Justice and Security Bill (Part 2): Tabled Amendments

House of Lords Report Stage Briefing

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Evidence which has been insulated from challenge may positively mislead.

Lord Kerr*, Al-Rawi v Ministry of Defence,* [2011] UKSC 34, 93.

The common law principles [of open justice]…are extremely important and should not be eroded unless there is a compelling case for doing so. If this is to be done at all, it is better done by Parliament after full consideration and proper consideration of the sensitive issues involved.

Lord Dyson*, Al-Rawi v Ministry of Defence,* [2011] UKSC 34, 48.

The question for Parliament is whether Government has persuasively demonstrated, by reference to sufficiently compelling evidence, the necessity for such a serious departure from the fundamental principles of open justice and fairness...the Government has in our view failed to discharge such a burden of justification...

Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill, HL Paper 59, 13 November 2012*

JUSTICE considers that the Bill's proposal to introduce closed material procedures (CMP) into all civil proceedings is unfair, unnecessary and unjustified. That one party will present his case unchallenged to the judge in the absence of the other party and his lawyers is inconsistent with the common law tradition of civil justice where proceedings are open, adversarial and equal. Introducing CMP into the ordinary civil justice "toolkit" of our judiciary could undermine their credibility irreparably and damage public confidence in the civil justice system.

The Supreme Court in *Al-Rawi* refused to expand CMP, concluding that such a fundamental change would require "compelling evidence". JUSTICE considers that Parliamentarians should ask for no less. We share the view of the JCHR that the Government has failed to discharge this responsibility.

In the absence of compelling justification for change, we would support amendments to delete Part 2 from the Bill, for the reasons set out below. We do not consider that amendment alone will address the serious implications of Part 2 for our civil justice system.[1]

However, we highlight a number of amendments in this brief which correspond to a few of the worst excesses of the proposals, including the near-unfettered control of the Secretary of State over the CMP process, the lack of judicial discretion over competing public interests, and post-legislative scrutiny.

We also consider amendments to the proposals to oust the jurisdiction of the Court to order disclosure in the public interest in cases where the security and intelligence agencies are "mixed up" in wrong doing. JUSTICE considers that the Government has also failed to make the case for reform of the *Norwich Pharmacal* jurisdiction and that these provisions should be deleted from the Bill. The amendments set out below highlight the breadth of the proposed ouster and the limited opportunity for effective judicial oversight in the Bill.

[1] We deal with our objections to the Bill in our brief for Report Stage. See http://www.justice.org.uk/resources.php/325/justice-and-security-bill

Background

1. JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists. In 2009, we published *Secret Evidence*, in which we called for an end to the use of secret evidence in UK proceedings.[2] We have a long history of litigating in cases where closed material procedures have been in issue.[3]

2. **This briefing supplements our primary briefing on Part 2 of the Bill, which urges Peers to support the deletion of the key parts of Part 2 of the Bill.**

3. **The proposals in this Part of the Bill would seriously undermine the common law principles of open, adversarial and equal justice and could irreparably damage the credibility of the judiciary. Organisations and individuals from the Joint Committee on Human Rights, the House of Lords Constitution Committee, the Law Society and the Bar Council, the Equality and Human Rights Commission and the United Nations Rapporteur on Torture and the very security vetted lawyers who operate at the heart of closed material procedures – the Special Advocates - have all expressed similar concern about the expansion of closed proceedings proposed by the Bill.**

4. **These proposals are unfair, unnecessary and unjustified. Below we consider a number of amendments tabled for debate on Report. This briefing principally focuses on amendments recommended by the Joint Committee on Human Rights**

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[2] JUSTICE, *Secret Evidence,* 2009. Electronic copies are available online: http://www.justice.org.uk/resources.php/33/secret-evidence

