JUSTICE AND SECURITY ACT 2013
Review pursuant to section 13

Reviewer: Sir Duncan Ouseley

SPECIAL ADVOCATES' SUBMISSION

Submitted to the Reviewer on 8 June 2021, with a request that the Government clear the submission for open publication.

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GLD	Government Legal Department
IRTL	Independent Reviewer of Terrorism Legislation
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MoJ	Ministry of Justice
ORs	Open Representatives (for the party excluded from the CMP)
PII	Public Interest Immunity
SAs	Special Advocates
SASO	Special Advocates' Support Office
SIAC	Special Immigration Appeals Commission

Introduction

1. On 25 February 2021 the Lord Chancellor announced the statutory review of the operation of closed material procedures (CMPs) provided for by the Justice and Security Act 2013 (JSA 2013), sections 6 to 11. The appointed reviewer is Sir Duncan Ouseley. A 'call for evidence' was published on 7 April 2021.

2. This submission is made by practising Special Advocates (SAs) with experience of CMPs, applied for and/or permitted, pursuant to section 6 of the JSA 2013:
   (i) Every Special Advocate still in practice at the Bar, who has acted in a CMP in England and Wales.[1]
   (ii) Every Special Advocate still in practice at the Bar, who has acted in a CMP in Northern Ireland.

   As far as we are aware, no applications under section 6 of the JSA 2013 have been made in Scotland.

   Three of those who have acted as SAs in England in such proceedings have since been appointed to the High Court Bench[2]. One SA in Northern Ireland has been appointed to the High Court Bench.[3] None of these four judges has had any input into this submission.

[1] The single exception is a SA (Ben Watson) who resigned from the list of SAs and is now instructed in CMPs on behalf of the Home Secretary, and so has not been involved in this submission
[2] Martin Chamberlain QC, Jeremy Johnson QC, and Judith Farbey QC (as they then were).
[3] David Scoffield QC (as he then was)

There is a degree of overlap between groups (i) and (ii) above, as some SAs have been appointed in cases in both jurisdictions, being called to the Bars of both nations. Some of those subscribing to this paper no longer act as SAs, although remaining in practice at the Bar. Some of us have experience of only one or two cases under the JSA (although may have wider experience of CMPs in other contexts since the JSA came into force). Others have been involved in CMPs under the 2013 Act throughout this time.

3. Our role as SAs gives us particular insight and experience in relation to CMPs. We are the only non-Government lawyers who have direct experience of their operation. Collectively, as far as we are aware, those subscribing to this submission have been involved in every case in which an application under s.6 has been made.

4. In the interests of transparency, this submission is intended to be made open, subject to clearance, and capable of publication. As a result, we are limited in our ability to provide specific examples to illustrate points made, where to do so might be regarded as risking harm to the public interest or breach orders providing for confidentiality or anonymity. We also have in mind our obligations under CPR rule 31.22 (restriction on use of disclosed documents, as applied in England and Wales) and the implied undertaking in relation to disclosed documents (in Northern Ireland). With suitable reassurances and approval, we can readily provide case-specific illustrations to the Reviewer.

5. In a corresponding spirit of transparency, it is hoped that any submissions to this review on behalf of Government bodies or agencies will be published in full, and so made available for wider review and comment. In so far as the Government only publishes a redacted submission or submissions, such redactions should be strictly justified and an unredacted version should be made available to SAs for comment.

6. Given the scope and depth of the collective experience which we would seek to contribute to the Review, we hope that we will be excused for substantially breaching the indicative limit on the length of submissions.

7. In large measure the systemic issues and concerns that we identify below, arising in the operation of CMPs under the JSA, also apply in CMPs in other contexts (such as SIAC) but which fall outside the scope of this review.

Principles

8. We set out the following propositions which we consider should be uncontroversial:

   (1) CMPs represent a fundamental departure from recognised standards of fairness in legal proceedings.

   (2) There is nonetheless a legitimate theoretical justification for CMPs, to the extent that they provide a means of trying claims that could not otherwise be tried, or only tried in circumstances where the unfairness involved is even greater than that which is inherent in the CMP.

   (3) Parliament has sanctioned, through the JSA, a regime that makes CMPs available in a wide range of civil proceedings. This is distinct from statutory CMPs that had already been created in various specific contexts.[4]

   (4) In passing the JSA, Parliament has (a) imposed requirements to enable monitoring and review of CMPs under the Act, through sections 12 and 13; and (b) identified in section 6 specific criteria that must be met in order to access a CMP under the Act.

   (5) Given the exceptional nature of CMPs permitted under the JSA, the level of unfairness that is inherent in CMPs, and the public interest in these procedures which depart from the recognised norms of fair trial procedures:

      A. It is critical that the Government should strictly comply with its duties under sections 12 and 13, which are provided to enable monitoring and oversight of the operation of CMPs under the JSA.

      B. The Government is under a duty to provide adequate support for Special Advocates to enable them to perform their role as effectively as possible within the statutory constraints of CMPs.

      C. There is a heightened duty on all those operating such exceptional procedures to ensure that in each case the incursions into ordinary fair trial principles are no greater than may be strictly justified under the Act. That applies to the Courts, Special Advocates, open representatives, and most particularly (given their primary role in initiating CMPs and the selection of material that is not openly disclosed) the State bodies involved and their representatives.

[4] Notably immigration proceedings in SIAC, control orders (which were superseded by TPIMs, or Terrorism Prevention and Investigation Measures), proceedings arising out of some financial restrictions in the High Court, and some other specialist tribunals.

Summary

The Government repeatedly asserts its commitment to CMPs, and ensuring that they are properly resourced, and operated as fairly as possible. Such assertions were made at the time of the Green Paper and Bill that led to the JSA, and have been repeated since. It is, however, our routine experience since the JSA 2013 came into force that those assertions are not matched by reality in some serious respects.

- The Government has failed to honour commitments made at the time the JSA was being debated. These failures have all combined to increase the unfairness of CMPs, significantly beyond the unfairness that is inherent to such procedures.

- The Government has also failed to comply with Parliament's requirements for monitoring and review of the operation of CMPs, which in turn has delayed and deflected legitimate public scrutiny and debate in relation to their operation.

A. Monitoring and Review

Parliament's requirements for monitoring and review of CMPs under the 2013 Act have been frustrated by the Government. In particular:

(i) There has been an inordinate and unlawful delay in commissioning the review, such that the review was only announced some 2½ years after the end of the 5 year period. Parliament had required through s.13 that the review should be performed "as soon as reasonably practicable" after the end of that period.

(ii) There have been unexplained and increasing delays in publishing the annual reports required by s.12, which prevent and delay public access to even the information that Parliament required under s.12.

(iii) Most recently, the Government has sought to prohibit discussion between the Special Advocates and bodies interested in contributing to the review. This constitutes an unjustifiable interference with legitimate public debate in relation to CMPs.

B. Systemic support for CMPs

The Government has failed to honour the commitments made at the time the JSA was being passed to improve CMPs and provide adequate support and resources for the Special Advocate system that is integral to the operation of CMPs. This is addressed in our submission under the following heads:

(i) Resourcing and support for SAs;

(ii) Training for SAs;

(iii) The provision of a Closed Judgment database.

In addition, there is a particular and acute failure to provide the necessary facilities and support for CMPs in Northern Ireland, to enable SAs to operate effectively in that jurisdiction. By contrast with the position in London for SAs operating in England and Wales, in Northern Ireland:

(i) There are no dedicated facilities for SAs to work on closed material.
(ii) There is no SASO office or presence in Belfast.
(iii) There is no mechanism or route for clearance of confidential communications from SAs to open representatives (known as 'the 'LPP route' of communication that has been devised in England and Wales).

These shortcomings have contributed to substantial delays in progressing any cases involving CMPs in Northern Ireland, over and above the delays beyond expected timescales that may be inherent in the operation of CMPs in all cases.

C. Operational approach

In specific cases, it is the routine experience of SAs that the State bodies involved do not recognise, or act in accordance with, duties:

(i) To keep open representatives as fully informed as is possible, subject only to the statutory constraints of the proceedings;
(ii) To maximise the open disclosure provided at the earliest possible stage;
(iii) To devote sufficient resources to progressing closed cases that enables them to be resolved within a reasonable timescale.

We have a series of more routine observations and suggestions in relation to the operation of CMPs from our perspective and experience that are also set out below.

Background

9. The genesis of the JSA 2013 is of some significance in addressing the questions raised in the call for evidence.

9.1 On 13 July 2011 the Supreme Court handed down its judgment in *Al Rawi and others v. The Security Service and others*[5] [2011] UKSC 34. The majority of a 9 judge Court held that the closed procedures were such a departure from fundamental principles of fairness and open justice that they could not be developed by the common law. Exemplifying this view was the conclusion of Lord Dyson at §69

> "… the issues of principle raised by the closed material procedure are so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so. No doubt, if Parliament did decide on such a course, it would do so in a carefully defined way and would require detailed procedural rules to be made (such as CPR Parts 76 and 79) to regulate the procedure."

9.2 The Supreme Court also highlighted the risks of opening the door to CMPs:

> "… it is a melancholy truth that a procedure or approach that is sanctioned by the court expressly on the basis that it is applicable only in exceptional circumstances none the less becomes common practice. … This is not the time to weaken the law's defences. On the contrary, any weakening in the face of advances in the methods and use of secret intelligence in a case such as this would be bound to lead to attempts to widen the scope for an exception to be made to the principle of open justice."

9.3 The Coalition Government's response to the Supreme Court's decision in *Al Rawi* was to publish its Justice and Security Green Paper in October 2011. This included a proposal to expand CMPs to be available in all civil judicial proceedings.

9.4 The proposals made in the Green Paper for the extension of CMPs proved controversial. They prompted strong reactions from a variety of bodies. The SAs collectively produced a detailed response[6], based on their experience of operating existing statutory closed procedures.

9.5 Taking account of some of these concerns the Bill was heavily amended in its passage through Parliament. Requirements for statutory review were

[5] [2011] UKSC 34, [2012] 1 AC 531
[6] SAs' Response to the Green Paper

inserted, providing for annual reports (in what became section 12) and a review after five years (now section 13). In addition, the Government gave a series of undertakings to improve the fairness and effectiveness of CMPs, as part of their justification for the substantial extension of their reach through the JSA: these commitments are considered below.

The justification advanced for CMPs in the JSA 2013

10. The justification for CMPs in the JSA 2013 may be seen from the Green Paper. Distinct from the proposals that led to sections 6 to 11 were relatively uncontroversial proposals for transferring challenges to various immigration decisions (in particular exclusion from the UK, and naturalisation and citizenship decisions) into the jurisdiction of SIAC, which had previously been the subject of judicial review. In due course these proposals were put into effect by section 15 of the JSA – so are not relevant to the justification for the CMP provisions at ss.6 to 11.

