
# Closed Material Procedure:

## The Government response to the independent report on the operation of closed material procedure under the Justice and Security Act 2013

May 2024

CP 1103

Ministry of Justice

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of His Majesty

May 2024

CP 1103

This publication is available at www.gov.uk/official-documents

Any enquiries regarding this publication should be sent to us at humanrights@justice.gov.uk

ISBN 978-1-5286-4988-9

E03139421 05/24

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of
the Controller of His Majesty's Stationery Office

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# Abbreviations

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| ADR | Alternative Dispute Resolution |
| AGO | Attorney General's Office |
| CMP | Closed Material Procedure |
| CPRC | Civil Procedure Rule Committee |
| CPR | Civil Procedure Rule |
| DV | Developed Vetting |
| FPRC | Family Procedure Rule Committee |
| GLD | Government Legal Department |
| HMCTS | His Majesty's Courts and Tribunals Service |
| HMG | His Majesty's Government |
| JSA | Justice and Security Act 2013 |
| LAA | Legal Aid Agency |
| LPP | Legal Professional Privilege |
| LSANI | Legal Services Agency Northern Ireland |
| MoJ | Ministry of Justice |
| NCND | Neither Confirm Nor Deny |
| NICTS | Northern Ireland Courts and Tribunals Service |
| NIO | Northern Ireland Office |
| OR | Open Representative |
| POAC | Proscribed Organisations Appeals Commission |
| Rules CJ NI | The Rules of the Court of Judicature in Northern Ireland |

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|---|---|
| RCJ | Royal Courts of Justice |
| SA | Special Advocate |
| SASO | Special Advocates' Support Office |
| SCJC | Scottish Civil Justice Council |
| SIAC | Special Immigration Appeals Commission |
| SLAB | Scottish Legal Aid Board |

# Ministerial Foreword

The disclosure of sensitive information through the Closed Material Procedure (CMP) ensures fundamental principles of fair and open justice are properly balanced with the vital need to protect our national security. This was made very clear in Sir Duncan Ouseley's thorough and informative report on the way CMP operates, and I would like to thank him for the considerable effort and time he spent preparing it.

The CMP provisions in the Justice and Security Act 2013 (JSA) enable the courts to consider sensitive evidence in closed proceedings before giving judgment in civil claims brought against the Government or other public bodies. In many instances, this means claims can proceed where this might otherwise not be possible, increasing the ability of our formidable and unimpeachable judiciary to scrutinise the executive and hold it to account. This is crucial in a nation like ours, which respects the rule of law and promotes access to justice.

Sir Duncan's report also makes clear that improvements can be made to how CMP operates under the JSA. The Government has examined each of Sir Duncan's recommendations carefully and considered how those we are taking forward can be implemented in a sustainable and impactful way. We acknowledge that this process has taken time, however we felt that it was important to provide as comprehensive a response to the report as possible – and believe that the proposals contained within this document will make CMP more efficient and effective in the future.

At the same time, the Government is clear that the process of improving CMP does not stop with the publication of this response. We will continue to work closely with stakeholders to ensure that CMP functions properly to afford justice to all who seek it, while also enabling us to keep the British people safe from threats to our national security.

The Rt Hon Alex Chalk KC MP
Lord Chancellor and Secretary of State for Justice

# Introduction

1. CMP is a process used in litigation, most frequently by the State, enabling information sensitive to national security to be disclosed in legal proceedings. Sensitive material is disclosed into a closed part of the proceedings, to the court and SAs. The sensitive material is not disclosed to the other party (the specially represented party), their OR (the specially represented party's usual legal representative) or the public. SAs are appointed to represent the interests of the specially represented party in the closed proceedings. Once the SA has seen the sensitive material, they are unable to consult further with the specially represented party, or the OR, without permission.

2. CMP was introduced substantively into civil litigation proceedings under Part 2 of the JSA. It allows some of the most senior courts across the UK to consider sensitive national security material in civil cases whilst protecting that information.

3. Section 13 of the JSA required that the process be reviewed, after 5 years of operation. This review was ultimately carried out in 2021, by former High Court Judge Sir Duncan Ouseley, and his report was published in November 2022 (the Ouseley Report).

