

**SPECIAL ADVOCATES' MEMORANDUM ON THE JUSTICE AND SECURITY
BILL SUBMITTED TO THE JOINT COMMITTEE ON HUMAN RIGHTS**

Summary

- 1 On Tuesday 29 May 2012, the Government published the Justice and Security Bill (**the Bill**) and, with it, its response (**the Response**) to the consultation on the Justice and Security Green Paper published in October 2012 (**the Green Paper**). It was widely reported in the press that the Government had taken on board criticisms made about the proposals in the Green Paper and that the Bill would now be regarded as acceptable by those who had made the criticisms. That is not our view.
- 2 As Special Advocates appointed to act in closed proceedings under existing regimes¹, we would respond to the published Bill as follows:
 - 2.1 While we can see reasons for the proposal to add naturalisation and exclusion cases to the existing jurisdiction of the Special Immigration Appeals Commission (**SIAC**), we remain of the view that the case has not been made for the introduction of closed material procedures (**CMPs**) in other types of civil litigation.²
 - 2.2 There is one respect in which the Bill represents an improvement on the proposals in the Green Paper – the restriction of the scope of **CMPs** to national security cases only.

¹ This Note has been subscribed to by almost every Special Advocate with substantial experience in the role. Of those on the list of Special Advocates whose names do not appear below, none has expressed active disagreement with its contents except one who was unwilling to sign on the basis that “*whilst he agreed with much of the analysis, he was of the view that there will be significant cases where existing procedural devices will not suffice*”. We therefore believe that the views set out here represent an overwhelming consensus from the body of Special Advocates.

² See the ‘Response to consultation from Special Advocates’ (**SA Response to the Green Paper**) of 16 December 2011, submitted in response to the proposals in the Green Paper. The comments set out here are a response to what we regard as the main proposals in the Bill. In the SA Response to the Green Paper, we made a number of points about ways in which **CMP** procedure could be improved. David Anderson QC, the Independent Reviewer of Terrorism Legislation, considered some of these points “hard to resist”. Primary legislation would not necessarily be required to address our points. If, contrary to our view, a significant extension of **CMPs** were considered necessary, we would hope to see some formal indication of the Government’s proposals to address the concerns we set out in this regard.

- 2.3 However, contrary to the assurance given by the Lord Chancellor in the Foreword to the Response, the Bill does not ensure that the decision to trigger a CMP “can only be taken where evidence a [CMP] is needed on national security grounds is found to be persuasive by a judge”.
- 2.4 Instead, the Bill requires the judge to accede to the Government’s application for a CMP if there is any material disclosure of which would damage national security, even if the judge considers that the case could and should be fairly tried under existing public interest immunity (PII) rules and there is no need for a CMP.
- 2.5 The Bill would remove the availability of the *Norwich Pharmacal* jurisdiction not just in cases where disclosure is sought of information obtained in confidence from the intelligence service of another state, but also in a much wider category of cases. No sufficient justification has been advanced for such a broad exclusion of the *Norwich Pharmacal* jurisdiction and, in our view, none exists.

No need for CMPs

- 3 We remain of the view we expressed in our response to the consultation (and endorsed by the Joint Committee on Human Rights): that CMPs are inherently unfair and contrary to the common law tradition; that the Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists.

Restriction in scope to cover national security only

- 4 We note that the Bill would make CMPs available only where there is material whose disclosure would be contrary to the interests of national security. If, contrary to our view, CMPs are to be introduced, it is right that they should be available only in national security cases.
- 5 We assume that the intention is that CMPs will not be available simply because there is relevant material whose disclosure would impact on “the international relations of the United Kingdom” or where disclosure might impact on crime prevention. If our assumption is correct, this is welcome, because in our experience the “international

relations” rubric has been relied upon in circumstances where the harm caused by disclosure is in reality little more than diplomatic embarrassment.

- 6 However, there has been no attempt to define “national security”. This leaves open the possibility that the Government will in the future seek to argue that cases currently understood as impacting on the international relations of the United Kingdom or on serious crime fall within the phrase “national security”.
- 7 The Government should be invited to make clear, either by amending the Bill or by making a *Pepper v Hart* statement, that it will not argue for such an expansive interpretation of “national security”.