[3] In 2010, JUSTICE jointly intervened with Inquest and Liberty in the Divisional Court in support of the decision of Lady Justice Hallett that she did not have the power to order to hear evidence in secret as part of the inquests arising from the 7/7 bombings (The Divisional Court accepted our submissions). Coroners do not have the inherent jurisdiction to order closed material proceedings. A copy of the judgment and JUSTICE's submissions can be found here: http://www.justice.org.uk/pages/r-secretary-of-state-for-the-home-department-v-assistant-deputy-coroner-for-inner-west-london.html) We made submissions in *A v UK* in Strasbourg and *AF (No 3)* in the domestic courts (Full information on each of these submissions is available online. http://www.justice.org.uk/pages/past-interventions.html). JUSTICE, together with Liberty, most recently intervened in the cases of *Al-Rawi* and *Tariq* in the Supreme Court (*Al-Rawi v Security Service* [2011] UKSC 34; *Tariq v Home Office* [2011] UKSC 35. Copies of JUSTICE's submissions can be found online: http://www.justice.org.uk/pages/al-rawi-.html) (*Tariq* is currently being considered by the European Court of Human Rights. JUSTICE is a third party intervener in the case). The key outcome in these cases – that the Supreme Court did not have the power to introduce closed material procedures in ordinary civil litigation without statutory authority – prompted the introduction of the Justice and Security Bill.

and tabled by members of that Committee and the House of Lords Constitution Committee.

5. The JCHR has proposed a number of amendments to deal with a few of the worst excesses of the Government's proposals; to reintegrate some judicial discretion into the CMP process; to limit the scope for further expansion and to provide for subsequent parliamentary oversight. Introducing a degree of judicial discretion may allow for some consideration of the countervailing public interest in open justice, or for the consideration of alternative means of securing protection for national security, but it will not address the burden posed by the Justices: the need for compelling evidence that the introduction of CMP is strictly necessary despite its impact on the right to a fair, adversarial and open hearing (notably, in *Al-Rawi,* the Court was asked to consider CMP as part of its inherent jurisdiction. The Court would have retained such discretion as would be written into the Bill by amendment). **However, we consider that these amendments do not address the underlying lack of justification provided by the Government nor the fundamental objections to the expansion of CMP into the ordinary civil justice system, including the potential impact upon open, adversarial and equal justice and the credibility of our judicial system.**

6. In our primary briefing on the Bill, we call on Peers to support amendments which propose the deletion of key parts of Part 2, such as **AMENDMENTS 45, 51, 54, 55. 57 and 61** tabled by Lord Dubs.

A: Closed Material Procedures (CMP)

AMENDMENTS 37, 38

Clause 6: CMP as a last resort

1. Amendment 40 would leave it to the discretion of the Court to consider whether an application for Public Interest Immunity could have been made before considering CMP. Amendment 37 requires that CMP may only be used when a fair determination of the proceedings is not possible by any other means.[4] is gives effect to the recommendation of the Joint Committee on Human Rights:

> We recommend that the Bill be amended so as to ensure that a CMP is only ever permitted as a last resort, by making it a precondition of a declaration that the court is satisfied that a fair determination of the issues is not possible by any other means.[5]

7. Notwithstanding our view that clauses 6 – 12 should be deleted, should they remain, these amendments would limit CMP to circumstances when a fair determination of the proceedings would not be possible by any other means.

8. The court would have the discretion to consider whether it is in the public interest that the proceedings go ahead under CMP (including whether the interests of justice require that CMP be used, whether a fair hearing can be secured without the disclosure of the material, and whether the interests of justice require that the hearing should proceed under this exceptional procedure).[6]

9. The Secretary of State considers that the proposals in the Bill are targeted at "the small number of civil cases where evidence is currently not being presented at all because it is too sensitive to be heard in open court".[7] This "last resort" criterion is not reflected in the proposals in the Bill. Under the proposals in the Bill, the court is bound to disregard

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[4] We note that other amendments have also been tabled which are designed also to ensure that CMP is only available as a "last resort". For example, Amendment 32 (Lord Hodgson and Lord Dubs) which would prohibit any CMP application unless a PII application had been successful and the proceedings cannot proceed unless there are no other means of a claim proceeding.

[5] Fourth Report of Session 2012-13, *Legislative Scrutiny: Justice and Security Bill,* HL Paper 59/HC 372, para 68.

[6] The amendments would lift the requirement that the court ignore the potential for material to be withheld on PII grounds and since PII will be a prerequisite to an application, removes the requirement for the Secretary of State to consider it.

