JUSTICE AND SECURITY BILL

BRIEFING NOTE TO PEERS FROM SPECIAL ADVOCATES

1. Introduction

This Briefing Note identifies and considers the subjects of two key **amendments to Clause 6 of the Justice and Security Bill**, which has returned to the House of Lords for consideration of Commons amendments:

(1) **Last resort**: a provision making it clear that a Closed Material Procedure (CMP) should only ordered if the case could not be tried fairly using other means.

(2) **The *Wiley* balance**: a provision requiring the importance of open justice to be weighed against national security when the Court decides whether to order a CMP.

From our perspective as Special Advocates with substantial experience of operating closed material proceedings in the contexts in which they are currently provided for (in particular the Special Immigration Appeals Commission and control order / TPIM proceedings), we summarise why we consider that amendments to this effect are necessary, if CMPs are to be extended as provided by Part II of the Bill.

2. Background

We consider that the following are significant matters to have in mind by way of background in considering the proposed amendments:

(i) **CMPs are inherently unfair**: The proposals in Part II of the Justice and Security Bill are controversial. Everyone accepts that there is unfairness associated with CMPs, and that they represent a serious incursion into common law principles of open justice and natural justice (i.e. knowing the case put against you)[1]. Many respected practitioners and commentators have strenuously argued that the case for extending CMPs to civil claims, as provided for in Part II of the Bill, has not been made out by the Government. The Special Advocates have themselves expressed such views, based on their experience of closed proceedings, and the existing alternatives to dealing with sensitive material, in particular Public Interest Immunity (PII). If such controversial and exceptional measures are to be applied in an individual case under the Bill, it therefore seems reasonable to require that they should only be resorted to if strictly necessary, with proper recognition of the importance of the principles that will be subverted whenever a CMP is ordered.

[1] See SAs' response to the Green Paper consultation of 16.12.11 and the SAs' Memorandum to the JCHR of 14.6.12

(ii) **No provision for a gist**: The Bill contains no provision requiring a gist (i.e. sufficient information for the party to give effective instructions to his special advocate) of the case to be provided to the party deprived of closed material. In some other contexts where CMPs are currently used, the requirement for a gist is imposed by virtue of Article 6 of the European Convention on Human Rights. But in other cases, the Supreme Court has held that Article 6 does not require the provision of any "gist" whatsoever.[2] In these cases, there is no overriding requirement to tell the excluded party anything at all about the case against him. The Government's stance in recent litigation indicates that it will seek to argue that the requirement to give a gist of the closed material is limited to a very narrow category of case where it is seeking to detain individuals or subject them to severe restrictions on liberty. Thus, it is perfectly possible that a party may be provided with no indication at all of the case relied upon against him[3].

(iii) **JCHR Reports**: The JCHR has given detailed consideration to this Bill, taken evidence from a full range of sources and interested individuals, and produced two extremely thorough and balanced reports on the Bill. These reports provide what, it seems to us, is a compelling and authoritative rationale for the substance of the two amendments considered here, which were first proposed as a result of the recommendations of the JCHR. See in particular the Second Report:-

- Strict necessity / last resort: Paragraphs 66 to 81
- The Wiley balance at the "gateway" to CMPs: Paragraphs 54 to 65

We suggest that the expertise and authority of the JCHR, based on its scrutiny of this Bill, deserves to be afforded special respect and weight in the consideration of the amendments.

[2] *Tariq v Home Office* [2012] 1 AC 452.

[3] In this connection, it is important to emphasise that the requirement in clause 8(1)(d) to provide the excluded party with a "summary" of the closed material is subject to clause 8(1)(e), which provides that the summary must not contain material the disclosure of which would be damaging to national security.

3. Amendment: If CMPs are introduced, they should be a last resort

Line 20, leave out subsection (1D) and insert
– Line 2, at the beginning insert : "**If the court considers that a fair determination of the proceedings is not possible by any other means,"**

Replacement of text at lines 20/21, 6/7, 10/11, 19/20:
"**necessary for the fair and just determination of the issues**"

In light of the considerations set out above, we consider that the most important safeguard that should be included in Part II is that CMPs should be a 'last resort'. By this we mean that the power to trigger them should be exercisable only where a fair determination of the proceedings is not possible by any other means. This would limit the use of CMPs to the exceptional cases which, in the Government's view, justify their introduction in the first place: cases where a fair determination is simply not possible using existing procedures.

