**What are Closed Material Procedures (CMPs)** ?[[1]](#footnote-1)

CMPs essentially allow the Government to present evidence to a judge without having to disclose it to the whole court, including the defendant or claimant (depending on whether it’s a criminal or civil trial). Originally devised for application in the immigration system and first introduced in 1997, they are a mechanism currently used in certain types of specialist proceedings and only in a very small number of cases.

The use of CMP, even to this limited extent, has been controversial and subject to unending litigation. Despite this, the \*\*\*\*\*\*\*\*Bill 2013 proposes to extend the mechanism to the ordinary civil law. It proposes that the law should be changed so that where a Minister decides that certain material, if openly disclosed, would cause damage to the interests of national security, he or she can trigger the use of CMP by application to the court. This means the material will not be disclosed to the other side, yet the Government will be allowed to put the material before a judge and rely on it in defending or pursuing a claim through the courts.

Being able to present evidence to a judge without the other side having the chance to refute it or even know what it is obviously gives the Government a huge advantage in legal proceedings and the potential to present a very one-sided or misleading version of events.

**What are Special Advocates, (SAs) ?**

SAs are appointed by the Government to act in the interests of those whose appeals are subject to CMP.

However, unlike legal representatives, SAs are unable to disclose material to the person whose interest they represent, are not allowed to communicate with the person concerned without the permission of the Government and can never communicate with them about the secret evidence. This means that they are often required to contest evidence on the basis of guesswork and estimation.

Many of those who have been appointed as Special Advocates have resigned in protest at the unfairness of the system or expressed frustration at the unfairness of the system.

**What are the alternatives to CMP?**

The law relating to Public Interest Immunity (PII) is the current mechanism for ensuring that material harmful to the public interest is not put into the public domain in civil proceedings.

PII principles have been developed by our courts over several decades and they have ensured that courts strike the appropriate balance between protecting the public interest and the need to ensure fairness.

Currently, if a Minister considers that the disclosure of a document could harm national security he or she can sign a certificate to that effect. The court will then consider the issue – looking at the material in question if necessary – and balance the public interest in withholding the document against the interests of justice in disclosing it.

Crucially - unlike CMP if the court decides in favour of disclosure then it is disclosed to all parties, unless the party holding the material decides not to rely on it or to abandon its case. If the court decides against disclosure then the document is not admitted into the proceedings at all and cannot be relied upon by either party.

This means that litigation in which information is withheld under PII can still be conducted openly, on the basis of admissible evidence, with the parties on an equal footing. Each then receives a fair hearing and a judgment publicly explaining why the court has reached its decision

The Government’s main argument for extending CMP is that it will allow more information than PII to be put before a judge therefore *enhancing*procedural fairness by allowing the court to examine “all relevant material”. But evidence submitted in secret by one party, without being examined or tested by the other side cannot be equated with “facts” let alone “full facts”. If the evidence is untested it is likely to be unreliable and even misleading.

The Government has also argued that without the general availability of CMPs in the civil law, in future some claims may not be able to proceed in circumstances where material crucial to a case may be too sensitive to reveal in open court. However, the Government has been unable to come up with any reliable examples of this happening in the past.

**Martin Chamberlain 14 March 2012 article on his experience as a Special Advocate[[2]](#footnote-2)**

Most people in this country trust the courts and respect their decisions. That is in part because, unlike in some other parts of the world, we tend to think of our judges as incorruptible, independent and wise.

But this is only one reason, and not the main one. The principal reason why people have confidence in the decisions of the courts is because of the process by which they are reached, which is generally seen to be fair and transparent.

If you are before a court, whether in criminal or civil proceedings, you will get to see and challenge the other side’s evidence; in a civil case the judge will give detailed reasons for his or her decision; and the whole process will be subject to scrutiny by the public and Press.

Even when your opponent is the state, the court will insist on the principle of ‘equality of arms’ between the parties. If the court reaches a decision that goes against you, at least you will know how and why.

However, since 1997, in a few special categories of case, mostly concerned with national security, a different process known as a ‘closed material procedure’ is adopted. Here, one side – the state – gets a distinct advantage over the other.

