MINIMUM SAFEGUARDS

A BRIEFING PAPER ON THE JUSTICE AND SECURITY BILL BY THE BINGHAM CENTRE FOR THE RULE OF LAW 5th July 2012[1]

1. The Bingham Centre for the Rule of Law submitted a response[2] to the Justice and Security Green Paper (October 2011) setting out our concerns about the proposed reforms to the civil justice system. To the extent that those proposals are now contained in the Justice and Security Bill we repeat our view that the Government has not justified the significant departure form natural justice, open justice and equality of arms entailed by the reforms.

2. Without wishing to endorse the proposals in the Bill, this briefing paper proposes amendments designed to introduce basic, minimum, safeguards.

I. Amendments to the "trigger" for CMP (Clause 6)

3. Clause 6 would introduce for the first time Closed Material Procedure ("CMP") into ordinary private and public law claims (contract, tort, judicial review, even *habeas corpus* cases).

4. ***What is CMP?*** CMP is **not** a system of private hearings. Under the present law courts can already hear national security issues in private sessions (so-called "in camera" hearings).[3] CMP would go much further and would prevent documents or information being communicated to the other party to the case or even to their legal advisers on confidential terms. In other words, CMP enables the Government to advance its case not just in private but in secret, without informing the other parties to litigation what that case is or what evidence and documents the Government is putting before the court.

5. This "closed" process is subject only to forensic testing by appointed Special Advocates who cannot communicate with the party whose interests they represent.[4] As such, CMP represents a fundamental departure from the right to know the opposing case and from the principle of equality of arms.

---

[1] The Bingham Centre welcomes comments on this briefing paper. Please send all communications to Tom Hickman tomhickman@blackstonechambers.com

[2] This is available on the Bingham Centre website.

[3] Rule 39 of the Civil Procedure Rules states, "(3) A hearing, or any part of it, may be in private if –… (b) it involves matters relating to national security;"

[4] Special Advocates can send written communications to the party whose interests they represent only with the permission of the Government which will review the communication in order to approve it - there is therefore no confidentiality in the communication. In addition the Government will not approve any communication if the communication will tend to indicate what information is contained in the CMP. In practice, this means that communications from Special Advocates relate only to procedural matters (for example about timetabling or the existence of closed grounds of appeal) and not to the substance of a case. The real and substantial limitations on the protection afforded by Special Advocates has been well documented and were

6. As vividly demonstrated in a recent case (*R (Omar) v Foreign Secretary* [2012] EWHC 1737, 26/6/12)[5] the effect of a CMP is total secrecy. It was alleged that the Government was mixed up in the unlawful rendition of a man from Kenya to Uganda and his subsequent mistreatment. The parties to the case agreed to a CMP. On this critical issue the Divisional Court's judgment simply states:

> "100. The Foreign Secretary adopted the position in the open hearing that he would neither confirm nor deny [even] the presence of British security personnel in Uganda or Kenya in accordance with well established NCND policy. …
>
> 101. The Foreign Secretary's contentions were developed in the closed hearing.
>
> 102. The evidence given in the closed hearing and the conclusions of fact on this issue are set out in Annex B."

7. Annex B is "closed" and therefore both the Government's response to the allegations and the Court's findings are secret and will remain so. This is the effect of a CMP.

8. Unlike in other cases where CMP has been used (Control Orders/TPIMs, deportation, civil service employment) there is no national security imperative for the use of secret hearings in ordinary civil claims.[6] The Green Paper gave two reasons for the introduction of CMP: (1) to allow Government Departments and the Intelligence Services to put forward evidence in their defence that would otherwise be excluded on grounds of public interest immunity ("PII") and therefore relieving the pressure to settle claims,[7] and (2) to ensure that cases are not struck out where evidence that Claimants require is excluded on grounds of PII (Green Paper, at [1.32-1.36]). Thus the justification for CMP was said to be to "enhance fairness" to both sides.

---

clearly expressed by the Special Advocates themselves in a response to the Justice and Security Green paper dated 16 December 2011.

[5] This was a *Norwhich Pharmacal* case, but the principle is the same.

[6] In these other contexts CMPs are used to enable the Government to protect national security by placing persons suspected of involvement in terrorism under restrictive obligations, deporting them or terminating their employment when, in the absence of a CMP, the Government would not be able to adduce before a court the evidence necessary to justify such measures. CMPs therefore enable action to be taken to protect national security that could not otherwise be taken. By contrast, there is no national security justification for CMPs advanced by the Government for clauses 6 and 7 of the Justice and Security Bill.