The Bill does not ensure that a CMP is adopted only when strictly necessary, nor does it provide for a judge to take the decision as to whether a CMP is needed

- 8 A number of respondents to the consultation paper argued that, if a CMP is to be introduced, it is essential that (a) this should only be where strictly necessary; and (b) the decision whether to trigger it should be for the judge and not the Secretary of State.
- 9 The reason why this was considered important was explained by David Anderson QC, the Independent Reviewer of Terrorism Legislation, in his response to the consultation on the Green Paper, at para. 22:

“The CMP has the capacity to operate unfairly, particularly in cases where a gist is not provided. This dictates considerable caution. Every effort should be made to prevent its adoption in cases where it is not strictly necessary.”

Such considerations led him to propose that:

“... the court’s power to order a CMP should be exercisable only if, for reasons of national security connected with disclosure, the just resolution of a case cannot be obtained by other procedural means (including not only PII but other established means such as confidentiality rings and hearings *in camera*)”.

- 10 The question which David Anderson and others envisaged being decided by the judge in a particular case was this: Is the case one which cannot be justly resolved using the existing procedural mechanisms?

11 Many commentators appear to have assumed that the Bill would require a judge to decide this question. They may be forgiven for thinking that, given what the Lord Chancellor said in his Foreword to the Response:

“The final decision that a Closed Material Procedure could be used will be a judicial one. This will ensure that the decision is made free of political influence, and can only be taken where evidence a Closed Material Procedure is needed on national security grounds is found to be persuasive by an independent judge.” [Emphasis added.]

12 But the Bill does not provide that the decision to trigger a CMP can only be taken “where evidence a closed procedure is needed on national security grounds is found to be persuasive by an independent judge”.

13 Instead, clause 6 provides that:

13.1 only the Government can apply for a CMP;

13.2 the judge must grant the application if there is any material which would fall to be disclosed and disclosure of which would be damaging to the interests of national security;

13.3 in considering that question the judge is required to ignore the fact that the material in question could be withheld under PII rules or under the Regulation of Investigatory Powers Act 2000 (**RIPA**).³

14 This means that:

14.1 the Government can still decide not to trigger a CMP if it considers that its own interests would be better served by not doing so (for example because it does not want the court to reach its decision on the basis of embarrassing sensitive material)⁴;

³ The only stage at which the potential use of a PII certificate is addressed is by the Secretary of State before making an application for a CMP: see clause 6(5). Thus the Secretary of State is required to consider making a claim for PII (but no more than that: no test of necessity for a CMP is applicable) before applying for a CMP, whereas the Court is required to ignore the possibility of sensitive material being withheld under a PII certificate.

⁴ See e.g. the evidence of David Anderson QC to the Joint Committee on Human Rights (Memorandum of 26 January 2012), in which he described this situation as “profoundly wrong in principle” as explained at paragraphs 25 to 26 of that document.

- 14.2 if the Government decides to apply to trigger a CMP, the judge will be required to accede to the application if there is any sensitive material relevant to the case, even if the judge considers that the case could be tried using the existing PII rules in a way that would be fair to both sides and that a CMP is therefore not needed.
- 15 Even if one makes the assumption that there are cases which cannot fairly be tried without a CMP, we consider it wholly unjustified to introduce provisions which allow CMPs in cases which can be fairly tried without a CMP. It is especially objectionable for only one of the parties to litigation (the Government) to be given the choice whether to apply for a CMP.⁵
- 16 We contrast the proposal in the Bill with the position adopted by the Government in *Tariq v. Home Office* (a case which involved consideration of a CMP in the existing statutory context of employment proceedings) where Lord Mance stated:
- “Clearly, it is a very significant inroad into conventional judicial procedure to hold a closed material procedure admissible, if it will lead to a claimant not knowing of such allegations in such detail. As the Home Office acknowledges, it is an inroad which should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case; and this should be kept under review throughout the proceedings.⁶
- 17 *We consider that, if power to hold a CMP is to be introduced:*
- 17.1 *both parties (not just the Government) should have the right to apply for a CMP;*
- 17.2 *the judge should be entitled to order a CMP only when the case cannot be fairly tried using the existing PII procedure and other procedural mechanisms (i.e. only in that very narrow category where the case would otherwise fall to be struck out under the principle in Carnduff v Rock or the Government would be unable fairly to defend itself).*

⁵ We also note that there is only a discretionary power (rather than a requirement) to appoint a Special Advocate, in circumstances where there appears to be no provision equivalent to CPR 76.28(1)(b) (which precludes reliance on closed material where no Special Advocate has been appointed). We assume that this will be dealt with in the rules. If a CMP could be imposed without appointing a Special Advocate, that would be a further significant concern.