[7] Government Response to the Consultation on the Green Paper, Executive Summary.

whether under the existing law of PII, alternative mechanisms such as redaction, confidentiality rights or anonymity orders could be used to protect national security (Clause 6(3)(a)). It is for the Minister alone to "consider" PII. On application, the judge must instigate CMP on production of any evidence on damage to the interests of national security. The judge currently has no discretion to consider whether a trial could proceed fairly without any closed procedure. This creates a distinct advantage for the Secretary of State, who may choose the option which better suits his case. The litigation advantage to the Secretary of State inherent in the unfair CMP process is generally far greater than under PII. However, there may yet be some cases where the Secretary of State might not wish even a judge to see material which may be extremely damaging to his case, and which may create embarrassment or provide evidence of serious wrongdoing. In these circumstances, a Minister might opt not to claim CMP, but instead pursue PII. If the court grants PII, the material is excluded entirely. If the court refuses to grant PII, or proposes disclosure with redactions or other accommodations, the Minister could argue that without PII, conceding the claim was in the public interest. As the JCHR explained in their report on the Green Paper, these measures must remain exceptional "Unless the [PII] exercise is gone through first, it will not be possible to tell whether a closed material procedure is the only possible way of ensuring that the issues in the case are judicially determined".[8]

AMENDMENT 33

Clause 6 - Triggering CMP: Who makes an application?

10. This amendment would allow an application for CMP to be made by either party to the case or by the Court on its own initiative. The Bill currently provides for CMP to be triggered by the Secretary of State alone. It is inconsistent with the principle of the equality of arms that this exceptional mechanism should be at the gift of one party to proceedings. The Government's argument that these proposals will allow claims which otherwise might be struck out – as unlikely as this theoretical risk may be - is undermined if only the Secretary of State is capable of triggering CMP. The JCHR concluded that:

> If CMPs are to be available at all in civil proceedings, it should be possible for either party to litigation to initiate the process.

[8] JCHR Report, para 111.

11. This amendment would allow any party to trigger consideration of CMP (taken together with other JCHR amendments, considered below, this would be subject to the Court's discretion to consider whether CMP would be in the public interest).

AMENDMENTS 35 and 36

Clause 6 – Judicial Discretion

12. These amendments provide for an element of judicial discretion at the gateway to CMP. They would allow the judge considering any application to consider both the public interest in protecting national security and the wider public interest in the fair and open administration of justice.[9]

AMENDMENTS 47, 48, 49, 50

Clause 7 - The role of the judge: controlling CMP

13. These amendments would require a judge to hear material in closed session only when the damage to national security would outweigh the public interest in fair and open interests of justice (47); to require a summary of the closed material to be provided (48); to ensure that summery was sufficient to allow the individual excluded to give effective instructions (49). It would make clear that the summary should take steps to protect national security in so far as it would be possible to do so (50).[10]

14. The Bill currently provides that once CMP is triggered, the court must provide for material not to be disclosed – or any summary provided - if disclosure would lead to any damage to the interests of national security. The court is not permitted to consider whether the evidence of damage justifies non-disclosure in the public interest. The first of these amendments would reintroduce a degree of "*Wiley"* balance into the determination of (a) whether material is considered in open session or closed and (b) the degree to which a summary of material considered in closed may be required.

15. The Bill places no duty on the court to provide a claimant excluded under CMP with a summary of the material which is "closed." The court is required to "consider" making a summary available, but is under no direct requirement to do so. Rather, Clause 7(1)(e) starts from the premise that the court is prevented from making any disclosure or

[9] See also Amendment 32

[10] See also Amendment 46 – 52, 53.

providing any summary which damages national security. This is perhaps surprising given that both domestic courts and the European Court of Human Rights have struck down decisions made under existing CMP as incompatible with the right to a fair hearing guaranteed by Article 6 ECHR where the person has not been given enough information for them to understand the case against them. The starting point in this case-law is that a person must be given as much disclosure – whether through the provision of documents, evidence or a summary – as is needed to secure a fair trial.[11]

16. Clause 11(5) stresses the duty of the court under the Human Rights Act 1998, providing that nothing in the Bill is to be read as requiring the court to act incompatibly with Article 6 ECHR. The Government explains that where Article 6 applies, the court should provide such summaries as are necessary.[12] This reassurance is welcome. However, the restrictive approach on the face of the Bill makes non-disclosure the starting point for the court. In our view, this is incompatible with existing case-law (and the common law principles of open justice) which suggests that the goal should be to secure a fair hearing in so far as is possible. These amendments would remove the requirement in the Bill that the Court should approach any summary with a view to the protection of national security, as opposed to the protection of the right to a fair hearing.