[7] ***What is PII?*** PII is a rule of evidence established in seminal legal cases in the House of Lords, in particular *Duncan v Cammell Laird* [1942] AC 624, *Conway v Rimmer* [1968] AC 910, *Air Canada* [1983] AC 394 and *Ex parte Wiley*. The Government must invoke PII by issuing a Ministerial Certificate in relation to documents the disclosure of which would cause real harm to the public interest. The courts will consider whether this claim should be upheld and whether the public interest in non-disclosure is outweighed by the public interest in disclosure, such as in the administration of justice and disclosure of wrongdoing: the "*Wiley* balance". If the public interest is in favour of not disclosing the documents, then they are inadmissible in the proceedings, although before ruling them inadmissible in their entirety the judge must explore ways of allowing the documents to be considered, such as use of confidentiality undertakings, gisting, private hearings CMP differs from PII in that it allows material to be admitted to the proceedings although it is not disclosed to the other party.

9. The Bingham Centre's first proposal would bring the Bill into line with the Government's own objectives for it. Clause 6 as drafted places the decision to hold a CMP entirely in the hands of the Government: as presently drafted a Judge cannot decide of his own motion that a CMP should be used and Claimants cannot apply to the Judge for a CMP. If a CMP is not in the interests of the Government because it will enable the court to see material that is damaging to the Government's case, the Government can choose to rely on PII to have the information excluded altogether from the proceedings. We consider that this departs from equality of arms further than is necessary to attain the Government's objectives and is inconsistent with the justifications given for the introduction of CMPs as set out in the Green Paper. **We therefore propose that it should be open to either party in a case to apply for a CMP.**

10. Furthermore, the Green Paper stated clearly that **even** in cases involving national security sensitive material a CMPs would **not** be available in every case:

> "2.4 CMPs should only be available in exceptional circumstances, and where used, every effort is and should continue to be made to have as much material considered in open court as possible. But in the **small number of cases where sensitive material is crucial to the outcome**, it is better that the court should be able to decide the case, despite the additional complexities a CMP might create, than – in a worst case – that the case should not be tried at all. …
>
> 2.5 An appropriate mechanism for triggering the CMPs will help to ensure that they are **only used where it is absolutely necessary to enable the case to proceed in the interests of justice.** The principle of open justice is an extremely important one, and any departure from it should be **no more than is strictly necessary to achieve a proper administration of justice**." (emphasis supplied)

11. However, Clause 6 of the Bill does not reflect the position taken in the Green paper. Clause 6 requires a court to declare that CMP may be used in a case whenever there are **any** relevant documents in the case the disclosure of which would be harmful on national security grounds, irrespective of whether using a CMP is necessary in the interests of justice or whether the judge considers the case can be fairly tried using PII alone. The court is then **required** to allow **all** such documents to be admitted in closed proceedings (clause 7).

12. **It is vital in our view that the court should be able to determine for itself whether or not the use of CMP is strictly necessary in the interests of justice.** In many national security cases a CMP, with its inherent departure from equality of arms, will not be justified.

13. This amendment would also enable courts to require a PII process to be gone through before acceding to any application for a CMP. Until this has been done it will not be clear whether crucial evidence will be excluded from the proceedings. Even those of their Lordships in *Al-Rawi v Security Services* who accepted the possible desirability of CMP emphasised that it should

follow a PII exercise so that the amount and importance of material that would be excluded would be known.[8]

II. Amendments to CMP (Clause 7)

14. The Secretary of State for Justice has made absolutely clear that he does not intend that the Bill should lead to **any more information being withheld** from open court than under the current law of PII:

> "It even appeared to some, notably this paper, that the changes could mean the public finding out less about the truth in important cases.
> That was never the intention and I would never support such a plan. …
>
> No evidence that can currently be heard in open court will be put into closed proceedings. For any claimant, or any reporter, the overall effect will be access to at least the same amount of information as under the previous rules, with the additional benefit that there will be an independent judgment on serious allegations."[9]

15. However clause 7(1)(c) as drafted **would** lead to documents that are currently disclosed being withheld from a party. This is because clause 7(1)(c) requires judges to rule that any material damaging to national security—to whatever extent and whatever the countervailing considerations—**must** be considered in a CMP. By contrast, at present both the Secretary of State and the Courts conduct a balance: they consider not only the public interest in withholding disclosure but also the public interest favouring disclosure.