It is entitled to rely on ‘closed material’, which is never shown to the other party or his lawyers, who are excluded from parts – often substantial parts – of the hearing.

The interests of the other party are represented in the closed hearing by a security-cleared lawyer or ‘special advocate’. The presence of a special advocate is the main reason why, in the Government’s view, closed procedures remain fair.

But, having acted as a special advocate in a dozen closed procedures over the past nine years, I do not think they can always be described as fair.

As a special advocate, you are able to see and hear both the ‘open’ and ‘closed’ evidence.

In open court, the Government’s evidence is generally given by someone who is not identified by name and sits behind a curtain. This is, of course, sensible: government employees often need to maintain their anonymity in order to do their jobs.

But often, the Government witness will refuse to answer particular questions in open court – and the issue will have to be pursued by the special advocate in a closed hearing.

Whenever I have acted as a special advocate, I have done my best to try to undermine the Government’s case – and sometimes I have succeeded. But not often. That is in part because, after seeing the closed material, I am prohibited from speaking to my client.

If the state alleges that my client met a terrorist at a particular time, I cannot ask him whether he was there and if so, why. So I will never know if he had an alibi or an innocent explanation for the meeting; and nor will the court. The task of the special advocate was described by the late **Lord Bingham, the internationally respected Lord Chief Justice and senior Law Lord, as like ‘taking blind shots at a hidden target’.**

Now imagine that you are Mr X, the defendant who has been excluded from the closed hearing. The Government says that you are a terrorist, but it will not tell you much (and in some cases may not tell you anything at all) about its basis for asserting that. Of course, you are entitled to call ‘open’ evidence of your own to rebut the allegation. But what evidence?

The predicament of a man in a similar position was explained by another writer in this way: ‘The written records of the court and in particular the document recording the accusation were not available to the accused, so it was not known in general or at least not exactly what the first plea had to be directed against, so really it could only be fortuitous if it contained anything of significance for the case.’ The writer was the early 20th-century Czech author Franz Kafka. He was describing Josef K’s fictional ordeal in The Trial, but he could as well have been describing a closed material procedure in Britain in the 21st century. There are people in Britain today who, like Josef K, have no idea why they have lost their case.

Thankfully, the number of people in this position is small. That is because, so far, secret procedures have been confined to a few specialist types of case – in the main, immigration cases involving issues of national security and control order proceedings involving terror suspects.

But last October the Government published a Green Paper proposing to make these secret procedures available in all types of civil proceedings.

The proposal is that, even when the Government is itself involved in proceedings, it should have the power to decide for itself whether to invoke the secret procedure, with only a very limited review by the court.

If the proposals become law, this power will be used not only in cases involving national security, but also in any other case where the Government decides that the disclosure of sensitive material is likely to result in ‘harm to the public interest’. Worse, the plan is to designate the types of case in which fairness requires disclosure of the gist of the case to the other party.

**Life imitates art: Franz Kafka's 'The Trial' imagines a system of secret justice**

The inference must be that the Government considers that there are some, perhaps many, where the court can decide the case without giving the other party even the barest bones of the case against him.

Those pushing for this radical change to our justice system are rightly concerned about the dangers which can arise from the disclosure of sensitive material.

But our justice system already has a set of rules – developed by the courts over the years – to ensure that sensitive material is not disclosed where the interests of national security mean that keeping it secret is justified.

These rules enable judges to insist that sensitive evidence which would otherwise fail to be disclosed should be withheld on the grounds of ‘public interest immunity’. This means that some of the evidence in the case has to be left out of account. But it preserves the crucial principle that both parties, as well as the public and Press, can be shown all of the evidence upon which the case is decided.

At the extreme, the application of the public interest immunity rules may mean that a case cannot be heard at all. Some argue that this possibility justifies the introduction of a power to invoke closed procedures in all civil cases………. ( excerpt ends)

1. www.liberty-human-rights.org.uk/campaigns/for-their-eyes-only-faqs.php [↑](#footnote-ref-1)
2. www.dailymail.co.uk/article-2114162/closed-material-procedure-barrister-describes-twisted-justice-worthy-Franz-Kafka-html [↑](#footnote-ref-2)