4. In summary, the Ouseley Report concluded that the objectives of the CMP provisions in the JSA are being met; that the JSA is operating within the general scope of Parliament's intentions; and that the concerns expressed during the passage of the JSA through Parliament in 2012–13 about its practical operation have generally not been borne out. Sir Duncan did, however, make 20 recommendations to improve the operation of CMP, and it is to these recommendations that the Government now responds.

## The UK Government's approach to the response

5. CMP strikes a necessary balance between the fundamental principle of open justice, and the protection of national security. As such the Government wants to ensure that it runs as efficiently and effectively as possible.

6. The Ouseley Report was invaluable in providing a full picture of how CMP under the JSA is operating, highlighting the utility of having CMP available in certain civil proceedings, and identifying opportunities to improve the process.

7. We have taken time to consider carefully each recommendation from the Ouseley Report and have endeavoured to take forward as many of them as possible, notwithstanding the complexity that national security requirements will inevitably place upon any considerations.

# Response to recommendations

## Procedural Changes

8. Of the 20 recommendations Sir Duncan Ouseley made in the Ouseley Report to improve the operation of CMP, ten propose changes to the rules of court governing the use of CMP under the JSA. Any changes we make to the rules of court in England and Wales will need to be made by the CPRC.[1]

9. Following the publication of this response the Government intends to take forward recommendations 4, 5, 8, 9, 12 and 15 from the Ouseley Report, detailed below, for consideration by the CPRC. We will work constructively with the committee and other interested stakeholders during the next steps of this process.

10. We also intend to consult the CPRC on proposals for recommendation 13, on the creation of a practice direction, but note that the Master of Rolls is responsible for making practice directions for civil courts.

11. There are four recommendations pertaining to proposed rule changes (recommendations 6, 7, 10 and 11) that the Government has chosen not to take forward at this time, and the reasons for this are explained in paragraphs 30–36 and 41–44.

12. Finally, the Government notes Sir Duncan's points about the uncertainty as to whether the Family Division has a common law jurisdiction to use CMP and whether cases in that Division are "relevant civil proceedings"[2] under the JSA, and therefore within its scope. We understand that the FPRC is considering a proposal to introduce a formal CMP in family proceedings and will be carrying out work to address the points raised by Sir Duncan. Therefore, it will be for the FPRC to determine if the introduction of a formal CMP in family proceedings is required. Until that work is completed, we would like to make it clear that the proposed changes detailed below are intended to apply to all cases, and only those cases, to which the CPR apply.

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1 The CPRC is a statutory non-departmental public body, sponsored by the Ministry of Justice, which makes rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court.

2 Section 6(11) of the JSA

## Recommendations the Government will be taking forward

**Recommendation 4:** The rules of court should make provision enabling a court to require a draft closed defence or draft summary to be served, or a particular issue to be pleaded to in draft, before it considered or ruled on a section 6 application. The rule should also provide that the draft could not be the subject of any disclosure request into open or comparison with later non-draft versions. *(Section 4, paragraphs 17–20)*

13. We understand that in some proceedings, the court has requested a draft closed defence to be served, in order to assist with the decision on whether or not to make a declaration under section 6 of the JSA.[3] However, in many cases, the courts have been content to proceed with the determination of a section 6 application[4] without the need to see a closed defence.

14. The Government agrees that it is vital that the court has sufficient information to understand clearly the issues in the proceedings in order to determine properly whether the statutory conditions under section 6 of the JSA have been met. We will propose an amendment to the CPR that will allow the court, where it considers it necessary, to ask for a draft closed summary defence or pleadings on a particular issue to be pleaded in draft.

15. Whilst in many cases, the Court may have sufficient information already to determine a section 6 application, where it requests further information, it is our view that a summary defence would provide the appropriate level of information required by the courts.

16. We do not propose that the court should be required to ask for a closed summary defence in every instance, whether of its own volition or through an application from the OR. Where a summary defence is requested, we will propose that this summary defence could not be subject to a disclosure request, nor would the defendants be required to make an application to withhold the summary defence from open disclosure.

[3] A declaration that the proceedings are proceedings in which a CMP may be made.

[4] An application made under section 6 of the JSA seeking a declaration.