AMENDMENT 56

Clause 10 – New Clause – Notification

17. This amendment would require the Court to notify the media of any application for CMP and would make clear that intervention by third parties is possible, and should be facilitated by the Court.

18. This amendment would give effect to the JCHR conclusion that the Bill could have a chilling effect on media reporting of significant court proceedings with a corresponding impact on public trust and confidence in the judiciary. It would ensure that there were some degree of public awareness of the use and frequency of CMP applications, and it would enable the press to make representations in favour of increased openness and transparency.

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[11] *A v UK* (2009) 29 EHRR 29, the Grand Chamber concluded that where insufficient material had been disclosed to an individual subject to a control order following a CMP, this rendered the hearing unfair and incompatible with the Convention. In *AF (No 3)* [2009] UKHL 28, Lord Hope described the fundamental principle "that everyone is entitled to the disclosure of sufficient material to enable him to answer the case that is made against him".

[12] Cabinet Office, ECHR Memoranda, para 31.

AMENDMENTS 58-59

Clause 11 - Extending the application of CMP further

19. Clause 11 would currently allow the Secretary of State to extend the scope of the Bill to any other civil proceedings, including inquests, by secondary legislation. These amendments would remove the power of the Secretary of State to further extend the application of CMP by secondary legislation.[13]

20. The Government took the decision not to include coronial inquests within the scope of this Bill. While this was a welcome concession, it was unsurprising. The previous Government failed twice to persuade Parliament that bereaved families of servicemen and victims of terrorist atrocities might be excluded under CMP from coroners' inquiries. However, Clause 11(6) provides for the Secretary of State to extend the scope of the Bill by secondary legislation, without the full scrutiny of Parliament. This would include the power to extend the Bill to cover inquests. Although the Bill provides for affirmative resolution, this affords far less opportunity for debate and effective consideration than primary legislation. If this Bill allows CMP to become an ordinary part of our civil justice procedure, Parliament may be asked to expand its use further without the opportunity to revisit the scheme wholesale or to adapt its use to any new fora. The Bill would allow amendments to its structure also to be made by secondary legislation as determined necessary by the Secretary of State. The Lords Constitution Committee has indicated that this Henry the Eighth clause is inappropriate and has suggested that a super-affirmative procedure might be more acceptable.[14] **This amendment would remove this power entirely and would prevent the further expansion of CMP without further parliamentary scrutiny.**

B: *Norwich Pharmacal* Proceedings

AMENDMENTS 66, 67, 68

Clause 13 – Ouster

21. This would remove the automatic exemption from the *Norwich Pharmacal* jurisdiction for material held by or related to the intelligence services. JUSTICE considers that the

[13] Amendment 58 would have similar effect.

[14] Third Report of Session 2012-12, *The Justice and Security Bill,* HL Paper 18, para 32

creation of an absolute ouster of this jurisdiction in connection with the status of the services – as opposed to the public interest in non-disclosure – would be a damaging and retrograde step.

AMENDMENTS 73, 74, 75, 76

Clause 13 - The scope of the certification process

22. We maintain that the certification process is unnecessary and unjustified. We share the view of the JCHR expressed in their report on the Green Paper that if there is any need to address any perceived fear that information which is damaging to national security may be disclosed by our courts, that this should be done within the existing system of PII.[15] However, the breadth of the certification system is such that there could be a danger of its operating as an effective ouster of the jurisdiction of the court based largely on Ministerial discretion.

23. These amendments would limit the certification power of the Secretary of State to circumstances where he is satisfied that disclosure would cause damage to national security. National security would be limited to circumstances which would harm the control principle, or where information which would reveal specified information about the operations of the security and intelligence agencies. It would remove the Secretary of State's power to issue a certificate on the basis of any kind of damage to the UK's international relations without evidence of damage to national security. This latter criterion is extremely broad and could arguably be used to prevent disclosure of material which was simply embarrassing for our diplomatic partners, or material which could undermine our diplomatic relations by disclosing evidence of embarrassing or unhelpful conduct on the part of UK officials. It would be inappropriate for this kind of interest to shield public officials from effective scrutiny in a way which deprived an individual claimant of a remedy which would otherwise be in the public interest.