11. The central argument advanced for introducing CMPs into ordinary civil proceedings appears to have been based on private law civil claims. Certainly that was the argument that was exemplified by the contention that "the Government has had to reach expensive out-of-court settlements with former Guantanamo detainees because of a lack of an appropriate framework in which civil damages claims involving sensitive material could be heard."[7] Curiously, however, these claims were settled before the Supreme Court had held in *Al Rawi* that no CMP was available under the common law, so the assertion that these settlements were forced on the Government through lack of a CMP may be questionable[8].

12. Review of the cases in which a CMP has been permitted under the JSA does not indicate that it has led to the Government defending civil damages claims to trial. Strikingly, by reference to the attached case list, we are not aware of a single private law damages claim – in any national jurisdiction – in which the Government has successfully defended at trial, rather than settled, a case in which a CMP has been imposed.

[7] Green Paper para 1.18. See also paras 1.54, 2.2, and App J at para 11 The Foreword to the Green Paper also makes this assertion and refers to the mediated settlement having been reached in November 2010.
[8] And was questioned at the time: see e.g. SAs' Response to the Green Paper at para 37.

A. MONITORING AND REVIEW

A1. The review required by section 13

13. Section 13(3) of the JSA 2013 stipulates that this review "must be completed as soon as reasonably practicable" after 24 June 2018 (i.e. the end of the 5 year period to which the review relates). On receipt, a copy of the report must be laid before Parliament by the Secretary of State (s.13(4)).

14. No explanation has been provided by the MoJ as to why the review was not announced until 25 February 2021, 2 years and 8 months after the end of the period, with completion of the review not envisaged until more than 3 years have elapsed since the end of the period.

15. Over the period running up to the 5 year anniversary in June 2018, and in the years since, there have been repeated Parliamentary Questions as to the timing of the statutory review[9]. Others, including a Special Advocate, have been pressing the Government to indicate when the overdue review would be commissioned.[10] [11]

16. This delay in appointing a reviewer is not simply an apparently clear breach of statutory duty, in relation to a safeguard that Parliament had imposed at the time the JSA was passed. Its unfortunate effects include the following:

    (i) The delay will have had a practical impact on the work of the review, given the years that have passed since the expiry of the 5 year period. It would seem unrealistic to ignore the experience of CMPs since the period under review, which provide the most recent examples of the operation of the JSA. That experience must at the least be essential context against which the 5

[9] The first backbencher to raise a Parliamentary Question on this issue was Kenneth Clarke MP, who was Secretary of State for Justice at the time the Green Paper was published and oversaw the Bill's passage through Parliament. That elicited on 23 April 2018 the first of a long series of non-committal ministerial answers from a succession of Justice Ministers: The Minister's answer on this occasion (Lucy Frazer MP) concluded: "Discussions between officials are ongoing and an announcement will be made in due course." See further: https://ukhumanrightsblog.com/2020/01/28/secret-justice-an-oxymoron-and- the-overdue-review/ The last in this series of questions was put by Lord Anderson QC on 23 September 2020, yielding an answer on 9 October 2020 which confirmed that a Reviewer had still not been appointed and "discussions are taking place on the appointment of a Reviewer".

[10] See Joshua Rozenberg, Law Society Gazette, 21 September 2020, https://www.lawgazette.co.uk/commentary-and-opinion/lifting-the-lid-on-closed-hearings/5105661.article

[11] Since November 2019 Angus McCullough QC has been repeatedly enquiring through the Government Legal Department and then directly to the MoJ as to why this review had not been commissioned: lengthy email chain can be produced, eliciting only a series of non-committal responses in line with those received to Parliamentary Questions.

year period must be considered, and could not realistically be ignored in the formulation of any recommendations by the Reviewer.

(ii) The delay has prevented such recommendations as the review may make with a view to improving CMPs under the Act – whether as to fairness or efficiency – being made at the proper time. In the meantime, since June 2018 CMPs have been being operated, unreviewed, whilst potentially capable of significant improvement in ways that the review may identify.

17. It is clear that the intention of Parliament in passing section 13 was that there should not be any significant gap between the period under review and the conduct of the review itself. On that basis, we have taken account of the experience of CMPs under the JSA over the entire period up to the point when the review was announced in February 2021, rather than artificially restricting it to the period ending in June 2018. As will be seen below, some of the concerns encountered during the 5 year review period have since been alleviated, whereas others persist. We respectfully invite the Reviewer to take the same approach in considering the operation of CMPs since June 2018.

A2. The annual reports required by section 12

18. Section 12 requires reports to be laid before Parliament at the end of each 12 month period, setting out specified basic information in relation to the applications under the JSA, as well as "such other matters as the Secretary of State considers appropriate"[12].

19. The Secretary of State is under a specific duty to prepare the report and lay it before Parliament "as soon as reasonably practicable after the end of the twelve month period to which the report relates." (s.12(4)).

20. The following table sets out the dates of publication of the reports under s.12.

Period ending 24 June:	Date published:	Delay
2014	8 August 2014	8 weeks
2015	15 October 2015	4 months
2016	16 November 2016	5 months
2017	14 December 2017	6 months
2018	13 December 2018	6 months
2019	1 December 2020	17 months
2020	22 April 2021	10 months

A3. Special Advocate input into the public debate on CMPs

21. There is a long-established history of SAs being involved in the public debate about CMPs and their operation. This is exemplified by the active role that practising SAs played as the Bill that led to the JSA 2013 was passing through Parliament. SAs have frequently given evidence on questioning by Parliamentary Committees. We have also often attended meetings with NGOs interested in the rule of law, as well as academics, students, and lawyers from other jurisdictions interested in the operation of CMPs. SAs have also engaged in public seminars and discussions in relation to CMPs. It is routine practice for SAs to inform SASO in advance of such involvement, so that there is a formal record. There has never been any objection raised to such activities, either in advance or following such engagement.

22. In the course of their consideration of the present review and call for evidence, the well-known NGO 'JUSTICE' convened a round-table meeting to discuss and

[12] In practice, it seems that the Secretary of State has not considered it appropriate to provide any significant further information by way of "such other matters".

inform their contribution to the review. A number of SAs, whom JUSTICE were aware had experience of CMPs, were invited to that meeting which was arranged for Friday 14 May 2021.

23. In line with previous practice, on 7 May 2021, SASO were informed of the intended SA participation in this discussion, with the usual reassurance that it was obviously appreciated that there would be no discussion by SAs of any specific cases.

24. The night before the meeting, at 8pm on Thursday 13 May 2021, an objection was received by SAs (passed by SASO, who had in turn received it from GLD) in the following terms:

> *"Further to my message below and our discussions, to confirm that my clients have given this matter careful thought and they <u>do</u> object to Angus[13]/SAs attending the JUSTICE event.*
>
> *As I've said below, it is the risk of inadvertent disclosure which makes clearance of communication with others about their work as SAs necessary, and the risk is just as real in the context of a forum such as JUSTICE is proposing as it is in the context of a book publication, submissions to the JSA reviewer, or as it was when SAs made submissions on the Green Paper. My clients are not aware of SAs speaking at events or giving evidence to a Parliamentary select committee without their involvement in clearing the speech/submissions. However, if you have any information that demonstrates departure from the usual approach of providing submissions, etc. for clearance ahead of involvement in public events my clients would consider that (to the extent possible in the time available).*
>
> *As I also mention below, it has been agreed that HMG will need to security check the SAs submissions to Sir Duncan, so it would be consistent for their input into others' contributions to be security checked.*
>
> *My clients have said however that they might be able to consider security checking speaking notes for the event but given the very limited time available it may simply not be possible to conduct a review in time, even if they were able to divert resource to it."*

25. On Friday 14 May 2021, SASO sent the following response to GLD, for transmission to their 'clients':

> *"The SAs proposing to attend the discussion organised by Justice this afternoon are surprised and concerned that there is an objection to their participation in the event. They would be grateful if the following questions could be passed back.*

[13] Angus McCullough QC

1. *Please confirm the organisation that has raised the objection, and the level within that organisation.*

2. *On what basis can there be any "risk of inadvertent disclosure" arising from participation in a discussion which does not relate to any specific cases (as the SAs have made clear would be the case)?*

3. *On what statutory basis or other authority is the objection raised? You have referred to the requirement for "clearance of communication with others about their work as SAs", but the only requirement for clearance arises in the context of specific cases: see e.g. CPR r.82.11 and equivalent provisions in other CMPs.*

4. *You state "My clients are not aware of SAs speaking at events or giving evidence to a Parliamentary select committee without their involvement in clearing the speech/submissions." That is surprising, as there is a long history going back at least 15 years of SAs being involved in public debates and speaking at public events about CMPs, as well as engaging in discussions with NGOs and academics. None of these has involved prior clearance of what they would say (which in any event would not be feasible where evidence is given in response to questioning), nor led to any concern or objection being raised. To collate a comprehensive list would be time-consuming, but the following are a few examples from very many, of SA involvement:*
   - *Oral evidence, 12 March 2007, Q85, quoted in the 19th Report of the JCHR, 16 July 2007, given by Nicholas Blake QC, Martin Chamberlain, Judith Farbey, and Andrew Nicol QC https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf*
   - *Oral evidence to the JCHR from Helen Mountfield, Angus McCullough, and Tom de la Mare, 3 February 2010: https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/uc356-i/uc35602.htm*
   - *A meeting with Amnesty in June 2011 attended by several SAs, including Martin Goudie and Angus McCullough, following specific approval from TH*
   - *Oral evidence to the Public Bill Committee, 21 June 2011: Angus McCullough and Judith Farbey https://publications.parliament.uk/pa/cm201011/cmpublic/terrorism/110621/pm/110621s01.htm*
   - *Oral evidence to the JCHR on the Justice and Security Green Paper, 31 January 2012: Angus McCullough QC and Jeremy Johnson QC*
   - *Further oral evidence to the JCHR on the Bill, 26 June 2012, Angus McCullough QC and Martin Chamberlain QC https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Uncorrected_Transcript_Justice_and_Security_-Bill_26062012.pdf*
   - *Participation in seminar on closed proceedings organised by the Administrative Law Bar Association, February 2015, Angus McCullough QC*
   - *Oral contributions to a symposium in New York in 2016: 'Terrorism Trials and Investigations: A US-UK Transatlantic Dialogue', with a range of senior US and UK judges and lawyers, arranged by the Center on Law and Security, New York University: Angus McCullough QC*

- *Meeting with Professor Jackson, an academic doing research for a book on Special Advocates in November 2016 – several SAs attended.*

Are your clients really unaware of this long history, from which the above events constitute only a limited selection? And do they now propose to prevent such contributions from SAs to inform the public debate in relation to CMPs, in particular in relation to the pending Ouseley review – if so, please could they explain this change of policy?