**Recommendation 5:** The rules of court ought to be amended as suggested by the SAs. The court ought also to be able to require them to put forward closed pleadings and grounds of challenge. This would be of value in focusing the arguments which the SA put forward as well, on fact as well providing a framework for their legal submissions. These closed pleadings and grounds can supplement the open ones, taking new or points expressed as alternatives to those in open, in the light of the closed material. They should not however be permitted to conflict with the open pleadings or grounds. *(Section 4, paragraphs 28–30)*

17. The Government agrees that there is real value in making provision for this and will propose that the CPR be amended to allow for the SA to put forward closed pleadings or grounds of challenge. They should do so either of their own volition or at the request of the court, and within 28 days after HMG has filed its closed defence or grounds of challenge. A similar procedure would be followed for closed grounds of defence or other closed pleadings where HMG was the claiming party.

18. We agree with Sir Duncan's assertion that it is not necessary to allow SAs to draft open legal submissions, thereby duplicating the role of the OR. However, mechanisms do exist by which the SA can communicate with the specially represented party and/or their OR, to which we will turn in paragraphs 19–21.

**Recommendation 8:** Rules of court should be amended to provide for a request for permission to communicate not being sent to the court, if agreed with the defendant. *(Section 4, paragraphs 40–41)*

**Recommendation 9:** This "LPP" confidential channel of communication should now be recognised in the rules of court, both in Great Britain and in Northern Ireland. *(Section 4, paragraphs 42–43)*

19. CPR Part 82, rules 82.11 and 82.14, set out the process through which the SA may communicate with the specially represented party and/or their OR, and for the resolution of disputes over the content of communications requests. As recommendation 8 suggests, CPR Part 82.11 requires that, following sight of any sensitive material, the SAs must obtain directions from the court authorising them to communicate with the specially represented party and/or their OR.

20. The Government agrees that there should be a route, recognised by the CPR, by which parties can agree on communication requests without needing to go through the court in every instance, and will propose that the CPR be amended accordingly. An informal agreement, developed between SASO and GLD's national security litigation teams in 2016, already operates. This provides a mechanism by which the SA can

send a communication request directly to HMG teams and it can be agreed without needing to go through the court, commission or tribunal. Whilst these communications will always need to be security checked, this means that in many instances HMG, parties and SAs can agree to bypass the application for a court order. The Government is of the view that it would be beneficial to codify this practice in the CPR (subject to judicial approval), so as to provide greater clarity and transparency to those who are less familiar with CMP cases and help to avoid unnecessary delays to proceedings.

21. Similarly, the Government agrees with recommendation 9 on the basis that there exists a category of communications that are confidential. The Government agrees that there should be a confidential route of communication between SAs and specially represented parties and their ORs, in CMP proceedings, and proposes that the handling arrangements around these communications, as set out in the memorandum of understanding developed between SASO and GLD, should be codified in the practice direction suggested in recommendation 13 (see below).

**Recommendation 12:** The interpretation of CPR Part 82.23 (2) and (4[5]) adopted by Bean J, in Sarkandi [2014] EWHC 2359 (Admin), (case 3) should be reflected in the CPR expressly. *(Section 4, paragraphs 49–50)*

22. The CPR Part 82.23 states that section 6 application hearings and any directions hearings shall take place in the absence of the specially represented party and the specially represented party's OR.

23. However in the *Sarkandi* case, as referenced in the recommendation, it was held that the hearing of the application "shall so far as is necessary" take place in the absence of the specially represented party, their OR, and the public, and that this is only necessary when submissions are being made referring to or otherwise revealing the closed material. The Government agrees with this interpretation, which aligns with the current practice that directions hearings and the hearing of a section 6 application in CMP proceedings are often divided into the necessary closed element and an open element which the specially represented party and/or their ORs attend. We will propose an amendment to the CPR to expressly reflect and permit this.

[5] There is typographical error in CPR Part 82.23 with two different rules numbered 82.23(3). The case of Sarkandi (above) and the recommendation in the Ouseley report relate to the latter (the hearing of the application) and therefore this response treats it as so doing.