AMENDMENTS 77, 78, 79, 80, 81, 88

Clause 14 – Judicial Oversight

24. Clause 14 currently provides for a limited form of judicial oversight of certification by the Secretary of State, on ordinary judicial review grounds. Any such review would automatically be subject to CMP, even where the Secretary of State issues his certificate

[15] JCHR Report, para 192

for reasons related to international relations, not national security. Thus, in cases involving *Norwich Pharmacal* certification, CMP is to be utilised far more broadly than proposed in the already broad provisions in Clauses 6 – 11.

25. These amendments would ensure that the court will exercise discretion on whether to accept any Ministerial certificate, and will have the power to balance the interests in disclosure against the Secretary of State's certification that disclosure would damage the public interest. This is in contrast to the current provision in the Bill, where review is limited to scrutiny of whether the Minister "ought" to have issued the certificate. In effect this amounts to a review of the rationality of the Ministerial assessment of whether the information in question may damage either national security or international relations. Case law – including *Mohammed* – illustrates that our courts are very deferential to executive assessments of risk on national security and international relations. This amendment would permit the Court to balance competing interests, including in access to justice and whether, for example, the individual concerned is seeking the information to aid in his defence against charges for which the death penalty may be applied or in connection with allegations that the UK has been mixed up in wrongdoing which amounts to a grave violation of our international human rights obligations (including, for example, violations of the UN Convention against Torture). They would introduce an express discretion for the Court to overturn the determination of the Secretary of State in circumstances where the interest in non-disclosure is outweighed by the need to ensure an effective remedy for serious human rights violations.

C: OTHER AMENDMENTS

AMENDMENT 83
New Clause, Part 2 – Reporting and Review

26. This amendment would create a requirement on the Secretary of State to collate and provide to Parliament statistics on the operation of this Part of the Bill (both in relation to CMP and the limitation of *Norwich Pharmacal* jurisdiction). It provides for quarterly statistics to be provided and for a report to be laid before Parliament. It also provides for annual review of the operation of Part 2 by the independent reviewer of counter-terror legislation.

27. In the course of JUSTICE's work on CMP we have found it routinely difficult to access information on the operation of existing CMP. It is clear that members, seeking

information during the Green Paper process have had similar difficulties.[16] Ministers have indicated that information has not been stored and that it would now be disproportionately expensive to collate for the purposes of informing Parliament's consideration of the Bill. The Lords Constitution Committee has recommended that the Government should be required to both keep consolidated records on the use of CMP and to provide for independent review.[17] JUSTICE considers that, in light of the exceptional nature of these measures, reporting and review requirements would not be unduly onerous and will allow Parliament to continue to monitor the impact of the use of CMP in future. While this amendment refers specifically to Part 2 of this Bill, in light of the exceptional nature of these proceedings, JUSTICE considers that there is a good case for maintaining up to date and consolidated statistics on the operation of all existing CMP.

AMENDMENT 84

New Clause, Part 2 – Sunset Clause and Renewal

28. This clause would mirror the treatment of control orders, by providing for Part 2 to lapse every 12 months, subject to renewal by secondary legislation. This would provide for parliamentary scrutiny of the operation of these provisions on an annual basis.

29. This form of after-the-event political compromise addresses neither the need to justify the need to act; nor will it protect against any harm which might ensue while the Act is in force. The impact of the mechanism on the use of CMP in connection with the control orders regime (with renewals year on year despite significant criticism of the fairness of the proceedings from commentators and the Joint Committee on Human Rights and litigation challenging the fairness of the process proceeding throughout) serves to highlight the limitations of subsequent parliamentary review.

30. **However, if Part 2 is passed, Parliament should limit the shelf-life of these potentially damaging legislative proposals through a combination of sunset clause and subsequent parliamentary review. We consider that a period of 1 year**

[16] See for example, HC Deb, 14 May 2012, col 18W.

[17] Third Report of Session 2012-12, *The Justice and Security Bill,* HL Paper 18, paras 34 – 35.

would be appropriate to allow for close scrutiny of the implications of these measures for the civil justice system.[18]

[18] We note that Amendments 85, 86 would have a similar effect and would have the provisions lapse after 5 years. We consider that this period of time is overly generous.