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Justice and Security Bill [HL]

Report

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Justice and Security Bill [HL]

1. The Justice and Security Bill [HL] was introduced into the House on 28 May 2012 and is due to have its second reading on 19 June.

2. In October 2011 the Government published a Green Paper on *Justice and Security* (Cm 8194). The Green Paper triggered a public consultation exercise to which there were 90 responses, almost all of which the Government have published online.[1] The Government's summary of and response to the public consultation was published alongside the Bill as Cm 8364. The Green Paper was the subject of an inquiry by the Joint Committee on Human Rights.[2]

3. The Bill seeks to make three main sets of changes. First, it would enact modest changes to the Intelligence and Security Committee (ISC), re-establishing it as a statutory committee of Parliament (clauses 1–4). (Under the Intelligence Services Act 1994, which first established the ISC, the committee is composed of parliamentarians but is not a formally a committee of Parliament.) The Bill would also confer additional oversight functions on the Intelligence Services Commissioner (clause 5).

4. Secondly, the Bill would enable certain civil proceedings to be held under a "closed material procedure" (CMP) (clauses 6–11). **This is a constitutionally significant reform, challenging two principles of the rule of law: open justice and natural justice.** It is on this proposed reform that this report focuses (although we may additionally report on further aspects of the Bill in due course). The Bill would also add to the jurisdiction of the Special Immigration Appeals Commission the tribunal in the United Kingdom that was the first to be permitted to hear cases under closed material procedure (clause 12).

5. Thirdly, the Bill would remove the courts' *Norwich Pharmacal* jurisdiction[3] in cases certified by the Secretary of State to involve "sensitive information" (as defined in clause 13(3)). The *Norwich Pharmacal* jurisdiction is a means whereby a party may request the court to order the disclosure of information in certain circumstances where there has been wrongdoing and where the information is required in order to claim redress for that wrongdoing.

Extending closed material procedure to civil proceedings

6. Parties to civil litigation have the right to see and, so far as they are able, to challenge the evidence on which the other parties to the case seek to rely. This poses a difficulty in cases that involve matters that the public interest demands should remain confidential. Our law recognises numerous circumstances in which the public interest demands sometimes very strict confidentiality. National security is but one example; additionally,

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1 http://consultation.cabinetoffice.gov.uk/justiceandsecurity.

2 24th Report, 2010–12, HL Paper 286, HC 1777 (April 2012). The Government's response to the JCHR's report has been published as Cm 8365 (May 2012).

3 See *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The use of this jurisdiction in the context of security-sensitive information became controversial in the *Binyam Mohamed* litigation of 2008–10: see the *Justice and Security* Green Paper, Cm 8194, paras 2.83–2.97.

commercial secrets may call to be protected, and family law proceedings may raise in acute form the need to protect confidentiality.[4]

Public interest immunity

7. Over the past 60 years the common law has addressed this difficulty by developing a doctrine now known as "public interest immunity" (PII).[5] The leading authorities include several canonical constitutional law cases, such as *Duncan v Cammell Laird*,[6] *Conway v Rimmer*[7] and *R v Chief Constable of West Midlands, ex p Wiley*.[8] In the national security context[9] and on the authority of these cases, PII works as follows: (i) first, PII applies only to material that is relevant evidence in a case (there is no obligation to disclose material that is not relevant evidence); (ii) secondly, if a minister considers that relevant evidence cannot be disclosed for reasons of national security, he signs a PII certificate to that effect; (iii) thirdly, an assessment must be made by the court as to whether disclosure would cause "substantial harm" or "real damage" to the public interest; (iv) if so, this harm or risk of harm must be weighed against the interests in the administration of justice in having the documents disclosed to the other party—this is now referred to as the "*Wiley* balance";[10] and (v) in cases where the balance of the public interest lies in non-disclosure, the court must decide whether "gists" of the documents can be provided or whether other means can be employed to mitigate the unfairness, such as disclosing the material to the parties' legal representatives on a confidential basis (so-called "confidentiality rings") or subject to redactions.