5. *Please could your clients explain why the risk of "inadvertent disclosure" is any higher from participation in such discussions than that involved in other SA activities that are routine, including participation in open hearings in which a CMP has been ordered and conferences with open representatives in cases before receipt of closed material in that case (assuming there to be no specific 'tainting' objection)?"*

26. A response to these enquiries has yet to be received as at the date of this submission, more than 3 weeks later. Pursuant to the SAs' request, GLD indicated that the SAs were permitted to attend the meeting on a 'non-participating' basis, such that they could play no active role in the discussion.

27. It is a matter of concern to SAs that the Government (or an agency of the Government) have sought to prohibit SA involvement in the legitimate public debate on an issue of this importance. As we highlighted at the outset of this submission, SAs are the only individuals outside Government who have direct experience of the operation of closed procedures, and so have a particular insight and contribution to make. Pending responses to the queries raised by SAs, as set out above, it is not apparent by what authority this objection was raised, or why a stance at odds with that which has been sensibly applied without any concerns arising for at least 14 years has been altered.

28. At all events, the Government's stance has inhibited informed input into this Review which is as regrettable as it seems unjustifiable.

A4. Publicly available information on cases under the JSA 2013

29. In the context of this Review, we consider that there is currently a lack of publicly available information that would enable interested bodies and individuals to contribute to it. The information published in the section 12 reports is limited, even when produced after substantial delays (as set out above), and the statistics provided are not easy to evaluate.

30. In the interests of identifying a comprehensive list of cases that fall within the scope of the Review, both within the 5 year period, and since, at our request SASO has sought to compile a list of cases in which an application under s.6 has been

made[14]. This list is annexed to our submission. It is hoped that this list may assist other parties in making informed representations on the Review. On 21 May 2021 SASO sought approval for this list to be made open. This request was followed up on 27 May 2021. On 4 June 2021, the request was refused in the following terms in an email sent from GLD to SASO:

> *"Thank you for the document that you delivered last week to be cleared by our clients. We understand this has been prepared in order to form part of the SAs' response to Sir Duncan's review.*
>
> *We note that Sir Duncan's review relates to the period 25 June 2013 to 24 June 2018. A number of the cases listed in the document provided last week fall outside of that scope and we do not agree that it is proportionate for our clients to divert resource to clearing material that falls outside of the scope of that review. In the circumstances, we would invite the SAs to provide a revised version, within scope, which our clients can consider.*
>
> *It is also important to note given the range of cases in the document and the material such cases cover, it is necessary for us to seek clearance from a number of departments on the contents of that table. Once we have we received the revised list from you, we will begin that process."*

31. The following points are highlighted:
    - It will be seen from the case list that the details included are devoid of any potential national security sensitivity. The request for clearance, with an appropriate degree of co-operation, should on any view realistically have been possible well within 48 hours.
    - The refusal, when finally received after 2 weeks (not the week before the refusal on 4 June 2021 as incorrectly stated there), is surprising. There was no suggestion that anything in the list was sensitive. The assertion that the resources that it would take to review the cases that post-date June 2018 were disproportionate and would require GLD's clients to 'divert resource' from other activities is hard to credit as consistent with a co-operative approach. The list was not to be cleared for accuracy, but sensitivity.
    - Even if the assertion that review of the cases post-dating June 2018 constituted a disproportionate burden were taken at face value, GLD's clients have apparently not seen fit to review and clear the cases that are accepted by them to fall within the relevant 5 year period.

32. We fully accept that Governmental bodies must take all reasonable steps to protect sensitive information. Indeed, it is integral to our responsibilities as SAs to ensure

[14] We record our gratitude to SASO for the considerable time taken to perform this task, and cross-check records against other sources. There are gaps, and may be some inaccuracies in the list, but we believe that these are minor. As errors or omissions come to light we will seek to update the list.

that any potentially sensitive information is protected, and each of us takes those duties extremely seriously. However, taken together with the points set out at A1 to A3 above, we are driven to observe that the response (or lack of it) to the request for clearance of the case list is symptomatic of the Government's approach. That approach cannot be justified by reference to the proper protection of genuinely sensitive information. The approach does not seem to recognise any duty of openness in facilitating access to information with no sensitivity, or to a properly informed public understanding of CMPs and their operation. Rather, the approach has the effect of obstructing and frustrating informed public debate and scrutiny of CMPs, including in the context of this review.

B. SYSTEMIC SUPPORT FOR CMPs

B1. Undertakings given by HMG

33. At the time the JSA was being passed the Government made a series of commitments to improve and enhance CMPs, including the following by way of support for SAs:

Legal Support[15]

> *"… in addition to further training sessions that Special Advocates may feel that they require, they will be provided with sufficient resources in terms of independent junior legal support to ensure that they are able to carry out their function as effectively and thoroughly as possible."*

Training:[16]

> *"The Government will make available increased training for Special Advocates where required."*
>
> The SAs' response to the Green Paper stated that *"the proposal for further training for Special Advocates is not unwelcome (although has previously been proposed without being forthcoming)."*

Closed Judgment Database[17]

> *"The Government believes it is important to ensure that those that are entitled to access closed judgments are able to do so efficiently and effectively. For this reason, the Government has created a searchable database containing summaries of closed judgments which will allow special advocates and HMG counsel to identify potentially relevant closed judgments. It is not a database containing the full version of closed judgments handed down by the courts."*

34. These commitments were reaffirmed in a letter dated 31 October 2012 from the Minister (James Brokenshire MP) to SASO, following meetings with SAs that year. This letter included the following:
    (i) *Legal support*: "We are also committed to providing proportionate resources (including capacity in SASO and availability of junior legal support) to Special Advocates."
    (ii) *Training*: "As you are aware, we are committed to support further training of Special Advocates both in terms of financing and input from agencies. …

[15] See e.g. Green Paper at para 2.27
[16] Para 2.24, within relevant section from 2.24 to 2.26
[17] See e.g. HMG Response to the Joint Committee on Human Rights Fourth Report of Session 2012-2013: and Green Paper at p.56

Agencies remain committed to providing the introductory training sessions that I believe Special Advocates find of great value and are considering the content and need for other bespoke or refresher courses. I look forward to seeing your proposals for in-house training and would encourage you to work with the agencies on further training that would beneficial [sic] to Special Advocates in the pursuit of their duties.

(iii) *Closed judgment database*: "Finally, I am grateful for your input in developing the database of closed judgment summaries. I understand that you have been given the opportunity to view the database, and that its initial incarnation is close to being finalised. The intention is for summaries of all future closed judgments to be entered on the database."

B2. Chronology

35. In each of these respects, there has been a serious failure to deliver the promised support, despite repeated requests by SAs through GLD. In the absence of an adequate response, the SAs have been forced to escalate their concerns to successive Independent Reviewers of Terrorism Legislation. This may be charted through the following history, of which the underlying documents may be produced:

13 January 2015 a letter from almost all then currently practising SAs was written to SASO, requesting escalation of concerns at:

(i) the decrease in staffing levels of SASO and highlighting the resultant inability to carry out our routine support functions, and "an immediate and urgent need for such further resources if we are able to continue to perform our function effectively": "Given the nature of our role and the importance of the underlying proceedings, these are serious concerns."

(ii) the absence of the provision of any further training since the Green Paper was published [in October 2011].

(iii) the continuing lack of any functional database of closed judgments available to SAs; and

29 January 2015: GLD response, (i) denying a systemic problem with SASO staffing levels and performance (although acknowledging the reduction in staff numbers); (ii) indicating that colleagues would be in touch with SASO shortly to discuss the agenda for a training day, hoped to be held before the end of March; and (iii) providing an indication that updating of the database of closed judgments was expected by the end of March 2015.

6 February 2015 GLD confirmed that there were no current plans to increase SASO staffing despite the serious concerns expressed by SAs.

24 March 2015: A meeting of SAs at which the concerns expressed in the letter of 13.1.15 were reiterated, and it was made clear had not been allayed by the GLD response to that point.

8 July 2015: A further letter signed by every practising SA in England at the time was written to GLD. It drew attention to the worsening problems arising from the lack of proper resourcing for SASO, as well as the continuing lack of a closed judgment database or any training.

> "The continuing failure, either before or since the end of March, to provide the updated database, or any proposals for training, is not just disappointing. It tends to cast further doubt on the Government's asserted commitment to the Special Advocate system. You reiterate this commitment in your 29.1.15 letter, but it has not been mirrored by any effective response to our concerns about the resourcing of SASO in the intervening months, over which time we have witnessed a further deterioration in the service."

The letter concluded as follows:

> "17. Our requests arise from our serious concern that we should not be compromised in the role that we perform as Special Advocates in cases that are almost invariably of high importance and sensitivity. We cannot function effectively in the present circumstances. We acknowledge and anticipate that the position is likely to be somewhat eased if and when two closed Administrative Officers are made available, but this will not be sufficient to run an effective service without more closed lawyers and some system to ensure that effective administrative support is maintained.
>
> 18. We have given every opportunity to the Government to demonstrate its asserted commitment to the special advocate system, and that has not been forthcoming. We would be grateful if you would confirm what, if any, steps GLD will now take to ensure that SASO is in a proper position to support our work effectively. We stand ready to do whatever we can to assist to that end."

5 August 2015 GLD response (after nearly a month): No acceptance of a problem with SASO functioning, nor any commitment to improved resourcing of SASO, but a meeting with the Treasury Solicitor (Jonathan Jones) was offered. On training: "… not within GLD's control, but SASO has been liaising with the relevant department and will continue to do so." It was noted that the closed judgments database is not something within SASO's control: "It is unfortunate that it has not yet been put in place but liaison will continue with a view to having it put in place as soon as practicable."

21 September 2015 SA collective response by email, stated:

"We are at a loss to understand how it cannot be accepted that there is any problem in the functioning and resourcing of SASO, given the unanimous and acute concerns of the special advocates whom the service exists to support. We are confident that the staff of SASO, in any candid discussion, would echo those concerns. There are now frequently times when only one closed SASO lawyer is available, given the inevitable coincidences of sickness and holidays on occasion. … We experience continuing incidents of missed and delayed deliveries and other failures in the service. We are clear that these are not generally attributable to individual failings amongst SASO staff, but are a product of the intolerable position in which they have been placed.

The stance adopted by the GLD in your letter, whereby the existence of any problem is simply denied, is inconsistent with the special advocates being able to function effectively. The direct corollary of the special advocates being unable to function effectively is that closed proceedings cannot be operated in the way Parliament has intended in setting them up.