⁶ [2011] UKSC 35, [2012] 1 AC 452, at para 67. See also Lord Hope at para 78.

The Bill does not require the excluded party to be given a sufficient gist of the closed material

- 18 If a CMP is triggered, and the court gives permission for material not to be disclosed in open, the Bill does not require the excluded party to be given a summary of the material. It requires only that the court consider requiring such a summary to be given: see clause 7(d). But, importantly, the court is required to ensure that the summary does not contain material whose disclosure would be contrary to the interests of national security: clause 7(e).
- 19 This means that:
- 19.1 there is no requirement to give the excluded person a gist of the case against him that is sufficient to enable him to give effective instructions to his Special Advocate;
- 19.2 it is perfectly possible (and indeed likely) that there will be cases tried using a CMP under the provisions in the Bill where the excluded party is told nothing of any significance about the case against him (as there have been in SIAC).
- 20 *We consider that, if power to hold a CMP is to be introduced, there should be a statutory requirement in all cases to provide the excluded party with a gist of the closed material that is sufficient to enable him to give effective instructions to his Special Advocate.*

Norwich Pharmacal

- 21 Clause 13 of the Bill prohibits the Court from granting relief on a *Norwich Pharmacal* application if the information sought is “sensitive information”. The definition of “sensitive information” at clause 13(3) is extraordinarily broad, and includes information “held by” or “relating to” an intelligence service as well as information specified in a certificate issued by the Secretary of State. Only in respect of this last category, certified information, is there any right of review.
- 22 The prohibition on ordering disclosure in relation to information held by, obtained from, or relating to a UK intelligence service – or where that information is “derived in whole or part from information obtained from, or held on behalf of, an intelligence service” is absolute. In these situations (i.e. other than where a certificate has been

issued), there is no means of evaluating whether or not the information would in fact cause any harm to the public interest, let alone any ability to balance such harm against the detriment to the individual from not disclosing it.

- 23 It is worth making clear that in this context the detriment to the individual may well be a death sentence, torture (or other inhuman or degrading treatment), or a loss of liberty, which might not have been imposed⁷ if the material held by the UK Government had been disclosed.
- 24 Clause 13 will require the court to refuse disclosure even where:
- 24.1 an individual facing the death penalty is seeking to establish that a confession being relied upon against him was procured by torture;
- 24.2 the UK Government has material which demonstrates that he was indeed tortured;
- 24.3 the UK Government was itself mixed up in the torture (whether innocently or not);
- 24.4 the result of not disclosing the material is that the individual may be convicted and executed in circumstances where the material, if disclosed, would have shown the confession being relied upon against him to be inadmissible.
- 25 As was noted by six Special Advocates in a Note to the Joint Committee on Human Rights on 23 March 2012,⁸ we were unpersuaded that provisions having this effect were justified – certainly not on the basis of what appeared to us to be misconceptions on the part of some US officials as to the protection accorded to secret material under PII principles.
- 26 However, although we do not agree with it, we can at least follow the argument for provisions to prevent disclosure where the relevant material has been obtained by UK

⁷ By a court or other authority of a foreign state.

⁸ Note from Angus McCullough QC, Martin Chamberlain, Jeremy Johnson QC, Tom de la Mare, Charlie Cory-Wright QC, and Martin Goudie, Special Advocates, on the supplementary memorandum from the Independent Reviewer of Terrorism Legislation (JS 27)': available at:

<http://www.parliament.uk/documents/joint-committees/human-rights/Written%20Evidence%20Volume%20v6.pdf>

intelligence agencies from their foreign counterparts in confidence. We can see that it might be said that, if such material were disclosed by a UK court in breach of confidence, the foreign intelligence service might be less willing in future to share intelligence; and that this would be to the detriment of the UK generally.

- 27 But the proposals in the Bill would prevent disclosure of a much wider category of material than this. They would prevent disclosure in the circumstances set out in para. 24 above, even where the material in question had not been obtained in confidence from a foreign intelligence service and would not damage national security or the international relations of the UK if disclosed.
- 28 Given this context, we consider that the proposals in clauses 13 and 14 are unjustifiable: they are unnecessarily extreme and imprecisely targeted.
- 29 *We consider that any statutory intervention into this area should (a) be precisely directed at information which, if disclosed, would cause real harm to the national interest; and (b) should provide for a test that enables the potential harm to the applicant to be considered and weighed by a Court.*

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