16. This principle of balance (sometimes called the *Wiley* balance[10]) is a fundamental constitutional protection that the courts have applied for decades with Parliament's implicit approval. It was famously articulated by Lord Reid in the celebrated constitutional case of *Conway v Rimmer*:

> "courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister' s view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh, then the Minister' s view must prevail."[11]

17. The balancing approach allows both the Government and the Courts to disclose documents revealing the involvement of Government officials in wrongdoing or showing that they were innocent of it, even though this may be sensitive material. Thus, Lord Fraser famously stated in the *Air Canada case*, "*I do not think that even cabinet minutes are completely immune from disclosure in a case where, for example, the issue in a litigation involves serious misconduct by a Cabinet Minister*".[12]

---

[8] Footnote 1 above, see especially, at [159] (Lord Clarke), at [120] (Lord Mance).

[9] 'Secret justice: My plans were too broad. The Mail has done a service to the public interest', The Mail, 28 May 2012

[10] Following the case of *Ex p. Wiley* [1995] 1 AC 274.

[11] [1968] A.C. 910, at 952 A-B.

[12] Supra, at 432 G.

18. By contrast, by removing the *Wiley* balance, clause 7(1)(c) would **require** the courts **not to disclose** documents or information even where this was overwhelmingly in the public interest, such as showing serious Governmental wrongdoing, if there was **some** risk of harm to national security interests.

19. Thus, contrary to the assumption of the Secretary of State for Justice, as presently drafted the public would certainly find out less about the truth of important cases and less material will be disclosed. **In our view it is vital that the public interest balance is not removed in national security cases with the effect that less disclosure would be made than under the present law. We therefore propose that cl. 7(1)(c) be amended to retain the public interest balance.**

III. The scope of application of CMP

20. It is very welcome that the Government has limited CMP to the national security context. One of the concerns that the Bingham Centre and others had voiced was that it could fundamentally affect the law on civil actions against the police and law enforcement bodies. The Secretary of State for Justice has now stated publicly that it is only intended to apply to "spies" and national intelligence.[13]

21. However the Bill is not as clear as the Secretary of State's public statements. It is not clear that civil actions against the police, such as for unlawful arrest, could never be subject to CMP. The Bingham Centre is also concerned that it could apply to cases relating to detention, for example by the military abroad, including habeas corpus cases.[14]

22. In *Al Rawi*, Lord Dyson stated, "***to allow a closed procedure in circumstances which are not clearly defined could easily be the thin end of the wedge.***"[15] This was one of the reasons why the Court decided that any change to the law would have to be done by Parliament which could provide such a clear definition to the scope of PII.

23. In our view **the legislation should specify that CMP cannot be used in actions against law enforcement bodies and that it cannot be applied in any case relating to the legality of detention.**

---

[13] *"what I have done is clarify ... this applies to spies and national intelligence. ... the only issue where you will go into closed proceedings will be national security."* Today Programme, 29th May 2012.

"*Let me set out the problem as I see it. Under the current rules in civil cases – we are not talking about criminal cases here – judges cannot hear evidence gathered by spies, even when it is absolutely central to the case. There is no option but for this material to be excluded entirely from the courtroom."* The Mail, 28th May 2012.

[14] E.g. *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

[15] at [44].

IV. Five-year review

24. If enacted the Bill would make fundamental changes to constitutional law and civil procedure. Given the (a) nature of the reforms, (b) the complexity of this area of law, and (c) the fact that the Government requires Parliament to proceed to a large degree on trust of its own analysis of a number of unspecified confidential cases, **we propose that the legislation be subject to an independent review of its operation after five years.**

V. *Norwich Pharmacal* disclosure proceedings

25. We do not accept that it has been demonstrated that the current law on *Norwich Pharmacal* applications leads to any danger to national security. Under the proposals in clause 13 of the Bill, the Secretary of State would be able to issue a certificate that disclosure would be contrary to the public interest and this would prevent disclosure. We welcome the fact that such a certificate would be subject to challenge on judicial review principles.

26. However, the Intelligence Services are to be entirely exempt from any requirement to provide disclosure under cl. 13(3)(a)-(d). This is unprincipled and disproportionate. Under the current law, the Intelligence Services would be required to give disclosure only if they had been "mixed up" in serious wrongdoing, such as in the *Binyam Mohamed* case, and they would not have to make disclosure if it would damage national security or international relations. We see no reason why the Intelligence Services should enjoy a blanket immunity from the law in cases where they are mixed up in wrongdoing. **For this reason, we propose that the Ministerial certificate procedure in cl. 13(3)(e) also apply to the Intelligence Services.**

VI. Reforms to the Intelligence and Security Committee (ISC)

27. We welcome that the Government is prepared to countenance reforms to the ISC. However, the reforms contemplated in the Green Paper and brought forward in the Bill are very modest. If such Committee is to be able to scrutinise the work of the Intelligence Services effectively and if it is to act as a real deterrent to malpractice it must as a minimum have the power to view any document held by those agencies.