If there is any prospect of a more constructive approach from GLD, we would welcome an urgent meeting with you and Jonathan Jones to discuss this further. …"

1 October 2015 A meeting between three senior SAs and the Treasury Solicitor, Jonathan Jones, took place. The Treasury Solicitor recognised and accepted that there was a problem with the functioning and resourcing of SASO (contrasting with the position asserted in the GLD letter of 5 August 2015). He indicated some steps to increase the resilience of SASO were to be taken by creating a pool of three DV'd members of the wider team who could be called upon when staff vacancies within SASO arose. However, it was made clear that there were no plans to increase the size of the SASO team of legal or non-legal staff. Furthermore, the expected length of the DV process meant that the pool of DV'd members from which SASO could draw was not expected to materialise for several months (with 6 months being the rough indication).

19 October 2015 A meeting was convened with the head of the relevant GLD team leader at the request of two senior SAs after a succession of acute problems experienced in the preceding weeks. The SAs stated that the lack of resourcing of SASO was now not just causing routine inconvenience and difficulty, but was impacting on our professional standards as special advocates. The GLD team leader indicated that she was unable to increase the staff allocated to SASO.

16 December 2015 Meeting of SAs with SASO, at which it was confirmed that there were no plans to increase the staff of SASO lawyers which had been reduced back down to 4 despite 5 having proved inadequate in previous months, although it was proposed to recruit 2 further administrative staff on temporary contracts, neither allocated exclusively to SASO.

9 February 2016 All SAs practising in England at the time wrote to David Anderson QC, as Independent Reviewer of Terrorism Legislation (IRTL) to draw the continuing

acute problem to his attention and seek his suggestions as to how to remedy the situation, concluding:

> "The position will persist, and indeed is likely to deteriorate further, without some committed action being taken urgently. It may be that it would be appropriate to seek an urgent meeting with the Attorney General, given his ultimate responsibility for the appointment of SAs. We would be willing to participate in any such meeting. Even if individuals among us feel driven to resign our appointments, as a body we remain concerned about the future of special advocacy and the impact on closed proceedings, without any tangible indication on the part of Government that it is prepared to provide effective support to those continuing to act as Special Advocates."

23 March 2016 Meeting of SAs at SASO, attended by GLD 'Head of Litigation B'. An increase back to 5 lawyers was confirmed, bringing SASO staffing back up to a level that had been shown to be inadequate the previous year. None of the steps to increase SASO's resilience to staff departures, as outlined by the Treasury Solicitor in the 1.10.15 meeting had been taken, with no apparent awareness of the GLD staff present that this had been planned. No indication of training in prospect, beyond a general willingness for this to be provided, with the position continuing that newer SAs had not had available even the initial training that had been provided many years previously (before the SA came into force). There was no progress to remedy the lack of access for SAs to an up to date closed judgment database.

5 April 2016 Treasury Solicitor (Jonathan Jones) letter to SAs following his meeting with the AG and David Anderson QC, setting out steps to increase staffing and improve resilience. On training and staffing, he stated that "we have impressed upon the acting Director of the Office of Security and Counter-terrorism in the Home Office the importance of taking steps to address both these issues …".

[18 months of significantly improved support, May 2016 to November 2017]

2 May 2018 Meeting at SASO between the head of SASO and 2 senior GLD lawyers, with a senior SA following a recurrence of serious concerns about SASO staffing. The email sent following the meeting stated: "Our meeting was useful, and reassuring to the extent that it is recognised that there is a serious problem, and that genuine effort is being applied to address it. What remains disturbing is that notwithstanding previous assurances from the Treasury Solicitor himself, and the ongoing efforts made to deliver those promises, we are still in the position in which SASO is woefully under-resourced and the planned 'pipelines' of DV'd lawyers and administrative staff are empty, so cannot supply the contingent resources when required (as I think we all agree they are, desperately, now). In turn, this seriously impacts on SAs' ability to discharge our role, and so the legitimacy of the system for closed proceedings. Having heard from you, [GLD leaders], my own view is that this needs to be escalated: it has not proved practicable to resolve these issues within the GLD framework at this level, notwithstanding real efforts of those involved. I will consult with other SAs and see if there is a consensus as to how to proceed."

3 May 2018 Email from GLD leader setting out detailed plans for staffing and improved resilience.

30 May 2018 Email from a senior SA to GLD leader: **"**Further to our meeting on 2 May 2018 and your helpfully detailed email [of 3.5.18], I am afraid that the position in relation to the staffing of SASO has become even more dire. As I understand it (having been in court in closed proceedings), last week there was only one SASO lawyer from the supposed complement of 5, and this week I am not aware of any lawyer being present at SASO. I have just been called by the Claimant's lawyer from [identified civil claim] litigation (with whom I am permitted to speak under the terms of our appointment) as she was in desperation to speak to someone at SASO to discuss urgent arrangements for an extension. She said that she had called 5 numbers and got an 'out of office' voicemail message for 4 and a standard voicemail for the fifth.
This position is quite hopeless. With the approval of practising special advocates I have sought an urgent meeting with Max Hill, in his capacity as Independent Reviewer to highlight this issue and seek a way of achieving some sustainable service from SASO, and how this may be achieved at higher levels of Government. I appreciate that you and [second GLD leader] have been doing what you can, but the fact is that the steps that were promised by Jonathan Jones have not been delivered, with the result that Special Advocates are left without any adequate support from SASO. It is obvious that the integrity of closed proceedings is undermined if Special Advocates are not effectively supported by SASO."

6 June 2018 Four senior SAs attend meeting with Max Hill QC, as IRTL to raise these ongoing and longstanding concerns, with the support of the wider body of SAs.

12 June 2018 Head of Litigation at GLD invites SA to a meeting: "I am sorry that we have had a particularly challenging period recently and I would like to explore in more detail the impact it has had on our support to you and the other special advocates. If we need to look again at our baseline planning, I am more than happy to do so."

13 June 2018: Email from a senior SA to GLD Head of Litigation: **"**Pending any meeting that we may be able to arrange, I think I should re-emphasise that the impact of the present situation, which you would like to explore, is severe: it arises from SASO's current inability (notwithstanding the best efforts of those who are left trying to cope) to provide a reliable service for the collection and delivery of documents, processing of communications, and pursuing other requests. It is not an exaggeration to say that the compromise to our role impacts on the legitimacy of closed proceedings. The situation very closely reflects that which developed over 2014 to 2015, culminating in the measures that you and Jonathan Jones devised and were set out in his letter of 5 April 2016. Those measures were a response to the problems that had arisen from the combination of three main factors: (i) reduction in SASO staffing; (ii) an increase in SASO workload; and (iii) the delays in obtaining DV clearance. Since then, the nominal staffing levels of SASO have not increased, the overall workload has not decreased, and the delays in DV clearance remain. The measures – in particular the 'pipelines' of DV-cleared staff to enable continuity of staffing – have not been successfully adopted and so the problems have

entirely predictably recurred, now with greater severity and impact than ever. [GLD leader] has been clear that the failure to establish the pipelines is not one of resourcing, but of recruitment, in particular due to the (surprising on the face of it) reluctance of legal and non-legal staff to undergo DV clearance. He is also clear that these recruitment problems have occurred despite the best efforts of him and your team. This tends to indicate that GLD cannot provide a reliably functioning body to support the Special Advocates, at least within the existing structure and approach to recruitment. The SAs have raised these staffing concerns repeatedly within GLD over recent months, but have been driven to the view (subscribed to by the whole body of practising SAs in England) that it is necessary again to seek the assistance of the Independent Reviewer to facilitate an escalation of problem, and the search for a sustainable solution. … I very much hope that between us all, we will be able to achieve functional support for SAs in our role, on a sustainable long-term basis, and quickly."

13 June 2018: Email response from GLD Head of Litigation: "Let me reassure you that I do not underestimate the severity of the situation." Proposed meeting with IRTL before deciding upon next steps. "I share your hope that between us we will be able to work out a more sustainable support function for the Special Advocates – which is vital to the continued fairness of the system."

19 June 2018 Email from GLD team leader indicating that by 20 August 2018 "normal complement staffing levels" would be resumed.

26 September 2018 Email from GLD team leader setting out steps taken to increase staffing and improve resilience.

October 2018 Report from the IRTL[18], Max Hill QC included the following in the course of his review of TPIMs (but of equivalent application to CMPs under the JSA):

> "10.7. … terrorism-related proceedings which involve Closed hearings require the considerable skills of security-cleared Special Advocates, all of them experienced barristers, supported by SASO which is staffed by lawyers employed by the Government Legal Department but who do not act for the Government or undertake other Civil Service work during their time at SASO.
>
> 10.8. It has been my privilege when acting in TPIM cases before my appointment as IRTL to come into contact with many of the SAs, supported by SASO. Their work is demanding, requiring mastery of volumes of intelligence and other secrets material which is presented in digestible form to the High Court Judges who superintend TPIMs. The SAs also perform the vital adversarial function of 'putting the defence case' to security and intelligence witnesses in Closed hearings, when the ordinary legal representatives for TPIM subjects are unable to appear.

[18] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf

10.9. I therefore give the highest commendation to SAs and SASO for oiling the wheels of justice in these complex hearings, and for rigorously upholding the twin gatekeepers to TPIM orders, namely necessity and proportionality.

10.10. This year, I have learned of a serious human resources issue within SASO, leaving the office literally unmanned at times and usually under-manned. This is a source of great concern to the senior SAs who brought the problem to me, and I have attempted to assist by conducting meetings within GLD to cure the blockage within SASO.

10.11. At the time of writing, I understand that GLD and senior SAs are involved in constructive dialogue, with a view to resolving any remaining human resources issues within SASO. I am pleased to note this progress, and leave the question of any further review in the hands of my successor."

5 June 2019 Email to SASO in relation to training: "When the JSA was passing through Parliament, the Government made an express commitment to improve the training available to SAs. Nothing was done to honour that commitment for several years. Finally, when something was done in the face of sustained pressure from SASO and SAs, the principal proposal consisted of senior SAs training junior SAs; with the senior SAs not being remunerated for the time spent preparing and delivering such training (beyond a nominal £250 which in no way reflected the time involved), and the junior SAs receiving no remuneration at all."

12 June 2019 Email to SASO raising issues in relation to SA practice in Northern Ireland, following a meeting between SAs (Neasa Murnaghan QC and Angus McCullough QC) with Senior Crown Counsel in Belfast. The issues addressed included SASO Facilities: "[Senior Crown Counsel] confirmed that CSO [Crown Solicitor's Office] was unlikely to be able to continue to provide use of their [closed material] room to SAs as the volume of cases meant that it would be fully committed for Govt cases. He indicated strong support for the proposal that SASO should be provided with its own dedicated [closed material] room in Belfast, with discussion of possible locations for this. I am clear that SASO facilities in NI and for SAs to access and work on closed documents now needs to be progressed with vigour and urgency given the number of CMPs in the pipeline in NI." There was also discussion about issues arising from the lack of an established route for clearing communications from SAs to open representatives, in particular by a means equivalent to the 'LPP route' adopted in England.