8. Three features of the law of PII are noteworthy: first, the court may uphold a PII certificate only if it is satisfied that the public interest in maintaining confidentiality outweighs the public interest in disclosure. Secondly, the result of a successful claim to PII will mean that the evidence in question is wholly excluded from the proceedings. No party may rely on it, and neither may the judge. Finally, the court must do everything consistent with the public interest to mitigate the unfairness of ordering that relevant material is excluded from the proceedings.

Closed material procedure

9. The Justice and Security Bill does not invent closed material procedure (CMP). As noted above, CMP was first used in the United Kingdom under the authority of the Special Immigration Appeals Commission Act 1997. CMP was also used in control orders proceedings under the Prevention of Terrorism Act 2005. It is used now in a number of discrete contexts, including in relation to terrorist asset-freezing cases and in relation to Terrorism Prevention and Investigation Measures (TPIMs), which replaced

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4 For example, in child protection cases and in forced marriages cases.

5 Formerly known as "Crown privilege".

6 [1942] AC 624.

7 [1968] AC 910.

8 [1995] 1 AC 274.

9 Clauses 6–11 would apply only in the context of national security: that is to say, the Bill would permit civil proceedings to be held under a closed material procedure only in cases raising matters of national security.

10 Although it dates back at least to the seminal judgment of Lord Reid in *Conway v Rimmer*.

control orders under the TPIMs Act 2011.[11] The novelty of the Justice and Security Bill is to enable the use of CMP in civil proceedings generally. The scope of the Bill embraces damages actions such as in negligence or for breach of contract, actions for injunctive relief, and claims for judicial review. In 2011 the Supreme Court ruled in *Al Rawi v Security Service*[12] that the court has no inherent jurisdiction to order that a damages action in the law of tort could be held, in whole or in part, under a closed material procedure, and that such a significant inroad into fundamental common law principle could be effected only by primary legislation.

10. CMP is significantly different from PII in two main respects. First, closed material is not excluded from legal proceedings in the way that material covered by a successful PII certificate is. That is to say, under CMP the Government may continue to use and to rely on closed material even though the other parties to litigation are unable to see that material. Likewise, the judge may rule on the closed material. Doing so will require the court to issue a closed judgment (that is, a judgment the existence of which is known but the content of which is unavailable either to the public or to non-government parties). Secondly, material may be closed without there being any balancing exercise in which the competing public interests are weighed against each other (which, as we saw, is a critical component of the law and practice of PII). This has the unsurprising consequence that much more is withheld under CMP than tends to be the case with PII.[13] In *Al Rawi v Security Service*, Lord Dyson in the Supreme Court summarised the difference between PII and CMP as follows: "unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and the natural justice principles".[14] **While the principles of open justice and natural justice are neither absolute nor inflexible, exceptions to constitutional principles such as these should be accepted only where they are demonstrated on the basis of clear evidence to be necessary**.

Special Advocates

11. When a court is considering closed material, the non-government party (who has not seen the material) must leave the court-room, as must their legal representatives and any press and public present at the trial. This does not mean that the non-government party will be wholly unrepresented, however. This is because a Special Advocate will be appointed to represent that party's interests in the closed proceedings. Special Advocates are security-cleared lawyers specially trained to deal with closed material. Such representation as they are able to offer is limited by the fact that, once the closed material has been served on the Special Advocates, they are unable to take further instructions from the party concerned and are unable to communicate with them or with their legal representatives without permission.

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11 Closed material procedures may also be adopted in certain employment cases, on which the leading authority is *Tariq v Home Office* [2011] UKSC 35.

12 [2011] UKSC 34.

13 Many of the responses to the Green Paper emphasised this point. The schemes of CMP that are used in asset-freezing and TPIMs cases do not include any judicial balancing exercise. As we explain below, however, and as the Supreme Court recognised in *Al Rawi*, this does not mean that no scheme of CMP could include an element of judicial balancing.

14 *Al Rawi v Security Service* [2011] UKSC 34, at para 14.