28. We therefore do not think it is justified for the Secretary of State to have a power to prevent the Committee from examining documents held by the Intelligence Services. Unlike in some other countries where there is a different division of powers, in the United Kingdom it is a constitutional fundamental that the executive, and every agency of the Government, is answerable and accountable to Parliament. Parliament, not the executive, is supreme.

29. **It is not constitutionally appropriate, even in the context of national security, for legislation to prevent Government accountability to Parliament by allowing Ministers, on advice from the Intelligence Services, to prevent a Parliamentary Committee from having access to documents that the Committee considers necessary to hold the Government to account.** Furthermore, since Members of the Committee will have been approved by the Prime Minister and approved by Parliament, there cannot be any valid objection to the Committee seeing whatever documents it considers necessary to properly fulfil its functions.

VII. Sections 2(2)(a) of the Security Service Act and the Intelligence Services Act

30. The final point is more technical, but very important. Under s.2(2)(a) of the Intelligence Service Act 1994 and s.2(2)(a) of the Security Service Act 1989 there is a restriction on the disclosure of information by those agencies save in very limited circumstances, including where necessary for criminal proceedings and where "*necessary for the proper discharge of [the] functions*" of the agencies.

31. In a number of cases in recent years it has been argued by the Intelligence Services that this provides a statutory bar on the disclosure of relevant information held by the Intelligence Services, save where the conduct of those services is expressly impugned. In at least one case the parties agreed to adopt a CMP to allow relevant material which the Intelligence Services claimed to be immune from disclosure to be considered by the court in a CMP.[16] However, as currently drafted, clause 6(2) would not permit such material to be considered even in a CMP.

32. We consider that the law should be clarified to make clear that where material held by the Intelligence Services is relevant to civil proceedings and is ordered to be disclosed by the court such disclosure is necessary for the proper discharge of the functions of the agencies and therefore is no statutory bar on disclosure. This would mean that such material could be considered in a CMP in appropriate cases.

33. Schedule 1, para. 3(4) of the Bill makes clear that ss.2 of the Acts do not preclude disclosure to the ISC. **An equivalent provision should be inserted in relation to civil proceedings generally ensuring that CMPs can be used in all cases in which relevant material is held by the Intelligence Services.**

5th July 2012

[16] *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) D. Ct.

ANNEX: PROPOSED AMENDMENTS (as at 5th July 2012)

Amendments to the "trigger" for CMP (Clause 6) and clarifying scope of CMP

Page 4, line 18, leave out "The Secretary of State" and insert "A party"

Page 4, line 21, leave out "must" and insert "may"

Page 4, line 27, after subclause (2)(b) insert, "and (c) that material would be inadmissible in the proceedings by reason of public interest immunity, and (d) it is strictly necessary in the interests of justice that the material is admissible."

Page 5, line 15, insert after "cause or matter", ", any action against the police or law enforcement agencies, or any action seeking a person's release from detention"

Page 5, line 18, insert new clause: "The disclosure of information in civil proceedings pursuant to an order of the court is to be regarded for the purposes of the Security Service Act 1989 or the Intelligence Services Act 1994 as necessary for the proper discharge of the functions of the Security Service, the Secret Intelligence Service or (as the case may be) the Government Communications Headquarters."

Amendments to the scope of CMP (Clause 7(1)(c))

Page 5, line 32, after "interests of national security", insert "and that damage outweighs the interests of justice in disclosure,"

Amendment to reforms to *Norwich Pharmacal* proceedings (Clause 13(3)

Page 10, lines 8-17, leave out subclauses (a)-(e) ("(a) ….to disclose"), insert "specified or described in a certificate issued by the Secretary of State, in relation to the proceedings, as information which B should not be ordered to disclose."

Amendment to the reforms to the Intelligence and Security Committee (Schedule 1 paras. 3(1) and (2), (3) and (4))

Page 14, line 4, leave out "either—…or (b) inform the ISC that the information cannot be disclosed because the Secretary of State has decided that it should not be disclosed."

Page 14, line 22, leave out "either--…or (b) inform the ISA that the information cannot be disclosed because the Minister of the Crown has decided that it should not be disclosed."

Page 14, line 24 (to line 34), leave out paragraph (3).

Page 15, line 1 (to line 18), leave out paragraph (4).