27 June 2019 SA meeting with new GLD leader: Concerns raised "based on personal experience and that indicated to me by various other SAs, that in recent weeks SASO had not been maintaining the improved standards of service that had been achieved over the last few months; and that this suggested a lack of resilience in the system to cope with surges of work". Agreement to keep this under review. In relation to Northern Ireland: "(a) A physical location is urgently required as CSO has indicated that continued access to their [closed material room] will not be possible – and in any event it is not satisfactory to be reliant on their goodwill. It is not realistic or practical for SAs to travel to [remote State locations], as the case may be, to review material on booked appointments. (b)

Staffing: We also discussed the potential need for SASO staff presence based in Belfast. [SASO leader] suggested that there was insufficient work for a full time member of staff, and there was no obvious suitable Government legal body from which to take on a part-time SASO officer. Set against that are the demands in stretching the current London-based SASO team in providing support in Belfast, and the inefficiency associated with time and costs of travel to Northern Ireland. (c) *Systems*: Recent experience, where this was having to be addressed on an ad hoc basis, has highlighted the need for established systems for the transfer of closed material between London and Belfast in hard and soft copy." GLD leader agreed to consider these issues further, having only recently come into the role, but it was emphasised by the SA that "the physical location for SAs to have dedicated secure access to closed material was the highest priority: the current intolerable position is likely to become even more acute as more CMPs are in prospect in NI."

19 July 2019 Update from SASO, including that the Crown Solicitor's office was "continuing to press for more/ better facilities" as well as considering the communications point.

March 2020 Report of Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, which included the following (in the course of his consideration of TPIMs):

> "8.30 … The support available to special advocates has been the subject of criticism by my predecessors. I have been informed by current special advocates that recent improvements have resolved the most acute problems, but that the move of the Special Advocates Support Office to an address further away from the court and barristers' chambers is leading to further logistical problems. This is something that I propose to keep under review.
>
> 8.31 In a similar vein, I have been informed there are no facilities for special advocates or the Special Advocates Support Office in Northern Ireland to hold sensitive material. No TPIM has ever been imposed in Northern Ireland, but litigating these complex orders requires special advocates to have independent secure access to the material relied upon by the Secretary of State. The role of Special Advocates in Northern Ireland already extends to appearing in closed material proceedings under the Justice and Security Act 2013, and in prisoner recall or release cases which are based solely or partly on national security sensitive information."

B3. Support for SAs

36. As will be apparent from the litany above, during the five year period under review there were serious issues with the support provided to SAs through an unsustainable reduction in the staffing of SASO, and failures to provide for continuity of service.[19] At points, the Government sought to deny that there was a problem, necessitating escalation by the full body of practising SAs[20] to the highest levels before action was taken. Far from honouring the promise that SAs "will be provided with sufficient resources in terms of independent junior legal support to ensure they are able to carry out their function as effectively and thoroughly as possible" (see above) the legal support available in SASO was cut severely, at the same time as an increase in SA work, with a failure to take any steps to cater for absences and departures (taking into account the requirement of DV clearance and the time that this took). This lack of basic support compromised the effectiveness with which SAs could discharge their function, in proceedings in which the highest standards are required to ensure that the unfairness is restricted to that which is inherent in a CMP.

37. *Update since June 2018* 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 (although subject to the significant structural limitations in relation to support for SAs in Northern Ireland, addressed below) which is valued and appreciated by the SA body. Issues on occasion still arise - in particular concerns raised in June 2019 when the system appeared to be beginning to fail again - and we have the impression that staff are quite often overstretched, notably when individuals are absent (as will inevitably occur with sickness or holidays, even aside from sudden departures), but the diligence and experience of the leadership mean that the system is usually able to cope. It is hoped - but we are unaware of the precise position until it is put to the test - that there is now sufficient resilience in the system to cater for exigencies such as illness or sudden departures.

[19] It should be re-emphasised (as the SAs did throughout the period reviewed in detail above) that this systemic failure was in no sense attributable to those staffing SASO, who throughout have been dedicated professionals seeking to do their best in impossible and stressful circumstances.

[20] This constituted all SAs in England (including those based in England but also called and appointed as SAs in Northern Ireland), as it was not until later that there was substantive involvement in closed proceedings by SAs appointed in cases in Northern Ireland.

B4. Training

38. Despite the Government's commitment at the time the JSA was under consideration, the training provided by the Government to SAs has not been improved or increased, but almost stopped altogether in the 5 years following the JSA coming into force. This is so despite repeated representations and requests from SAs via SASO, as set out above. SASO has consulted its records and the only indication of any SA training between June 2013 and June 2018 is a one-day training session provided on 25.6.16, and an in-house session delivered by two experienced SAs on 6.12.16.

39. Thus, even the introductory training course that had been widely praised, was not made available to newly appointed SAs (save for the one session on 24.6.16). This lack of training for newly appointed SAs means that learning was 'on the job' and reliant on working with more experienced SAs.

40. *Update since June 2018* In about autumn of 2018 a budget for SASO to produce training was made available. This enabled 'in-house' training to be delivered by more experienced SAs to their colleagues in sessions that took place in London in late 2018, 29.4.19, and 12.3.20, of an hour each, extended by discussion and questions. The sessions were largely directed to new SAs who had received no other training before being appointed to their first cases, in the absence of any available Government-provided training (whether from the introductory training course or otherwise). SASO has provided input and support in the delivery of these sessions. The pandemic, rather than resourcing, has resulted in this programme being suspended.

41. In 2019, the Government provided its one-day course on 3 days (12.7.19, 2.10.19 and 22.10.19), each of which was well attended by both junior and more experienced SAs – no doubt reflecting the long backlog from the lack of any other Government-supplied training for so many years. It is hoped that, at a minimum, this course will be regularly available so that every SA will have been able to attend it following appointment. That would be no more than to maintain the level of training that had been in place before the JSA was passed, and would not constitute the promised increase in training provided by the Government.

B5. Closed Judgment Database

42. Neither during the five years following the JSA coming into force, nor since, has an up-to-date Closed Judgment Database been available to SAs, despite undertakings made at the time of the Bill. As indicated above, this is an issue that has been pursued repeatedly by SAs since the JSA came into force, and before then[21].

43. We have experience of counsel for the Government citing closed judgments in written responses to SAs' disclosure submissions, of which the SAs were unaware and had no means of knowing[22]. Conversely, individual SAs have no access to that body of caselaw to draw upon, beyond the specific cases in which they might have happened to have been involved.

44. The lack of access to closed judgment summaries has an obvious significance in terms of both the rule of law and the fairness of CMPs under the JSA (and other regimes).
    (i) Equality of arms: In practice, the Government has access to the full range of closed decisions (whether or not through a formal database), and it is unacceptable that SAs do not.
    (ii) Access to the law: The accessibility of the law is a well-recognised component of the rule of law. Whilst closed judgments cannot be publicly available, it does not appear justifiable (and indeed we are not aware of any attempt at justification) for SAs not to have access to closed judgment summaries[23].

45. For completeness, we mention the Practice Direction: Closed Judgments that was issued by the Lord Chief Justice and Senior President of Tribunals on 14 January 2019[24]. We do not know whether the "library of closed judgments now established in the Royal Courts of Justice" is being maintained. But at all events this library has not been made accessible to SAs or SASO. This judicial initiative does not constitute the closed judgment database that the Government committed to providing when the JSA was under consideration.

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[21] See e.g. §17(8) of the SAs' response to the Green Paper

[22] This has occurred in SIAC, but is a systemic problem that may be equally applicable to CMPs under the JSA.

[23] The factual details need not be immediately available, and can lead to problems of 'tainting' (the practice considered at C6 of tis submission) – whereby the Government objects to a SA having discussions with open representatives in a new case (before receipt of the closed material in that case), on the basis of material seen in a previous case.

[24] https://www.judiciary.uk/wp-content/uploads/2019/01/lcj-and-spt-practice-direction-closed-judgments-jan-2019-as-published.pdf

B6. Northern Ireland – specific additional issues

46. The position set out above – both historically and by way of update - is that which applies to SAs practising in England and Wales. The position in Northern Ireland is different in some significant respects.
    - Support for SAs is addressed below.
    - The provision of training for SAs in Northern Ireland has been negligible. The Government training course has not been made available at all. The only training to which any Belfast-based SAs have had access has been a single 1 hour session delivered by a senior SA (called, and with substantial experience, in both jurisdictions) on 30.1.20. No alternative date was available to those unable to make this session.
    - As with SAs practising in England, there is no access to a database of closed judgments.

47. The Bar Library system in Northern Ireland means that different arrangements for the handling and storage of closed material are required from those for SAs practising from chambers in London. Despite repeated representations (including as referred to in the chronology above), no such dedicated facilities have been made available and there appears to be no progress in relation to this. This creates unacceptable constraints on the ability of SAs based in Belfast to work on closed material. In turn, this contributes to substantial delays in progressing any CMPs in Northern Ireland, which may readily be confirmed by a review of the cases in which a s.6 declaration has been made.[25]

48. The absence of any infrastructure for SAs in Belfast, and being beholden to State bodies, creates problems even at the most basic level, such as:

    - The lack of dedicated closed computer hardware to individual SAs based in Northern Ireland (in contrast to what is available to individual SAs based in London);

    - The lack of an available secure printer to review drafts in hard copy;

    - Substantial delays in transmitting and receiving messages and documents with SASO (Closed staff) in London and/or London-based SAs also appointed on the case;

[25] It is right to point out that a significant factor that has also led to lack of progress in some of the NI cases are issues that have arisen in relation to disclosure and the relationship with a police inquiry. But that by no means provides a complete explanation for the delays in achieving any appreciable progress for CMPs.

- A requirement to work at a secure State facility that may be remote from central Belfast;

- Being subject to substantial restrictions in terms of availability and notice requirements in attending any State facility (whether remote or central) to view closed material;

- The lack of any support staff based in Belfast, and a dependence on SASO staff travelling from London for hearings (which travel in turn impacts on SASO's staffing capacity in London, which is generally already fully stretched, and at times substantially over-stretched as set out above).

- Generally being beholden to relevant State bodies in relation to all aspects of closed litigation, including delivery of closed material to Court.

C. OPERATIONAL APPROACH

C1. Duty of openness

49. As a general observation, based on our collective experience, we have a concern that Government bodies, and those acting for them, frequently do not recognise the duty on them at every stage to maximise the openness of any proceedings subject to a CMP, subject only to the statutory requirements. Most cases under the JSA in which we have been involved as SAs yield examples of this. The concern applies at both a procedural level and a substantive level.

50. At paragraph 1.37 of the Green Paper the following was stated:

> "1.37 The Government has always sought to ensure that at the outset of the case the excluded party in a CMP is given as much material as possible, including summaries of the sensitive case against them, subject only to public interest concerns related to national security."