12. The use of Special Advocates has proven to be highly controversial. The Joint Committee on Human Rights concluded in 2009–10 that even with the use of Special Advocates closed material procedure "is not capable of ensuring the substantial measure of procedural justice that is required".[15] The Special Advocates themselves have voiced grave concerns as to the limitations inherent in their role. They submitted a collective response to the Green Paper in which they argued forcefully that "Our experience as Special Advocates … leaves us in no doubt that CMPs are inherently unfair; they do not work effectively; nor do they deliver real procedural fairness".[16] The Court of Appeal has stated that "the special advocate system enjoys a high degree of confidence among the judiciary", despite the fact that it is "inherently imperfect" and that the system "cannot be guaranteed to ensure procedural justice".[17] In the Supreme Court in *Al Rawi* Lord Kerr of Tonaghmore gave the following warning:

> "The central fallacy of the [Government's] argument … lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. *Evidence which has been insulated from challenge may positively mislead*. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial."[18]

Fairness

13. Given all of this, why seek to extend CMP into ordinary civil proceedings at all? The answer given in the Green Paper is that it would be "fairer".[19] In the Government's view, the law of PII renders some cases involving national security effectively untriable. Suppose, for example, that more or less the entirety of a claim or of a defence to a claim in a civil action for damages against the Government is covered by a successful PII certificate. Depending on the circumstances, the Government may consider that they have to concede liability; alternatively, they may be well-positioned to apply to the court to have the case struck out. The former course may be unfair to the Government (which will not have the opportunity to demonstrate that the claim is unmeritorious); the latter may be unfair to the claimant (who will not have the opportunity to show that the claim is justified). The Bill's extension of CMP to ordinary civil proceedings is designed expressly to find a fairer way of litigating cases that involve matters of national security. **It is in the light of the values of fairness, therefore, that these provisions of the Bill should be scrutinised**.

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15 Joint Committee on Human Rights, 9th Report (2009–10): *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (HL Paper 64, HC 395), para 90.

16 Special Advocates, Response to the *Justice and Security* Green Paper, available online (see n 1 above), para 15.

17 See *Home Office v Tariq* [2010] EWCA Civ 462, at para 32 and *Al Rawi v Security Service* [2010] EWCA Civ 482, at para 57.

18 *Al Rawi*, *op. cit.*, at para 93 (emphasis added).

19 Cm 8194, para 2.2.

The proposed scheme of CMP under the Bill

14. The Bill envisages a three-stage process by which it may be determined that civil proceedings should be conducted (in whole or in part) under a closed material procedure. First, under clause 6(5) the Secretary of State "must consider" whether to make (or advise another person to make) a claim for PII.

15. Secondly, under clause 6(1) the Secretary of State may apply to the court for a declaration that certain proceedings "are proceedings in which a closed material application may be made". Under clause 6(2), upon receipt of such an application the court must make the declaration if, in the proceedings in question, a party "would be required to disclose material" whose disclosure "would be damaging to the interests of national security". Clause 6(3) further provides that, in ruling on this matter, the court "must ignore" any possibility of the requirement to disclose being displaced by a claim to PII.

16. Thirdly, once such a declaration has been granted, a "relevant person"[20] may apply to the court for permission to treat some (or all) of its evidence as closed: that is, that it will not be disclosed to the other parties to the proceedings or to their legal representatives, but only to the judge and to any Special Advocates appointed to represent their interests in the closed hearings. Such an application is always to be considered ex parte (clause 7(1)(b)) and the court is "required" to grant the application "if it considers that the disclosure of the material would be damaging to the interests of national security" (clause 7(1)(c)). The court must consider requiring a summary (or gist) of the closed material to be provided to the other parties, but must ensure that no such summary contains material the disclosure of which would be damaging to national security (clause 7(1)(d) and (e)).

17. This CMP scheme is a significant improvement on the proposals contained in the Green Paper. Under those proposals, a CMP would have been available whenever the Secretary of State certified that proceedings entailed damaging disclosure of sensitive material. Under clause 6 it is the court that will make the decision (albeit with its role strictly curtailed by the terms of clauses 6(2) and (3)), not the Secretary of State; and under clause 6 a CMP will be available in civil proceedings only in cases involving national security, not in all cases said by the Government to involve sensitive material. **While we welcome these improvements, the scheme as presented in the Bill nonetheless contains three basic flaws**.

