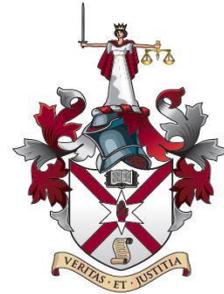


THE **LAW SOCIETY**
OF NORTHERN IRELAND



**Ministry of Justice
Consultation**

**STATUTORY REVIEW OF THE “CLOSED
MATERIAL PROCEDURE” PROVISIONS IN THE
JUSTICE AND SECURITY ACT 2013**

**Response of the Law Society of
Northern Ireland**

June 2021

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ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is the professional body for the solicitor profession in Northern Ireland.

The Society represents over 2,800 solicitors working in approximately 480 firms, throughout Northern Ireland, in the public sector and in business. Members of the Society represent private clients, Government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

The Society plays an important role in helping to shape the legal system in Northern Ireland.

June 2021

RESPONSE

The Society wishes to submit general views on the operation of the Closed Material Procedure (CMP) as set out below, in addition to the information sought in the Consultation Questionnaire.

GENERAL VIEWS

Fundamental Principles and Human Rights Considerations:

The introduction of the Closed Material Procedure (CMP) under the Justice and Security Act 2013 (the 2013 Act) represented a fundamental departure from both the Public Interest Immunity (PII) procedure and the common law principle of openness.

The Society is aware that CMP is contrary to many of the basic principles of justice and the rule of law. The increase in the use of this procedure, sometimes described as ‘secret courts’, can be perceived as a threat to many fundamental principles. The system represents a deviation from the usual and important principle that justice must not only be done, but seen to be done.¹ Concerns were raised during the final debate of the Bill, when Lord Brown warned that the legislation “involves a radical departure from the cardinal principle of open justice in civil proceedings”², and other commentators have remarked that the procedure represents “a carveout from the basic principles of equality of arms and open justice”.³ The Society notes that as a consequence, the procedure appears to contradict the common law principle of open justice, and the concept of a fair trial.

It is inescapable that the CMP raises fundamental concerns surrounding the right to a fair trial, as enshrined in Article 6 ECHR. Lord Kerr described the “peril” that CMP’s present to the fair trial of contentious litigation as both “obvious and undeniable”⁴ and pointed out that “to be truly valuable, evidence must be capable of withstanding challenge...evidence which has been insulated from challenge may positively mislead...the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial”.⁵

Moreover, CMP limits the adversarial nature of trials, which is fundamental to our legal system, and therefore can make a case difficult to litigate. The Society is concerned that the provision of a Special Advocate, as permitted under the 2013 Act, cannot effectively rebut evidence as the advocate cannot communicate with their client. In the open aspects of the trial, legal representatives cannot adequately present their client’s case because they do not know what evidence they have to disprove, which ultimately may impede justice for claimants.

¹ <https://ukhumanrightsblog.com/2017/12/07/when-can-a-closed-material-procedure-be-used/>

² <https://publications.parliament.uk/pa/ld201213/ldhansrd/text/130326-0002.htm#13032671000268>

³ <https://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/>

⁴ *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 35.

⁵ *Al Rawi & Ors v The Security Service & Ors* [2011] UKSC 35.

Importantly CMP violates the principle of equality of arms as the procedure creates inherent unfairness and disproportionately impacts the excluded party.⁶ The Society is aware that this is partially mitigated by the presence of a Special Advocate in closed proceedings who will represent the interests of the excluded party. However, as indicated above the process limits the ability of those who have potentially been wronged to meet the case against them.

Public Interest Immunity Procedure vs Closed Material Procedure:

Some Society members hold the view that they are content with the operation of Public Interest Immunity (PII) procedures and application of the *Wiley* test allows a balance to be achieved between the administration of justice and the public interest. Unlike CMP if a PII certificate is upheld none of the parties may rely on the sensitive material. In CMP the use of 'gisting' results in the legal representative for the absent party not having the context for the information. In addition, the ability to carry out appropriate cross-examination is curtailed which encroaches on the principle of open justice and this is a concern for the Society.

Parliaments Intentions vs Operation in Practice:

The Society notes that CMP was first introduced as an exceptional measure within the Special Immigration Appeals Act 1997 to deal with deportation decisions on the grounds of national security. However, in 2011 the Justice and Security Green Paper proposed that the Government make CMPs more widely available in civil proceedings for use in "rare instances in which sensitive material is relevant to the case". During the passage of the Justice and Security Bill through Parliament, it was made clear that the procedure *would only be used in the most limited circumstances* and would be limited to cases involving the War on Terror. However, the Society notes that the original intention for the operation of the procedure to focus on national security issues has not been adhered to and its application has extended to other areas of the law, including in civil and family cases. This extension was clearly not intended when the Bill was being debated and scrutinised. In this jurisdiction the Society notes with some concern that CMP is disproportionately applied here in comparison to other UK jurisdictions and particularly in relation to legacy cases.

Section 7 of the Justice and Security Act allows judicial oversight on how the procedure is working, however nothing is publicly known about the operation of Section 7. Inherently it is a protective mechanism to deem CMP compliant with the ECHR. Unfortunately, as information is unavailable on the working of Section 7 the Society seeks reassurance that it is operating effectively.