That approach does not reflect our experience of the Government's approach in the operation of CMPs under the JSA.

51. At a procedural level, we find that communications between GLD and SASO / SAs are not routinely copied to open representatives (ORs), even when nothing of any sensitivity is raised. Frequently, when a request is made by SAs that the communications should be forwarded to the ORs, SASO is required to go through a time-consuming and cumbersome procedure of producing a communication request in hard copy, before the exchange is considered for approval and sending. That should not be necessary if the parties are cooperating to ensure that the ORs are as fully informed as they can be within the constraints of the CMP. Such concerns in the context of CMPs in SIAC have led to the duty being expressly referred to in the SIAC Practice Note[26]:

> "Throughout the proceedings the SSHD and the Special Advocates have a duty to inform the Appellant's/Claimant's representatives of the nature and purpose of any CLOSED steps in the proceedings (including written submissions, oral hearings, rulings, and decisions) in so far as this is possible consistently with rule 4(1). That duty operates both before a particular step has been taken, and afterwards. In particular, at the end of any CLOSED hearing and/or following any CLOSED ruling or decision, the SSHD and Special Advocates shall consider, and

[26] https://www.judiciary.uk/wp-content/uploads/2014/12/practice-note-for-proceedings-before-siac-from-5-oct-2016.pdf at paragraph 21

if possible agree, what may be said to the OPEN representatives by the Commission in relation to that hearing, ruling or decision."

52. The process for clearing communication requests, even of anodyne purely procedural matters was confirmed in a letter dated 31 October 2012 in a letter from the then Parliamentary Under Secretary for Crime and Security at the Home Office, James Brokenshire MP. As indicated in the Green Paper, the Government had undertaken to look again at issues in relation to communications from SAs. Having done so, including meeting with two senior SAs, it confirmed its absolutist position in relation to the prohibition of all such communications, save through the clearance procedure.

53. Mr Brokenshire's letter stated: "It may be helpful to clarify that Government counsel is also not in a position to communicate freely with the open counsel of the other party on procedural matters." That was in response to an anomaly that the SAs had identified, as between the restrictions on SAs and those to which the Government's counsel were subject. Neither at the time of the letter, nor since, is it correct that Government counsel do not communicate freely with ORs on procedural matters. To the contrary, such communication is routine and occurs without any suggestion of a risk of inadvertent disclosure. The anomaly identified by SAs in 2012 therefore remains, and illustrates the irrationality of the prohibition to which the SAs are subject in relation to routine administrative matters. SAs see the same sensitive material as Government counsel, and are entrusted to safeguard it appropriately in the same way. Yet Government counsel (and GLD staff) are not subject to prior clearance for routine communications with ORs, whereas SAs (and SASO closed lawyers) are required to put hard-copy requests for messages through SASO for clearance. This can and does lead to practical difficulties, which are particularly acute when urgent or time-sensitive discussions are in train, and can mean that SA input is only received after a deadline has passed or decision taken – to the potential disadvantage of the open party, with avoidable additional unfairness.

54. At a substantive level, we frequently find that no serious attempt is made to put documents into a form in which they may be made open at the earliest stage. Generalising (but with frequent examples that may be produced) we find that the default position of Government bodies is to seek to withhold the document in its entirety, and then leave it to the SAs to make proposals for its disclosure in the s.8 process. This exploits the CMP to unfair forensic advantage, and has the effect of:
    (i) Delaying receipt by the ORs of material that they should have received and been able to evaluate at a much earlier stage.
    (ii) Specifically, adding to the unfairness of the proceedings, through depriving the ORs of the ability to consider and discuss the case with the appointed SAs (before the SAs receive the closed material and 'go into closed' with the

consequent restrictions on communication) on the basis of a view of the case that is as properly informed as it could and should be.

(iii) Protracting the section 8 process, as a result of the SAs having to make a series of submissions which in large measure are accepted as uncontroversial.

55. As both a matter of practice and principle, it is inappropriate for a Government party not to take the initial responsibility for maximising open disclosure. The s.8 process may then operate to focus on the genuinely difficult or marginal items, to seek to devise a suitable gist or form in which disclosure may be made while protecting any true sensitivity.

C2. Openness when making the s. 6 application

56. In line with the concerns expressed above, there is a recent example of a case in which it has been suggested on behalf of State parties that in making the section 6 application there is no duty to disclose all that may be disclosed without revealing sensitive material. In this case (which may be identified to the Reviewer), the SAs objected to the extent to which material in support of a s.6 application which was capable of being made open had not been disclosed openly. The State party's response was that the JSA and procedural rules "do not require that there should be a disclosure process before the application for a section 6 [declaration] has been determined" [original emphasis]. That is plainly correct, as far as procedural rules are concerned, but the response tends to confirm that in practice no general duty of openness in CMPs under the JSA is recognised on the part of HMG.

C3. Procedure on s.6 application

57. We have three suggestions in relation to the procedure on an application under section 6.

58. *Draft closed Defence* We consider that there should be a requirement for a draft closed defence to be served at the same time as an application under section 6. The section 6 criteria need to be assessed against an understanding of the closed issues that arise in the proceedings, as formally set out in pleadings (necessarily draft closed pleading prior to a s.6 declaration being made). What is in issue in closed is likely to be relevant to both s.6 conditions: the material that would be required to be disclosed, and the fair and effective administration of justice. Service of a draft closed defence has been resisted by the Government in some earlier cases, but following judicial directions more recently we consider that this

should be uncontroversial, as being in the interests of an informed determination of any s.6 application, at least where not consented to by the party to be excluded.

- *Belhaj v Straw* [2017] EWHC 1861 (QB) at [50]

- *Kamoka v Security Service* [2018] EWHC 517 (QB) at [33]. In *Kamoka*, Jay J, in ordering a draft closed defence to be served on the special advocates, accepted that: "… it would be far preferable for the Court to be appraised, in closed, of the true nature and scope of the issues between the parties before a decision is made on Section 6."

- *Abdule v Foreign and Commonwealth Office* [2018] EWHC 692 (QB), A draft closed defence was again ordered to be produced before consideration of the s.6 application, despite opposition by the Government defendants, the court having considered the decisions in *Belhaj* and *Kamoka* cited above.

59. *Rules in relation to hearing of s.6 application* There is an anomaly in the procedural rules relating to directions for the hearing of an application for a s.6 declaration. CPR r.82.23(2) and (4) provides that both any directions and the substantive application "shall take place in the absence of the specially represented party and the specially represented party's legal representatives". Rule 22(2) and (4) of Order 126 of the Rules of the Court of Judicature (Northern Ireland) is in the same terms.

60. From an early stage after the JSA came into force, it has been recognised that these provisions cannot be interpreted literally. The Government has never contended otherwise, and as far as we are aware Courts have accepted that the exclusion of ORs and their clients should be interpreted as applying only "so far as necessary": see e.g. *R (Sarkandi) v. SSFCA* [2014] EWHC 2359 (Admin), Bean J at §9. Although the provisions have not given rise to any difficulties in practice, it would seem sensible for the rules to be amended so that they reflect both what happens in practice, and to avoid an apparent impermissible additional incursion into the principle of open justice.

61. *Selection of sensitive material on s.6 application* The procedural rules[27] require the applicant for a s.6 declaration to file "material in relation to which the court is asked to find that the first condition in section 6 of the Act is met". Section 6(6) states that the conditions may be met on the basis of "any material" and "need not be based on all of the material that might meet the conditions". Thus, as confirmed in *Sarkandi* (cited above) the Government is entitled to rely on a selection of sensitive material in making an application under s.6.

[27] CPR r.82.22(1)(b) and Order 126, r.21(1)(b).

62. There are concerns, both as a matter of theory and on occasion in practice, that the Government's selection of sensitive material for the purposes of the s.6 application is not representative of the totality of the closed material that will be sought to be relied upon. This risks the Court having an unbalanced picture in assessing whether or not the s.6 declaration is in the interests of "the fair and effective administration of justice in the proceedings" (i.e. the second condition, at s.6(5)). We consider that there should be a requirement in making a s.6 application for (i) any selection of closed material produced on the s.6 application to be representative of the range of relevant closed material, and (ii) at least an indication to be given of the nature and extent of the full range of closed material that will be sought to be relied upon at the substantive hearing. In conjunction with a draft closed defence, that would enable the Court to make a more informed assessment of the merits of the s.6 application than may currently be possible.

C4. Issuing of section 6 applications without due consideration

63. There are examples, both in England and Wales, and Northern Ireland, of s.6 applications being issued inappropriately, and without due consideration. These instances fall into two broad categories:

(i) A lack of consideration of whether the application of traditional PII principles (and ancillary mechanisms) may achieve a more effective and fairer process than is possible with a CMP. Clearly the section 6 criteria include an express requirement for PII to have been considered, but there are cases in which this does not appear to have been properly considered.

(ii) A lack of consideration of the ongoing sensitivity of the material that is sought to be withheld. In particular in Northern Ireland, CMPs have been applied for in cases that involve events that are historic, sometimes decades old. Material that may have been sensitive at the time, may have lost its sensitivity. Basic checks to establish whether there is continuing sensitivity, (for example to establish whether individuals are still alive or tactics are still in use) have not been made before issuing a s.6 application by State bodies.

C5. Closed Court facilities

64. Since the JSA 2013 came into force, administrative difficulties are encountered through a shortage of security-cleared staff within the Court system in the Royal Courts of Justice. This is exacerbated by the turnover of cleared staff. The lack of DV'd staff creates problems for SASO in delivering closed documents and meeting deadlines for filing. In practice, the judges are understanding of these difficulties

(which we assume are also encountered by Government representatives) where deadlines may not have been met.

65. Other indicators of a lack of adequate resourcing for closed procedures within the court system are problems that have been encountered with the secure recording equipment and/or availability of those required to operate it, and DV'd shorthand writers. In context, however, these practical difficulties are much less serious than other concerns in the operation of CMPs under the JSA that we have sought to highlight in this submission.

66. These problems are encountered to an equal or greater extent in the RCJ in Northern Ireland, where we understand delays are also encountered through a lack of facilities available to the judiciary to work on closed material and produced closed judgments. By contrast, SIAC (the tribunal with the greatest throughput of closed procedures) is relatively well equipped with facilities and consistency of security-cleared staff, and the logistical difficulties encountered in the High Court in both London and Belfast are generally not experienced to anything like the same extent in SIAC.