The executive as sole gatekeeper

18. The first flaw is that the scheme of CMP as presented in the Bill is one-sided in that it confers exclusive discretion on the Government. Thus, it is only the Secretary of State (and no other party) who may apply to the court for a declaration under clause 6(1) and it is only the "relevant person" (and no other party) who may apply to the court under clause 7(1) for a ruling that material is to be treated as closed. Yet, as the Government have noted both in their Green Paper and in their response to the JCHR's report on the Green Paper, the unfairness of relying on PII in national security cases may

[20] Under clause 6(4) a "relevant person" is any party to the proceedings whose disclosures would be damaging to national security.

be an unfairness caused either to the Government or to another party.[21] If fairness requires that the Government are able to apply to the court for a declaration under clause 6(1), by the Government's own logic fairness likewise requires other parties to litigation to be able to make such an application. Indeed, we consider it to be constitutionally inappropriate for the executive to have the dual role in civil proceedings of being a party to the litigation and at the same time being the sole "gatekeeper", controlling access to the possibility that the litigation be conducted in a certain manner.

19. **The House may wish to consider whether clauses 6 and 7 of the Bill should be amended accordingly.**

20. Some cases have been conducted according to a CMP with the consent of the parties although, very recently, doubt has been cast on whether this is lawful.[22] In their response to the JCHR's report on the Green Paper the Government have stated that, in their view, the process to be provided for by clause 6 of the Bill "negates the need for CMPs by consent".[23] If this is so it supports the argument that clause 6 should be amended such that any party to civil proceedings may make an application under clause 6(1). If parties may no longer consent to a CMP it would seem to be all the more unjustified an inroad into the principle of equality of arms for the Secretary of State to have a power under clause 6(1) that is not shared with other parties.

The absence of judicial balancing

21. The second flaw in the scheme of CMP as presented in the Bill lies in its reduction of the courts' capacity to ensure fairness in civil proceedings. Under clause 7(1)(c) the court is required to permit material to be treated as closed if it considers that its disclosure would be damaging to the interests of national security, without the court being able to balance that damage against the damage to the public interest in the fair administration of justice that would be caused by the use of closed material. The damage to national security might be minimal, and the damage to the fair administration of justice might be very significant; yet still the court would be required to permit the material to be treated as closed notwithstanding that to do so would evidently be disproportionate. This is a clear departure from common law principle. The so-called *Wiley* balance has rightly been viewed as an essential constitutional safeguard since at least the case of *Conway v Rimmer* in 1968.[24]

22. In our view, there are no grounds for believing that the courts are unable to strike an appropriate balance between the competing public interests of national security and the proper administration of justice. We know of no PII case in which a court has performed the *Wiley* balancing exercise and has ordered the disclosure of national security secrets contrary to the wishes of a Government minister. The purpose of these provisions of the Bill—in

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21 The Government are, quite rightly, explicit about this. At p 2 of their response to the JCHR, the Government state that "It is also clear that in some cases the absence of CMPs is particularly unfair to the claimant" (Cm 8365, *op. cit.*). See further *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin).

22 See *AHK*, *ibid.*

23 Cm 8365, *op. cit.*, p 10.

24 It can be traced further back, to 1956, in the decision of the House of Lords in the Scottish appeal of *Glasgow Corp v Central Land Board* 1956 SC (HL) 1.

contrast to those provisions concerning the *Norwich Pharmacal* jurisdiction—is not to add further safeguards to the protection of sensitive information but to make litigation involving national security fairer. **Judged against this standard it is difficult to see the justification for removing the *Wiley* balancing exercise.**