**Recommendation 13:** There should be a Practice Direction under CPR Part 82 and Rules CJ NI Order 126 which, among other matters, could usefully address the issues described above *(Section 4, paragraphs 52–59)*

24. The Government agrees that it would be beneficial to both HMG advocates and SAs to have further guidance on various aspects of the CMP process, to ensure a consistent approach is taken in proceedings involving the use of CMP across the board. We will work with interested parties to produce guidance that takes into account the issues raised in the Ouseley Report, including the matters raised above in response to recommendation 9, and any other matters that would benefit from greater clarity.

**Recommendation** 15: CMP cases under the JSA should be excluded from the cost management provisions in the rules of court. *(Section 4, paragraphs 70–71)*

25. Costs management provisions for civil proceedings in England and Wales are set out in CPR Part 3.12–3.18. These provisions largely focus on matters arising from the filing and/ or exchanging of budgets throughout the proceedings, and any costs management orders made by the court, to manage the budgeted costs of either party.

26. In line with the recommendation, the Government will propose an amendment to the CPR with the intention of excluding CMP cases from the costs management provision set out at CPR Part 3.12–3.18 in so far as they relate to costs budgeting.

27. Costs budgeting requires parties in litigation to estimate the costs they are likely to incur at each stage of the proceedings. This is done through the completion and filing of a Precedent H form. The Government is concerned that it would likely be damaging to national security to estimate costs associated with closed proceedings, in an open costs budget, as it may reveal identifying information about the volume and complexity of the closed material involved.

28. Furthermore, due to the often-complex nature of cases involving CMP, it can be difficult to disentangle costs arising from the open proceedings, with those from closed proceedings. This is because work done in relation to the open proceedings is usually heavily informed by closed material. Therefore, limiting cost budgeting requirements to costs incurred in open proceedings only, would not eliminate the risk of revealing inappropriate information.

29. Whilst CPR Part 3.12(1)(e) implicitly provides the court with the power to disapply these provisions from cases involving a CMP, we are of the view that it would be

useful to expressly disapply the provisions but making it clear that this applies to costs provisions in relation to costs budgeting only, though for both open and closed costs.

**Recommendations not being taken forward**

**Recommendation 6:** Attendance at ADR procedures, if desired by the ORs, should be added to SA's functions set out in the rules of court. I consider that SAs should be able to attend to make representations in private to the defendants about how they are putting matters at ADR procedures. *(Section 4, paragraphs 32–35)*

30. The Government does not believe it is necessary, nor appropriate within the broader national security context, for SAs to participate in ADR. After careful consideration, the Government will not take forward this recommendation at this time. However, we will agree to keep this under review and to consider where it is appropriate to receive representations from SAs as to how matters are being put forward in ADR.

31. Whilst the theory behind this recommendation is understood, the Government considers that there is little practical role for the SAs in ADR. In most cases where ADR is pursued, the main focus is on conciliation and, where possible and appropriate, seeking to agree damages or other matters. In cases where sensitive material is engaged, there can be little discussion on points of law or the facts of the case where HMG cannot take a position beyond NCND. The nature of discussions during ADR in these cases is therefore generally only in relation to open matters, with no focus on the closed case. As such, there is no role for the SAs (whose role relates to the sensitive material) to play in the open case particularly on open matters of law and quantification of damages.

32. Furthermore, as ADR is intended to be flexible and provide an expedient opportunity for settlement outside of the confines of the standard litigation process, it would be disadvantageous to create new procedural rules making ADR more complex, formal or time consuming, or which create additional barriers to settlement.

33. Finally, SAs attending ADR may present a risk to protecting HMG material and undermine national security considering HMG mediations typically occur in a neutral and open setting (i.e., not a Highly Classified Area or closed court). Such a setting would not be an appropriate place for SAs to participate, when they have had sight of highly classified material, and are not best placed to decide what is open or closed material. Creating such a process to advise the SAs what is open/closed would be complex and undermine the purpose of ADR.

**Recommendation 7:** The rules of court should be amended so as to permit the addition of a party named solely in closed proceedings, supported by closed pleadings. *(Section 4, paragraphs 38–39)*

34. The Government is of the view that such a rule change is not necessary. CPR Part 19, rule 19.2 already provides the court with a general power to order a person to be added as a new party to proceedings.