C6. Tainting

67. When a SA is appointed on a case, it is envisaged under the rules (CPR r.82.11(1) and Order 126 r.10(1)) that he or she is permitted to meet the ORs and their client to discuss the case, and is not subject to any constraints on communication. In practice, however, that may be prevented as a result of a practice that has become known as a 'tainting check' performed by the Government. This check involves a review of the previous cases involving CMPs in which the SA has been instructed, and the closed material supplied in those cases. A view is taken as to whether there is considered to be a risk of 'inadvertent disclosure' arising from that SA communicating with the ORs. If so, an objection is raised by the Government on the grounds that the SA is 'tainted' by their involvement in one or more previous CMPs. This does not necessarily prevent the SA from being appointed, but it does prevent the unrestricted discussion that could ordinarily take place before the SA receives the closed material. The ORs then have to decide whether to try to identify a different and 'untainted' SA, or proceed with their initial choice but be deprived of the ability to discuss the case with their chosen SA.

68. Objections on grounds of 'tainting' do not have any basis in either statute or procedural rules. It may be seen that the practice may restrict the choice of SAs open to the ORs, or restrict their ability to communicate with their chosen SA.

Furthermore, the more experienced the SA, the greater the risk of a 'tainting' objection being raised.

69. In practice, we find that the 'tainting check' process may cause unreasonable delay. In a recent example in a current case involving a junior SA who has never previously been involved in any CMP (so with no chance of being tainted, not ever having received any sensitive material in any cases), the taint check has taken over 2 weeks and is still awaited.

70. Furthermore, in our experience the outcome of the tainting check process sometimes appears inconsistent and capricious. There is no basis on which to challenge an apparently bizarre objection, other than by asking for the decision to be reviewed (which we are not aware has ever led to the decision being reversed). No reasons for an objection are generally provided.

71. We therefore suggest that the process of tainting checks which has been unilaterally put in place by the Government is unregulated and opaque, may cause delay, and serves further to increase the unfairness of the proceedings to the excluded party. We do not accept that tainting objections are lawful within statutory CMPs. Parliament has not authorised such additional restrictions in the operation of CMPs. Nor do we accept that tainting checks are reasonably necessary, as there is no real risk of 'inadvertent disclosure' from SAs revealing sensitive information obtained from a previous case in the course of communications in a subsequent case.

C7. Objections to SA attendance at mediation

72. In cases involving private law claims in which the parties have agreed to attend mediation, in circumstances in which it seems appropriate SAs instructed in the case have sought to attend the mediation in a non-participating capacity. The rationale is that, with knowledge of the closed material, the SAs are in a position to consider submissions that the Government representatives are advancing within the mediation. If those submissions are liable to create a partial or misleading impression to the ORs, then the SAs are in a position to seek to have that corrected – by separate discussion with the Government representatives in the absence of the ORs. The ORs have supported these proposals, when made, but we have found that the Government routinely objects to SA attendance in person, even if a non-speaking capacity is proposed.

73. We consider that the Government's position is untenable as a matter of authority, rationality, and principle. There is no authority to prohibit SA attendance at a mediation, and none has been identified. The rationale advanced by Government

parties is that there is a risk of inadvertent disclosure by SAs. When pressed, it has been suggested that this is through 'body language' or 'facial expressions'. We cannot accept that to be so, acting in good faith, but in any event it overlooks the fact that SAs routinely attend open hearings with ORs, at which evidence and submissions are deployed, without any suggestion that this leads to a risk of inadvertent disclosure. As a matter of principle, if SA attendance at a mediation may reduce the disadvantages to the party whose interests they represent, and if it is desired by the ORs, then it would be wrong to prevent that.

C8. Application of the JSA 2013 to family proceedings

74. As far as we are aware, there is only one case in which a CMP under the JSA has been sought and approved in family (wardship) proceedings: see Case 33 on the annexed case list, *Re H* (Hayden J). However, non-statutory CMPs are not infrequently adopted in family proceedings in which SAs are appointed. We highlight the following issues in this context:
    (i) It is apparent that a declaration under s.6 may be made by the family division of the High Court. That is so on the face of the JSA, and demonstrated by *Re H*.
    (ii) Following *Re H* (Case 33 on the Annexe), amendments to the Family Procedure Rules (a proposed Part 38 to those rules) were drafted in 2017 to provide a formal basis for CMPs in family proceedings, but no steps to bring these into force appear to have been taken by the MoJ.
    (iii) It appears anomalous that there are no applicable procedural rules governing the exercise of the JSA in family proceedings (in which the Civil Procedure Rules, including Part 82, do not apply). It may be felt desirable, in the interest of both certainty and transparency, that clear rules, with explicit safeguards, should exist in this context. Whilst the Court's inherent jurisdiction to regulate its procedure may be invoked (as it was in *Re H*) in devising ad hoc rules for a CMP, this does not appear entirely satisfactory in this context.

75. It is not clear whether (and if so the extent to which) the common law jurisdiction recognised by the Supreme Court in *Al Rawi*[28] as applying in relation to cases involving children, in which the interests of the child are paramount, survives the statutory intervention of Parliament in this field.
    (i) The Family Division of the High Court appears from a series of cases to assume a residual common law jurisdiction to adopt a CMP, so distinct from that available under the JSA. Unlike the position in CMPs under the JSA, the sensitive evidence considered in these non-statutory proceedings

[28] [2011] UKSC 34, [2012] 1 A.C. 531 – see e.g. Lord Dyson at §63-64 (also Lord Brown at §85, Lord Mance at §114, and Lord Clarke at §169

may involve sensitivities beyond national security, and thereby provide greater flexibility.

(ii) However, the application of this enlarged common law jurisdiction that is deployed in family proceedings remains unclear, including its scope by reference to the jurisdiction recognised in *Al Rawi* and its relationship with the statutory CMPs provided by Parliament under the JSA.

(iii) At all events, as with the position in relation to CMPs in family proceedings under the JSA, there is an equivalent issue arising from the absence of any applicable procedural rules in the exercise of the residual common law jurisdiction.

C9. Closed grounds advanced independently by SAs

76. On occasion, based on their knowledge of closed material, SAs may consider that it is in the interests of the excluded party to advance grounds that are not merely supportive of the case advanced by the ORs, but are independent of that case.

77. The rules do not currently make any specific provision for SAs to advance independent closed grounds (for judicial review, or on appeal). In practice this has not led to any significant problems as HMG and the Courts generally take the pragmatic view that this is within the scope of the SAs' remit, as broadly and sensibly interpreted. At the extreme, there are examples of CMPs under the JSA the entire substance of which is in closed, with only the formal documents (Claim Form or Notice of Appeal) being in open, with no open particulars in support. The issues to which this gives rise are practical ones, notably in relation to costs and funding which we mention separately at sections C13 and C14 below.

78. What remains unresolved is how to proceed when it is apparent to the SA, on sight of the closed material, that the wrong defendant has been sued. This is not a purely theoretical issue and has been encountered in practice. There are obvious difficulties with a defendant being joined to a claim in closed, but equally there is potential injustice if a party is denied a remedy against the correct defendant through ignorance of closed material which (but for its sensitivity) would otherwise be known to them.

C10. Communications from and with SAs

79. Since the JSA, there has been a positive development in devising a route for communication from SAs to ORs that enables communications to be cleared by the Government that is insulated from the legal team with conduct of the litigation. Those approving the communication on behalf of the Government (on the basis that it has no national security sensitivity) are relied upon to treat it as confidential,

and not to be disclosed to the Government representatives involved in the litigation. By this means a private 'back-channel' for such communications is achieved which, somewhat inaccurately, has been termed 'the LPP route'[29]. Concerningly, as set out above, this development in England has not been mirrored in Northern Ireland, despite SAs pressing for this.

80. The restrictions on SAs communicating with ORs in relation to purely procedural issues remain an impediment to the efficient conduct of CMPs which in our view is unjustifiable. This has been repeatedly rehearsed, before and since the publication of the Green Paper[30], but HMG appears implacably opposed to this limited permission. The problems are compounded by the lack of recognition by the Government, in practice, of a duty to keep ORs as fully informed as possible, as discussed at C1 and C2 above.

81. On occasion we encounter problems through parties (both the Government representatives and open representatives, as well as court staff) overlooking to include SASO on open discussions, in relation to the case, including case management. This appears to occur more frequently in cases under the JSA than in other jurisdictions (in particular SIAC).

C11. Calling evidence

82. The procedural rules make provision for SAs to call evidence: CPR r.82.10(b) and Order 126 r.9(b). This has almost never been done[31], as the practical difficulties facing SAs in identifying, accessing, and calling expert evidence have never been addressed. Currently, the power for SAs to call evidence (in practice, most realistically expert evidence) is largely or entirely illusory. Witnesses called by the State in closed proceedings may have genuine expertise (even if not being independent experts) in the subject matter that is in issue, and there is an inequality in arms that arises though a practical inability, notwithstanding having the theoretical power, for SAs to be able to call expert evidence to support a party's case in closed.

[29] On the basis that it is analogous to a communication that is subject to legal professional privilege (LPP)
[30] See e.g. SAs' response to the Green Paper at §27 to 29.
[31] The only case in which an expert has given evidence in closed proceedings, of which we are aware, under the JSA is reported as *K,A,and B v. Secretary of State for Defence and another* [2019] EWHC 1757 (Admin), Ouseley J.

C12. Witness evidence in Northern Ireland

83. In private law claims in civil proceedings in Northern Ireland there is no general provision in the procedural rules for witness statements to be served in advance of a hearing: the witness comes to court and gives evidence and is cross-examined. In the context of a CMP where there is closed material about which oral evidence will be given by a witness in a closed hearing, this may lead to unfairness and/or practical difficulties.

84. The provision of such statements may be seen to be necessary to enable the SAs to discharge their statutory functions and responsibility in Closed, in particular as to:
    (a) *Ensuring that which may properly be made open is disclosed to the ORs*. In practice, parts of what the witness proposes to say in the closed hearing might be susceptible to being made open (or in given in evidence in private, in camera, in a hearing attended by the ORs and their client). If that is not properly considered and resolved, the result may be that the proceedings have been less open than could be justified. Any attempt to resolve the issue after oral evidence has been provided in closed is liable to cause delay and practical difficulty.
    (b) *Cross-examining witnesses* in the substantive closed proceedings, proper preparation for which requires an indication of the evidence that is to be led, and by whom.

85. We therefore consider that it is in the interests of the fair and effective administration of justice in CMPs for the SAs to have notice of precisely what evidence the State party proposes to adduce in support of their case in Closed. That would assist with the efficient preparation and conduct of the trial, such that the SAs will be able to focus on the relevant and not the irrelevant, so avoiding wasted time and costs. The provisions of such statements would also be of obvious assistance to the Court. More fundamentally, this would help to minimise the unfairness that is inherent in a CMP.

86. Accordingly, we would propose that where a State witness is to give oral evidence in closed proceedings, there should be provision requiring service of a witness statement setting out that evidence, in open and to the extent suggested to be necessary in closed.

