justice-and-security-act-2013>

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*the opinion of the Secretary of State, be damaging to the interests of national security if it were included in the copy laid before Parliament.”*

## Questionnaire

5. This is a review of the operation of the CMP. It is not a review of the overall principle of making a CMP part of the civil procedure in senior Courts across the UK. That has been decided by the UK Parliament in 2013, and it will be for the UK Parliament to decide whether this procedure should remain, including by taking into account this review of its operation. Please bear this in mind when providing your responses to the questions set out below.

### **Theme 1 – Aims of CMP under the JSA.**

6. How do you see the rationale for extending the use of CMP under the JSA?
7. What judicial interpretations of the CMP provisions have there been and how have they affected its operation, in particular in relation to Article 6 ECHR (right to a fair trial) and the meaning of “civil proceedings”, and how have the disclosure limits and obligations been affected in cases to which Article 6 applied?

### **Theme 2 – How has CMP under the JSA operated in practice.**

8. What was the impact on the timetable of cases of a CMP application, disclosure processes, and further consideration of continuation of CMP?
9. How often was Article 6 ECHR disclosure invoked and ordered? How were the tests for the application of Article 6 ECHR formulated for those cases? What difference to the disclosure ordered did this make?
10. Did defendants decline to reveal evidence which had not been permitted to be withheld and, if so, with what effect on the subsequent conduct or outcome of proceedings?

### **Theme 3 - How has CMP under the JSA measured up against its original objectives.**

11. To what extent were the objectives set out by HM Government and the UK Parliament for the use of CMP under the JSA met? What concerns expressed about how it would operate have been experienced in practice?
12. Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

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

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

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

15. Are there any changes to CPR Part 82<sup>3</sup> which should be made?

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

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<sup>3</sup> [PART 82 - CLOSED MATERIAL PROCEDURE \(justice.gov.uk\)](https://www.justice.gov.uk/part82)



## How to respond

### Contact details for, and format of, the responses

17. Please email your response to the questions at pp. 7-8 **by Wednesday 30 June 2021** to [JSA-CMP-statutoryreview@justice.gov.uk](mailto:JSA-CMP-statutoryreview@justice.gov.uk)
18. Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or if you would prefer to mail a hard copy of your submission, please get in contact with the JSA CMP review secretariat using the email address above.
19. In preparing your response, please consider the following guidance:
  - We would welcome succinct responses. Please try to keep your response to a maximum of 10 pages or 6,000 words.
  - Respondents should only submit a single response.
  - Where relevant, representative groups are asked to give a summary of the people and organisations that they represent when they respond.
  - All respondents are asked to familiarise themselves with the section further below on “Treatment of responses”.

### Complaints or comments

20. If you have any complaints or comments about the consultation process you should contact the JSA CMP review secretariat by emailing [JSA-CMP-statutoryreview@justice.gov.uk](mailto:JSA-CMP-statutoryreview@justice.gov.uk)

### Extra copies

21. Alternative format versions of this publication can be requested from the JSA CMP review secretariat by emailing [JSA-CMP-statutoryreview@justice.gov.uk](mailto:JSA-CMP-statutoryreview@justice.gov.uk)

## Next steps

22. The responses to this call for evidence will be considered by the reviewer in coming to his conclusions in the report.
23. In accordance with sections 13(5) and (6) of the JSA, the Lord Chancellor and Secretary of State for Justice must lay a copy of the reviewer’s report before Parliament. Before doing so, he may, after consulting the reviewer, exclude from the copy any part of the report that would be damaging to the interests of national security if it were included in the copy laid before Parliament.

24. We are aiming to conclude this process within 2021.

# Treatment of responses

## General approach

25. A general summary of the responses to this call for evidence will be included as an annex to the reviewer's report.
26. Individual responses are subject to the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation (GDPR), the Data Protection Act 2018 (DPA), and the Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry of Justice.
27. In terms of personal information, the Ministry of Justice is the data controller and will process any such data in accordance with the UK GDPR and DPA.
28. The obligation of anonymity (for example where a party or witness was anonymised) by Court Order must be respected in all responses.

## National security

29. Where responses deal with what happened in the closed part of the CMP in a particular case, they are to be in a separate response from any response that relies on open sources. These responses will not be published at all, and they must be provided under the same security classification and procedure as applied to documents produced in the CMP. **Please contact the JSA CMP review secretariat (by emailing [JSA-CMP-statutoryreview@justice.gov.uk](mailto:JSA-CMP-statutoryreview@justice.gov.uk)) before you submit this type of response. Do not send this type of response without prior arrangement with the JSA CMP review secretariat.**