35. Part 82 of the CPR provides a mechanism through which this can be done in closed proceedings. It is already within the scope of the functions of SAs to make an application to the court. The functions of SAs are laid out in CPR Part 82.10. CPR Rule 82(c) states that one of the ways in which SAs can represent the interests of specially represented parties is by "making applications to the court or seeking directions from the court where necessary".

36. There will of course be national security considerations that the court will need to consider before deciding on whether it is appropriate to add an additional party to closed proceedings, but the court will be aware of this and as such we do not think this requires a rule change.

**Measures in Northern Ireland**

37. In Northern Ireland the relevant court rules are made by the Court of Judicature Rules Committee. However the overriding objective for CMP is the protection of national security and it is therefore an excepted matter. This means that whilst the Court of Judicature Rules Committee will still need to consider and make any proposed rule changes, they must then be allowed or disallowed by the Lord Chancellor.

38. We have engaged with officials in the Department of Justice in Northern Ireland and will work with them, and any Northern Ireland Executive at the relevant time, in relation to taking recommendations 4, 5, 8, 12, 13 before the Court of Judicature Rules Committee. Regarding recommendation 9, we will work with interested parties to see if and how a similar protocol might be implemented in Northern Ireland.

39. For the reasons set out at paragraphs 30–36, recommendations 6 and 7 will not be taken forward. Similarly, recommendation 15 on costs management provisions will not be taken forward as it is not applicable to CMP cases in Northern Ireland, where there are no such provisions in the Rules CJ NI.

40. Furthermore, we will not be presenting recommendations 10 and 11 to the Court of Judicature Rules Committee for the reasons set out below.

**Recommendation 10:** The Rules CJ NI should be changed so that written witness statements for closed evidence are served on the SAs, and indeed by the SAs for any closed witnesses whom they call, well before the closed hearing at which they are to be adduced. I say "well before" so as to provide the opportunity for further disclosure to be explored and, if more is disclosed, for instructions to be taken on it. *(Section 4, paragraphs 44–46)*

41. The decision has been taken not to implement this recommendation in Northern Ireland. There is no general provision for the exchange of witness statements in private law claims in civil proceedings in Northern Ireland. Implementing this recommendation would bring about a fundamental change in what is required, not just in CMP cases, but in the entire litigation process in Northern Ireland. The starting premise of proceedings involving CMP is that anything that can be done in open proceedings, will be. This ordinarily includes witness evidence. Where a party asserts that a witness cannot give their evidence in open, it will be for the court to provide directions on an individual basis, as to how that should progress. However the view is that this does not occur enough in closed proceedings as to warrant a rule change, which would have a disproportionately disruptive impact on wider litigation process in Northern Ireland.

42. Lastly, whilst we appreciate that such a provision exists so as to allow for this under the CPR (CPR Part 32.4), given the different ways in which litigation is conducted in England and Wales, compared to Northern Ireland, it will not always be possible to achieve complete parity.

**Recommendation 11:** Amendment to the Rules CJ NI should be considered to see if they can reduce delays in legacy litigation in particular. *(Section 4, paragraphs 47–48)*

43. Legacy cases are inherently complex matters. Introducing CMP into those proceedings, and the national security requirements that come with it, will inevitably increase the level of complexity, and the time it takes for these proceedings to progress. In light of this, it is felt that any changes to the rules of court in Northern Ireland would not have a significant impact on reducing delays to legacy cases.

44. However, the work we are undertaking to increase the resources and facilities available to advocates (see paragraphs 47–56) will provide some relief in this space. Furthermore, in relation to recommendation 17 of the Ouseley Report, NICTS has confirmed that the level of DV-cleared court staff has increased substantially since the Ouseley Report was published, and they are sufficiently resourced to meet current demands within Court Operations.

### Measures in Scotland

45. Changes to the relevant rules of court in Scotland are made by Act of Sederunt of the Court of Session, following early policy discussions with the SCJC who prepare and submit draft rules to the Court of Session for approval. As stated above, CMP falls within the remit of protecting national security and therefore in the context of Scotland it would be a reserved matter. In Scotland the Court of Session has a statutory power to amend court rules, even where they relate to reserved matters.

46. propose to consult with the relevant bodies in Scotland (including the SCJC) to seek their views on which (if any) of the proposed changes to the rules of court would be appropriate in the Scottish legal system.