23. Clause 7(1)(c) as currently drafted is based on the rules pertaining to closed material that were found in the Prevention of Terrorism Act 2005 and are now found in the TPIMs Act 2011. It would be inappropriate, however, to assume that there ought to be a direct read-across from the control orders / TPIMs context into the altogether different context of ordinary civil actions. The point of control orders was, and the point of TPIMs is, not to maximise fairness to litigants but to maximise security in the small number of terrorist cases that, for one reason or another, cannot be handled through the regular criminal justice system. TPIM notices are issued to persons reasonably believed by the Secretary of State to be involved in terrorism (TPIMs Act 2011, section 3(1)). The use of CMPs proposed in the Justice and Security Bill, by contrast, could apply to anyone who, for whatever reason, is caught up in civil litigation involving national security. Suppose, for example, that there is a fatal accident involving a military aircraft and the widows of the armed forces personnel killed in the accident sue the Ministry of Defence for negligence, claiming that the MoD had reason to know that the aircraft was unfit to fly.[25] Under this Bill such a claim would be liable to be heard under a CMP. In our view, there is no justification for requiring that material must be closed in such a case even where the risk to national security of its disclosure could be shown to be outweighed by the risk to the fair administration of justice that would be caused by its being withheld.

24. The further issue arises of how to ensure that the court takes all available steps to mitigate the unfairness inherent in permitting material to be treated as closed. **In our view, the court should be required, for example, to consider whether the material could be disclosed to parties' legal representatives in confidence and whether the material could be disclosed in redacted form.**

The relation of CMP to PII

25. The third flaw concerns the relation of the proposed CMP scheme to the current law and practice of PII. We noted above that clause 6(5) provides that, before applying to the court for a clause 6(1) declaration, "the Secretary of State must consider whether to make, or advise another person to make, a claim for public interest immunity". There is nothing in the Bill to suggest that a clause 6(1) application may be made only where no claim to PII has been or is to be made in the proceedings in question. Thus, it seems to be contemplated that a civil action could proceed both under PII and under a clause 6 CMP simultaneously. **The House may wish to ascertain how, precisely, the Government consider that this would work in practice**.

26. More fundamentally, however, in choosing whether to claim PII or whether to apply instead to the court for a declaration under clause 6(1) the Secretary of State appears once again to have an exclusive discretion. This may be illustrated with our earlier example of an action for negligence brought

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[25] These hypothetical facts are adapted from those in *Duncan v Cammell Laird* (involving the sinking and flooding of a submarine).

against the Ministry of Defence following a fatal accident. Suppose that the Secretary of State has in her possession material showing that the Ministry have not been negligent, but that the disclosure of this material would risk damaging national security. Clearly, the Secretary of State has an incentive not to claim PII in respect of the material but to apply instead to the court for a declaration that the case may adopt a CMP. This would enable the Secretary of State to continue to use and rely on the material in question, thus assisting her with her defence to the claim.

27. However, suppose instead that the Secretary of State has in her possession material showing that the claimants are correct—that the Ministry have been negligent—but, again, that the disclosure of this material would risk damaging national security. Here, the Secretary of State has an incentive to claim PII because, if successful, the PII certificate would have the effect of removing the material in question from the proceedings altogether, meaning that the claimants could not rely on it, even via Special Advocates in a closed hearing.

28. In their response to the JCHR's report on the Green Paper, the Government emphasised that "PII will continue to be available for use wherever it is more appropriate than a CMP" and that it "was never the intention of Government to prevent PII from being used in cases where it is more appropriate".[26] The scheme of the Bill, however, is that it will fall exclusively to the Secretary of State to decide whether or not it is "appropriate" to claim PII and to decide between the PII route and applying to the court to adopt the CMP route. There are no criteria against which "appropriateness" is to be assessed. It is not the public interest in the fair administration of justice that is served by such a scheme, but the Secretary of State's necessarily partisan interest as a party to litigation. We do not consider this to be constitutionally appropriate.

29. The Secretary of State may seek a declaration under clause 6(1) before the PII process has been completed in the proceedings in question. In *Al Rawi* no Justice of the Supreme Court was prepared to countenance the idea that, in a civil action for damages, resort could be had to a CMP before the PII process had been completed. Three Justices (of nine who heard the appeal[27]) were prepared to rule that circumstances may in the future arise in which the courts might have to rule that a trial could go into CMP, but each of these Justices clearly stated that such an eventuality could occur only after the PII process had run its course.[28] In this respect the scheme provided for by clause 6 goes much further than any member of the Supreme Court was prepared to go in *Al Rawi*.