The Government's position on this, as we understand it, has consisted of one or more of the following objections:

(a) if such a provision were introduced there would be a risk that it would necessitate a costly and time-wasting PII exercise to be undertaken before it could be said that a fair determination was not possible without a CMP.
(b) it is not necessary to spell this out legislatively: it is sufficient to give judges a broad discretion whether to order a CMP and leave it to them whether to exercise it in a particular case
(c) There may be some cases that could be tried more fairly (or less unfairly) with a CMP than using existing procedures, so a 'last resort' provision is inappropriate.

We respectfully disagree. None of these objections withstands any scrutiny.

As to (a), whatever procedure is adopted, courts will have to subject to careful scrutiny any material said to be sensitive on grounds of national security. Our experience of disclosure processes under statutory CMPs suggests that it is no less time consuming than the process of examining documents for which PII has been claimed in non-statutory proceedings. The documents will have to be examined anyway. There is no reason why, having examined them, the court should not be required to consider whether the claim could fairly be tried applying PII principles. In order to reach a view about this, it should not be necessary for the court to undertake a full PII exercise, in a case where the outcome of such an exercise is obvious and inevitable. If this were a serious concern (which we cannot recognise on the face of the wording proposed) it could be catered for by an express rider, as follows:

> *a fair determination of the proceedings is not possible by any other means, provided that in considering whether this condition is met the court shall not be obliged to subject the material to public interest immunity process if to do so is considered by the court to be unnecessary after hearing submissions from an appointed special advocate*

As to (b) and (c), if the true intention behind these reforms is to cater for the narrow and exceptional category of cases that cannot be tried using existing procedures, we can see no reason why CMPs should be available in a case which can be fairly tried under existing procedures. Moreover, we think it is essential to spell this out in terms. If it is not spelled out, there is a risk that the court will not address its mind to the question whether the case could be tried fairly under existing procedures. There is a risk that CMPs will become the default option and that what was justified as an exceptional procedure will come to be accepted as the norm, so further eroding and corroding valued principles of open and natural justice. This risk is exacerbated if Parliament decides not to include such a provision, after an amendment to this effect was inserted by the House of Lords.

4. Amendment: Balancing national security against fairness

> Line 20, leave out subsection (1D) and insert—
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> "(1D) The second condition is **that the degree of harm to the interests of national security if the material is disclosed would be likely to outweigh the public interest in the fair and open administration of justice."**

When considering whether to uphold a claim for PII, the courts are required to balance two competing interests: one the one hand national security and, on the other, the fair and open administration of justice. This is known as the *Wiley* balance.[1] This is a very important feature of the existing rules. When the Government assesses that disclosure of a particular piece of evidence would damage the interests of national security, judges almost invariably accept that assessment and exclude the evidence from consideration in the proceedings. But the final decision is for the court. So, for example, if the Government tries to withhold a document which tends to show that they have been guilty of serious wrongdoing, whilst at the same time denying that very wrongdoing, the court may be sceptical. It may say that the damage to national security would be slight and the relevance of the document to the proceedings very great. Balancing these interests, the court might decide to reject the PII claim, thereby exposing wrongdoing by the Government.

In a CMP, as envisaged by the Bill, no such power is given to the courts. When deciding whether to order a CMP, there is no obligation on the court to consider the public interest in the fair and open administration of justice – however compelling the interests of fair and open justice may be, or slight the harm that may be caused by disclosure. We think this is wrong. We would strongly support this amendment so that, before ordering a CMP, the court should have to balance the degree of harm to national security that would be caused by disclosure of particular documents against the damage that a CMP would cause, in the circumstances of the case, to the public interest in the fair and open administration of justice.

In this context it is significant to note that, once a CMP has been ordered, there is no power for such a balance to be provided in relation to the material under consideration[4]. It therefore seems all the more important that this power should be available at the stage of the Court deciding whether or not a CMP should be ordered.

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This paper reflects views that have previously been expressed by the substantial majority of all currently active Special Advocates. It is based heavily upon, and to an extent repeats parts of, a Memorandum submitted to the Joint Committee on Human Rights submitted by this group of Special Advocates. We therefore consider that it may reliably be taken to represent a generally held consensus from among this body.

[4] See Clause 11(1) of the Bill, which relates to the rule-making powers.