C13. Costs between parties

87. One of the issues flagged up by SAs (amongst others) in response to the Green Paper, and as the JSA was being debated, was the problem in relation to costs, and

how the Part 36 regime can operate in this context. If the claim brought by a plaintiff / claimant fails, or (within the CPR) a claimant fails to beat a Part 36 offer, how should costs be assessed where the closed material has played a significant or decisive role? In the period of almost 8 years since the JSA came into force, as far as we are aware this issue has yet to be addressed, perhaps because thus far no private law claim has failed at trial.

88. Aside from private law claims, the issue has the potential to impact more widely. At its most acute the situation may arise where a step in the proceedings (for example an appeal) is based entirely on closed evidence, and has been instigated by the SAs. This has occurred, and there is no settled practice for dealing with costs liabilities.[32] As such, this may be a further impediment to the fairness of the proceedings, if costs considerations inhibit steps being taken in closed proceedings, on the basis of matters of which the ORs have limited or no awareness.

C14. Funding and access to justice

89. We understand that there are real practical problems with funding, where it is apparent that the State defendant is relying on closed material. We have been involved in cases that have been substantially delayed, by many months on occasion, by problems in getting legal aid, where the merits of the claim are uncertain as a result of the ORs being unaware of the arguments and evidence likely to be deployed against them. As SAs we do not have direct experience of dealing with these issues, which may be better addressed by other respondents to the Review.

[32] See e.g. the review of costs in cases involving CMPs in Ward and Jones, National Security (2021), (Chapter 7, section J) which includes examples of cases under the JSA 2013 and consideration of the difficulties in principle and practice of costs in this context, including the scope for Protective Costs Orders.

THE QUESTIONS RAISED IN THE CALL FOR EVIDENCE

Theme 1 – Aims of CMP under the JSA.

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

The Government's rationale for extending the use of CMPs is apparent from the Green Paper. Essentially, the rationale advanced was to enable the Government to defend itself against civil claims that it would otherwise be required to settle or would be declared non-justiciable: see paragraphs 10 to 12 above.

The premise was that CMPs were fair and effective. That premise was the subject of challenge by the SAs, and many others responding to the consultation. CMPs can never be 'fair', as applied to legal proceedings for the well-rehearsed reasons that they constitute serious incursions into principles of open justice and natural justice. Any rationale for CMPs must be that they are less unfair than the alternatives, where there is sensitive material of central relevance to the issues in a case.

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?

At a level of principle, the question relating to judicial interpretations may be addressed by reference to open case law. We therefore leave this to open representatives and others. The effect of that interpretation is case-specific, and we briefly comment further in our response to question 9 below.

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?

In general CMPs substantially protract the length of time that cases take to resolve, to accommodate each of the stages. The Government rarely has an incentive for cases involving CMPs to be resolved speedily. Resource considerations (which may impose real logistical constraints, but are rarely transparently presented) are routinely invoked as justifying timetables that are far more protracted than would be tolerated in other contexts.

(a) Application for section 6 declaration

Even where the parties consent to the making of a s.6 declaration, the Government may insist on issuing an application, resulting in avoidable delay.[33]

The requirement of consideration of PII under s.6(7) is not, in practice, treated as adding anything to the two principal conditions in s.6. Courts tend to accept at face value a brief statement by the relevant Secretary of State that PII has been considered as being sufficient.[34]

Our experience suggests that, as applied in practice, the conditions for the making of a section 6 declaration are undemanding. The result may be that, in at least some instances, cases which previously could have been fairly tried using PII and ancillary mechanisms (including gisting and confidentiality rings) are made subject to a s.6 declaration. In so far as the statutory machinery provides protection, this is through the operation of the section 8 process within the CMP rather than at the section 6 stage.

(b) Disclosure processes

The length of time that the disclosure process takes is case-specific, but in all cases it protracts the timetable. In the most document-heavy cases the Government may demand a timetable spread out over many months, sometimes more than a year, and insist that it is not realistically possible for disclosure to be completed any more quickly. Resource limitations and competing priorities (usually invoking national security imperatives) are cited in support. Courts, perhaps inevitably, are reluctant to gainsay the Government's demands, which tend to be acceded to in the directions ordered.

The section 8 process tends to be far more protracted and onerous that it would be if the Government recognised a duty of openness at the outset of the process: see under section C1 above.

(c) Section 7 review

In most cases the section 7 review is not a time-consuming stage, but requires to be catered for in directions so adding to the overall timetable. Very rarely, if ever, does the section 7 review lead to a revocation of the s.6 declaration: we cannot identify any case in which this has occurred.

(d) Substantive hearing

Hearings are substantially protracted by involving closed, as well as open, elements.

[33] A recent example may be given

[34] Examples may be provided, including apparent from open case reports.

More broadly, we have addressed in the body of this submission a range of problems and concerns arising in the operation of CMPs under the JSA in practice.

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?

How often was Article 6 disclosure invoked and ordered? How were the tests … formulated for those cases?

There may be scope for confusion in the formulation of this question. The requirements of Article 6 will apply in most, although not all cases, under the JSA. That is not to say that the level of disclosure required by Article 6 is held to be the standard that Article 6 was held to require in *AF (No.3).* These questions may be answered on the basis of what is known in open in each case under the JSA.

What difference to the disclosure ordered did this make?

This question needs to be addressed on a case by case basis. The requirements of *AF (No.3)* will generally make a considerable difference to the degree of disclosure required. Even if held to be required by Article 6, the Government may decline to give the disclosure identified, preferring to abandon the relevant part of the case. In a small number of cases *AF (No.3)* is not likely to make a large difference to the degree of disclosure (an example may be given).

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?

This question is case-specific and we do not seek to address it in this open submission.

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?

Achievement of objectives: Most notably, in the large-scale civil claims for damages the Government has not used the CMP to fight the case to trial, but the claims have been settled (almost invariably on confidential terms – and only after the case has been substantially

prolonged by the procedures that the CMP entails). Examples are probably well known and may be seen from the attached case list. The stated objective that the JSA would enable HMG to fight cases that it would otherwise have to settle therefore does not appear to have been borne out in relation to private law damages claims which were advanced as the primary requirement for CMPs in civil proceedings.

Across the board of judicial review applications to which the JSA has been applied, there may be a clearer attainment of the objectives (although as we understand the Green Paper, judicial review cases were not identified or advanced as the main basis for the provisions for CMPs in ss.6-11). the Government has won (and sometimes lost) cases, at least some of which may be recognised as being hard or impossible to have tried fairly without recourse to a CMP.

The SAs' Response to the Green Paper listed a series of practical concerns about the proposal for CMPs to be extended to ordinary civil proceedings at §38 under the following heads:

(a) Funding and access to justice;
(b) Evidential admissibility;
(c) Costs protection mechanisms (in particular Part 36)
(d) Advice on prospects;
(e) Corruption of the common law (through development of a body of secret case law);
(f) Funding of SAs and closed proceedings.

To a greater or lesser extent, each of these anticipated problems has been encountered in practice, and we have highlighted those that we regard as most significant (from our particular perspective as SAs) in the body of the submission. Open representatives acting for the excluded party are probably better placed than the SAs to elaborate on most of these. Point (e) is more acute than had been feared, through the lack of a closed judgment database: an issue that has been set out above.

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

This question is case specific. There are cases in which a s.6 application has been refused, and cases in which the case has proceeded without recourse to the CMP after the s.6 declaration has been made. Examples can be given.

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 principal procedural safeguard that we regard as unnecessary, and an impediment to the efficient conduct of CMPs, is that the bar on communication between SAs and open representatives extends to purely procedural issues: see C10 above. We have also queried the legal basis and practical justification for the 'tainting check' process at C6 above. We have made a series of other suggestions in relation to procedure in the body of the submission.

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

We assume that this question is also intended to refer to Order 126 of the Rules of the Court of Judicature in Northern Ireland. We have identified issues in the body of our submission, at least some of which may indicate changes to Part 82 and Order 126 are required.

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

Yes. We have set out above our substantial concerns in relation to the operation of CMPs, including arising from failures in their monitoring and review. The way in which CMPs have been operated by State parties have the effect of increasing the unfairness, beyond the level of unfairness that is inherent in the regime of CMPs sanctioned by Parliament. The Government's failures in relation to monitoring and review required by Parliament, and the unjustifiable impediments placed in the way of legitimate public scrutiny and debate in relation to CMPs, are likely to have impacted adversely on their operation: they risk frustrating the conduct of this review (and those seeking to contribute to it), as well as having delayed such recommendations for the improvement of CMPs under the JSA as this review may make. We ask that these concerns should be considered, leading to specific recommendations where appropriate.

Acknowledgment

We are very grateful to the staff of SASO for their considerable support and assistance in the production of this submission, and the annexed case list.

More generally, we record our appreciation to both the legal and administrative staff of SASO - extending not only to those currently in post, but also their predecessors - for all they do to facilitate our work as Special Advocates. We are conscious of the pressures that they operate under in this challenging and sensitive field. At times (as we have recorded above) that work has been carried out in acutely difficult and demoralising circumstances. Whatever criticisms we have made of the adequacy of the support that SASO has been in a position to provide is no reflection on the individuals within SASO, who have consistently shown professionalism, dedication and fortitude in their work, as well as a willingness to go beyond the call of duty in their support. We consider ourselves fortunate to have them as our colleagues.

We also acknowledge with gratitude successive Independent Reviewers of Terrorism Legislation: David Anderson QC (now Lord Anderson of Ipswich), Max Hill QC, and Jonathan Hall QC. As recorded above, each has promptly appreciated our concerns as to failings in support for SAs to carry out our functions effectively, when we had been unable to get any response from Government. Each took steps to escalate those concerns to achieve, at least, recognition of their validity, and proposals for improvement.

ANGUS McCULLOUGH QC ‡
NEASA MURNAGHAN QC *
MARTIN GOUDIE QC ‡
ZUBAIR AHMAD QC ‡
SEAN DORAN QC *
DOMINIC LEWIS
GREG BERRY QC *
AARON WATKINS
ADAM STRAW QC ‡
ASHLEY UNDERWOOD QC ‡
BEN COLLINS QC ‡
BILAL RAWAT
CHARLIE CORY-WRIGHT QC
DAVID LEMER
ESTHER SCHUTZER-WEISSMANN
GARETH WEETMAN
HELEN MOUNTFIELD QC
HUGO KEITH QC
IAN SKELT ‡
JENNIFER CARTER-MANNING QC
JOSEPH AIKEN QC *
JOSEPH KENNEDY *
KIERON BEAL QC
MICHAEL CHAMBERS
PAUL MERTENS
PETER CARTER QC
PHILIP HENRY *
RACHEL TONEY
RONAN DALY *
SHAHEEN RAHMAN QC
STEPHEN CRAGG QC
TIM BULEY QC
TOM FORSTER QC

8 June 2021

*: Bar of Northern Ireland
‡: Bar of Northern Ireland and England & Wales

ANNEXE – List of cases in which an application under section 6 has been made

See separate document attached.