## Resourcing

**Recommendation 16:** The Attorney General, for England and Wales, and the Advocate General in Northern Ireland, with GLD and Northern Ireland Office, and SASO should resolve urgently what is required, and the Ministry of Justice should take responsibility for seeing that what is necessary is provided, with budgetary provision accordingly. The chief topics are set out above. Future Annual Reports should have an annex explaining which support issues have been resolved in England and Wales and in Northern Ireland, and which issues continue. As there have been no cases under Part 2 in Scotland, the urgent resources issue does not arise there. *(Section 4, paragraphs 73–85)*

47. As the Ouseley Report notes, the number of cases in Northern Ireland that fall under the jurisdiction of the JSA was not anticipated during its passage as a Bill through Parliament. However, the Ouseley Report has provided an opportunity for the Government to review how CMP is resourced and where the gaps might be. We accept that more needs to be done in Northern Ireland to ensure that CMP continues to operate effectively.

48. Following consultation with SASO we have begun work to identify a suitable venue from which to set up a SASO office in Northern Ireland. We are working with security partners and SASO to ensure that the space has the infrastructure and facilities required to provide the necessary support to SAs in Northern Ireland. We are confident that this will assist in reducing delays to litigation in Northern Ireland.

49. The Ouseley Report also mentions a number of other resourcing concerns, namely staffing levels in SASO, a searchable closed judgments database (see below) and an insufficient training offer for SAs. We are working with SASO to understand what would be required, in terms of resourcing, to deliver an increased training offer to SAs, to ensure that regular training is available to both new and existing SAs. We note the

SAs' comments on this, in their submission to the call for evidence for the Ouseley Report, including that "*the measures taken in mid-2018 have achieved a marked improvement in the support that SASO has been able to deliver. SASO has strong leadership, and provides a generally reliable service in support of SAs*." We will continue to engage with GLD and SASO to ensure that the system has sufficient resilience.

**Recommendation 18:** HMG should now, and with speed, devise and maintain the summaries database in consultation with SASO, the system for identifying and summarising the points of potential wider application, and the means of making it available securely on electronic device available to SAs and HMG advocates alike in their secure locations. It should follow the lines set out in the Factsheet cited above in the absence of good reasons to alter it. *(Section 4, paragraphs 88–105)*

**Recommendation 19:** The database of summaries should cover Northern Ireland cases as well and be available to SAs and HMG advocates there on an equal footing. The England and Wales closed judgments should be available to SAs in Northern Ireland as they are to SASO in London. If a JSA case is heard in Scotland, the same should be made available to them. *(Section 4, paragraphs 106–108)*

50. As the Ouseley Report demonstrates, the issue of creating and maintaining a closed judgments database and a summaries database has been an ongoing one and pre-dates the passing of the JSA.

51. A library of closed judgments was established in the RCJ. This contains hard copies of closed judgments given under a range of different jurisdictions within which CMP is used, including the JSA. The RCJ library was intended to be a resource accessible to all holders of appropriate clearance with a need to access it, including HMG advocates and SAs, in addition to the judiciary. This work therefore superseded work on a separate HMG library as the work would have been duplicative. However, we acknowledge that the RCJ library has not had the intended impact on advocates' ability to review closed judgments, for the reasons set out in the Ouseley Report (Section 4, paragraph 98).

52. The Government agrees that a secure electronic database summarising points of law in closed judgments would be a useful tool for both HMG advocates and SAs. A summaries database would set out any legal principles contained in a closed judgment for the purposes of identifying and summarising the points of potential wider application but would not necessarily set out any factual information from the case or the closed material involved. This would provide a mechanism through which legal advocates could quickly establish which closed judgments contain legal principles of relevance to an ongoing case. This would help to improve the efficiency of the process

and would have practical value for both HMG and SAs, who must both currently rely on institutional knowledge of – sometimes historical – judgments to determine which may have relevance to the case at hand.

53. The Government will work to create an accessible, searchable, closed judgment summaries database, as well as a secure electronic full closed judgments database. Whilst the recommendation in the Ouseley Report only proposes a summaries database, we are aware that the SAs have made the point that, given the limitations of the RCJ library, a separate full judgments database is required.