Notably the Bingham Centre on the Rule of Law outlined in its 2014 report⁷ that Section 12 reporting requirements do not ensure enough information is provided so that the public are informed about the occasions when CMP's are sought and why declarations are or are

⁶ M. Chamberlain, 'Special Advocates and Amici Curiae in National Security Proceedings in the United Kingdom' (2018) 68 *University of Toronto Law Journal* 3

⁷ https://www.biicl.org/documents/284_cmps_the_first_year_-_bingham_centre_paper_2014-03.pdf

not made. The report stated it is reasonable to expect that sufficient information should be provided as it is a matter of democratic accountability, particularly as cases where CMPs have been or will be sought, often engage the behaviour of Governments. Consequently, the Society believes that there is a need for openness around the procedure and how it operates in practice.

Practical Considerations and Procedural Matters:

Section 9 of the Justice and Security Act allows for a Special Advocate to represent the interests of a party who is prevented from seeing the sensitive material. Once closed proceedings are entered into, the Advocate cannot communicate to the instructing solicitor nor client. The Society suggests that this raises fundamental concerns around the discharge of professional ethics and the resulting perception of distrust with the instructing solicitor. It is noteworthy that many Special Advocates have publicly expressed concerns that the CMP is inherently unfair and contrary to the common law tradition.

John Sullivan argued in an article 'Closed Material Procedures and the Right to a Fair Trial',⁸ that allowing ongoing communication between the Advocate and the defendant, even if the Advocate cannot reveal specific details about the evidence, would at least improve the excluded party's ability to present his/her case. The Society believe this would be fair. In addition, further training and support should be provided for Special Advocates, and importantly more resources are required as there are simply not enough Special Advocates in this jurisdiction. This deficit requires to be addressed.

The Society has concerns regarding the lengthy delays incurred when the CMP is commenced in a case. CMP appears to be used frequently in this jurisdiction in historical litigation where the plaintiffs are generally older citizens and solicitors have a real concern that by virtue of the delay - due to CMP - their clients may not survive the to see proceedings concluded. The delay in such proceedings due to CMP is perceived to inhibit access to justice. Therefore, the Society believe that a potential resolution to address this injustice would be to implement effective time limits and case management guidance.

Northern Ireland Perspective:

During the passage of the Justice and Security Bill, many lobbied against its introduction due to the potential adverse impact on outstanding conflict-related cases in this jurisdiction. The Committee on the Administration of Justice's (CAJ) submission to the Second Reading of the Bill⁹ highlighted a number of serious implications specific to the legacy of the conflict in Northern Ireland and a potential confliction with the framework of the Good Friday Agreement on transparency and accountability. CAJ also called on Peers to assess the compliance of the legislation with international standards in the UN Convention Against Torture.

⁸ <https://core.ac.uk/download/pdf/56359797.pdf>

⁹ <https://caj.org.uk/wp-content/uploads/2017/03/S387-CAJs-submission-to-the-Second-Reading-of-the-Justice-and-Security-Bill-on-Closed-Material-Procedures-Ju.pdf>

As outlined above, CMP is disproportionately used in Northern Ireland for purposes other than what it was originally intended. From 2013 to 2017, a total of 41 applications for CMP were made across the whole of the UK, 15 of which were relevant to NI. This represents **36% of applications** during this time period relating to this jurisdiction. The Society believes that this can only be viewed as disproportionate. In addition, of those 41 applications during the first five years of the operation of the procedure, none of them related to the War on Terror.

The Society would like to express concern about the overuse of the procedure and its general expansion, especially its disproportionate use in this jurisdiction in legacy litigation. There is no doubt that there are still national security issues prevalent in today's society, but when the data is scrutinised it appears that CMP is being disproportionately applied to legacy litigation in Northern Ireland.

Conclusion:

In conclusion, the Society is concerned that CMP does not sit comfortably with the basic principles of justice, particularly the rule of law and the principle of open justice. It also raises human rights concerns, especially in relation to Article 6 of ECHR. Since the procedure came into operation it has been deployed in a wide variety of cases, and seems to be over used in Northern Ireland in contrast to sister jurisdictions. The growth of the procedure into areas for which it was not originally intended is concerning.

CONSULTATION QUESTIONNAIRE

THEME 1: Aims of CMP under the JSA

6. How do you see the rationale for extending the use of CMP under the JSA?

It is evident from the information provided above by the Society that it would be concerned by any further extension in the use of CMP.

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?

Please refer to the section above titled 'Fundamental Principles and Human Rights Considerations' for judicial interpretations.

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?

Please refer to the paragraph above titled 'Practical Considerations and Procedural Matters' which clearly sets out the adverse impact of CMP on a litigated case in terms of its duration, particularly in legacy actions in this jurisdiction.

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?

The Society is unable to respond to this question as it is not privy to such information.

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?

The Society is unable to answer this question as it is not privy to such information.

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?

Please see response to question 10 and refer to the section above titled 'Parliament's Intentions vs Operation in Practice' which crystallises the Society's views that the operation of the procedure has been extended beyond what was intended.

12. Is it possible to see how the litigation would have proceeded (or not) in the absence of a CMP?

The Society suggests that a PII procedure would have been applied.

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?

The Society suggests that this should be a separate exercise requiring specific attention with input from practitioners to ensure compliance with ECHR.

15. Are there any changes to CPR Part 82 which should be made?

The Society suggests that consideration be given to an allowance for the Special Advocate to have ongoing communication with the person excluded without revealing specific details. Please refer to 'Practical Considerations and Procedural Matters' above.

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

Please refer to the Society's commentary provided above which deals with all aspects of CMP.

CONCLUSION

The Society welcomes the opportunity to submit a response in respect of the call for evidence on the "closed material procedure" provisions in the Justice and Security Act 2013.

We trust our contribution is constructive.