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[26] Cm 8365, *op. cit.*, pp 6, 8. Clause 11(5)(b) of the Bill provides that nothing in clauses 6–10 "affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings" but this provision says nothing about the ways in which PII and CMP will relate to one another in practice.

[27] Only eight gave judgment: Lord Rodger of Earlsferry died after the appeal had been heard but before the judgment of the Court was handed down.

[28] *Al Rawi v Security Service*, *op. cit.*, Lord Mance at para 121; Lord Clarke of Stone-cum-Ebony at para 178. Baroness Hale of Richmond agreed with Lord Mance and gave no separate judgment of her own. (Most of the other Justices were even more adamant: agreeing with the Court of Appeal in the case that the courts could never order civil proceedings to be heard under a closed material procedure: this was the position of Lords Dyson, Hope of Craighead and Kerr of Tonaghmore. Of the remaining Justices, Lord Phillips of Worth Matravers did not address the point and Lord Brown of Easton-under-Heywood indicated (at para 86) than an altogether more radical solution may be required.)

30. In their response to the JCHR's report on the Green Paper, the Government made clear that they do "not agree that it is necessary to go through a PII exercise before being able to take a decision as to whether a CMP is appropriate … it would be illogical to go through a potentially lengthy PII exercise in circumstances where it was apparent that if a PII application were to be successful the Government would be left with no material to put its case forward …".[29] We can see force in the argument that it will sometimes be otiose to push the PII process to its completion before turning to CMP. But this does not detract from the proposed approach being inappropriately one-sided in favour of the executive.

31. **We welcome the fact that the Bill preserves the PII process in cases involving national security where, in the Government's words, "it is more appropriate."[30] Reserving the matter to the exclusive discretion of the Secretary of State is however inherently unfair. Determining which of PII or CMP is the more appropriate route to adopt in any particular litigation is essentially a case-management issue and so, constitutionally, is the proper preserve of the court.**

The ambit of the scheme

32. A declaration under clause 6(1) may be made in any "relevant legal proceedings". Clause 6(7) defines this to mean non-criminal matters in the High Court, the Court of Appeal, or the Court of Session. Clause 11(2) provides that the Secretary of State may by order amend this definition. Clause 11(2) is therefore a "Henry VIII" power. Clause 11(3)(c) provides that exercise of the power is subject to the affirmative resolution procedure. **Given the sensitivity of the subject-matter the House may consider that this is an insufficiently robust safeguard and that a super-affirmative procedure should be adopted**.[31]

33. Our concerns about this Henry VIII power are not limited to matters of constitutionally appropriate procedure, however. We also have a concern as to the possible scope of this power. In particular, the Green Paper contained a number of options concerning inquests that raise questions of national security. The Bill includes no provisions on inquests. **The House may wish to ascertain whether the Government consider that the power in clause 11(2) could be used to add inquests to the definition of "relevant civil proceedings" for the purposes of clause 6**. In the *Justice and Security* Green Paper the Government referred to inquests as being different from "other forms of civil proceedings" and discussed "civil proceedings, including inquests", which would seem to suggest that the Government view inquests as a form of civil proceedings.[32]

Requirements as to recording, reporting and review

34. The answer to a recent Parliamentary Question in the House of Commons suggested that no records are maintained of CMPs adopted under other legislation.[33] The use of closed material procedure is a matter of considerable

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29 Cm 8365, *op. cit.*, p 8.

30 See para 31 above.

31 As found in Part 1 of the Legislative and Regulatory Reform Act 2006.

32 *Op. cit.*, at paras 2.9 and 2.10.

33 HC Deb, 14 May 2012, col 18W.

public and parliamentary interest and we think it appropriate for records of its use to be made readily available. **The House may wish to consider whether the Government should be required to maintain consolidated records.**

35. **The House may also wish to consider whether the Government should report annually to Parliament on the use made of CMP under the Bill and whether the Bill should be independently reviewed five years after it comes into force.**