54. Both databases would include closed judgments under the various regimes within which CMP operates in Great Britain and Northern Ireland, (including all relevant courts and tribunals, including JSA cases in the High Court, SIAC, POAC, the Employment Tribunal, the Parole Board and the Security Vetting Appeals Panel).

55. It is important to note, however, that this is not a straightforward task and will take some time to establish. There are a number of security considerations that will need to be taken in to account when dealing with material of such a sensitive nature. We will need to establish safeguards around how this material is accessed, and understand the implications this may have on resources, and other processes such as the "taint check" (see paragraphs 61–64).

56. We will work with stakeholders, including SASO, to establish a process for agreeing how existing and future judgments are to be summarised, and protocols for how the databases will be accessed. We envisage that these databases will be exclusively accessible to SA's in SASO's secure offices, both in the existing SASO London office, and the proposed SASO office in Belfast.

## Annual Reports

**Recommendation 1:** The Annual Reports should be improved by adopting the general format of Annex 4 (Part A) to this review, without being unduly prescriptive about it. Data should be recorded on a simple spreadsheet as it comes in. The Annual Report should not require an examination of each case file. There should be a single point of contact, which should be within the GLD, which acts for many of the defendant parties. The GLD then ought to have systems in place, outside their case files, for recording the broad subject matter of the case, the parties (anonymised if so ordered) to any case, dates of section 6 applications and declarations, disclosure and review or revocation decisions, whether judgments were given, both interlocutory and final, closed and open, and the outcomes including the fact of settlement. The data should identify orders made by consent or without opposition but need not record applications or permissions to communicate with ORs by the SA. The data should state in respect of each open judgment whether there was or was not a closed judgment. Neutral citations should be provided for open judgments. As cases continue from year to year, the reports would follow a rolling format, with concluded cases dropping off, and new data for existing cases being added. This is all of course subject to any court orders made in any particular case. GLD's counterparts in Northern Ireland and Scotland should do likewise and forward the information to GLD, so that they can all readily be brought together by the MoJ. *(Section 4, paragraphs 6–11)*

**Recommendation 17:** The availability of DV cleared staff in the court system for Part 2 cases should also be addressed in the Annual Reports. *(Section 4, paragraphs 86–87)*

57. Section 12 of the JSA required the Secretary of State to provide a report to Parliament on the operation of the CMP provisions under the JSA, as soon as reasonably practicable one year after the Act came into force (and every 12 months thereafter). These reports are laid before Parliament each year and subsequently published.

58. Sir Duncan Ouseley was right to highlight the importance of the annual reports, not only in terms of ensuring the Government remains accountable to Parliament, but also by helping to provide as much transparency to the public as possible around the CMP process.

59. The annual report for the period covering June 2021 to June 2022 was published on 11 January 2024, using the pre-existing format. Work is already underway on the report for the period covering June 2022 to 2023. The Government will implement the new format, as suggested by Sir Duncan Ouseley (recommendation 1), for future annual reports starting with the report for June 2023 to June 2024. We will also expand the information contained within the annual reports, in line with Sir Duncan Ouseley's recommendations, excluding dates of disclosure. This is on the basis that

it is not always possible to determine the exact date of disclosure, as it is an ongoing and iterative process. We will include data around the number of DV cleared court staff for England and Wales, and Northern Ireland respectively, in upcoming annual reports.

60. Whilst not part of any recommendation, Sir Duncan Ouseley also raised the issue of delays to the production of the annual reports. We are looking into ways of reducing the delays in the production and publication of future annual reports.

## The Appointment of SAs: the "taint check" and requests for specific SAs

**Recommendation 2:** This practice should be spelt out in guidance approved by the Attorney General, and Advocates General, and preferably agreed with SASO, on the basis that a "taint check" is a reasonable tool for the protection of national security at this interface between ORs, their clients and closed material. The guidance should convey the circumstances in which the check will be undertaken, its intended timescale, the need for a brief but informative reasoned response, with a quick review. The Law Officers should be in charge, proactively, of this process, as SAs are their appointments. Such a check need not be automatic for every appointment, but a request for a specific SA appears to be one reasonable trigger for a "taint check". *(Section 4, paragraphs 12–15)*

61. The "taint check" refers to vetting of a SA prior to their appointment, to see if their involvement in any previous closed cases has given them access to sensitive material that might increase the risk of inadvertent disclosure to the open representative or the specially represented party, when they meet to discuss the proceedings at hand. This will take place before the SA has had sight of any closed material in relation the current proceedings.

62. The existence of this process is not a reflection of any assumed impropriety on the part of the SA, but rather as a further necessary safeguard to ensure national security is protected at every stage.

63. The note agreed between SASO, GLD and the AGO already provides guidance on the process of carrying out a "taint check" and determining any disputes over the results of this check. Under existing practice, the party carrying out the "taint check" is already required to provide SASO with reasons as to why any particular SA is deemed to be "tainted" for the purposes of the case at hand.

64. The Government is firmly of the view that a "taint check" is required for every appointment and will work with SASO to ensure that this is reflected in their manual. This is true even in the case where someone is taking on the role of SA for the first time. There may be other factors, aside from the review of closed material in previous closed proceedings, that preclude an individual from acting as a SA in a particular case.

**Recommendation 3:** A record of which SA represented the interests of whom and in which case should enable the body controlling the intelligence material to offer a swift alert to the potential for a problem, and an appointment to be made of an SA for whom no such potential problem existed. *(Section 4, paragraph 16)*

65. As with the above recommendation, SASO already holds this information and routinely shares it with the party carrying out the "taint check".

## Legal Aid

**Recommendation 14:** LSANI, and the legal aid authorities in Great Britain if the same applies, should consider removing the requirement for a specific authorisation to participate in a CMP process, where legal aid has already been authorised. Its retention should be publicly justified. *(Section 4, paragraphs 66–69)*

66. There is no requirement in Northern Ireland to seek a specific authorisation to participate in a CMP process. In practice legal aid is often granted up to and including discovery – however the original application may not flag up potential for a CMP process and practitioners will revert to the Agency to have explicit cover granted. To address any misunderstanding, on the 27 October 2023 the LSANI published a Circular[6] to practitioners to make the position clear and avoid unnecessary delay.

67. Similarly, under the legal aid scheme in England and Wales there are no specific legal aid requirements for proceedings as a whole that include a CMP. A CMP could complicate the assessment of merits as it may represent a change of circumstances that should be reported to the LAA. The Government is in the process of ensuring that this is reflected in formal guidance for practitioners in England and Wales.

68. Although we note that there have been no CMP cases to date in Scotland, in order to deliver a consistent approach across the UK to the relationship between legal aid and

[6] LSANI Guidance Note – Closed Material Procedures in Legacy and Collusion Cases (justice-ni.gov.uk)

CMP, on 30 October 2023 SLAB updated its civil guidance[7] for practitioners in Scotland. The guidance now explicitly states that no fresh legal aid application is required, following the introduction of CMP into proceedings.

## Judges

**Recommendation 20:** I do not consider that the use of the same judge throughout where possible requires a rule change, but I recommend it as a deployment strategy. If adopted, there seems no need for a rule change in respect of Masters. But if a rule change is required for case management in CMP cases to be done only by High Court Judges, then I recommend it, at least where the case management issue touches or concerns closed material. *(Section 4, paragraphs 115–119)*

69. The Government agrees on the importance of ensuring that CMP cases can be dealt with at the appropriate judicial level. It is the judiciary that has the statutory responsibility for the deployment of the judiciary and allocation of work within courts in England and Wales. Having consulted the judiciary we can confirm that this is already part of existing judicial deployment strategies. The recommendation is also consistent with judicial deployment practices in Northern Ireland and Scotland and therefore, as Sir Duncan Ouseley rightly asserts, does not require a rule change.

[7] Closed Material Procedure under the Justice and Security Act 2013 – Scottish Legal Aid Board (slab.org.uk)

# Conclusion

70. As we have set out above, following the publication of this response, the Government will be working with the CPRC, and the devolved administrations, on the proposed changes to the rules of court governing CMP. We will also ensure guidance around legal aid, and the appointment of SAs is up to date and provides clarity to those operating within this field. Lastly, we will continue to drive forward work to increase the resources available to SAs, not just in Northern Ireland but England and Wales too.

E03139421

978-1-5286-4988-9