Centre for Policy Studies

Pointmaker

STILL NEITHER JUST NOR SECURE

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SUMMARY

- The Justice and Security Bill is still in a bad way. The arguments about the Bill are really about the kind of society that we want to live in: it is about what values this country is seeking to espouse and export.
- The Lords did good repair work on the Bill, but, using its Commons majority, the Government has undone much of it.
- The Lords now have a final chance to restore their original sensible amendments.
- Nine recommendations for amendments are suggested here. Almost all of them are supported by the Joint Committee on Human Rights (JCHR).

THE BILL IN A NUTSHELL

As it stands, this Bill would do three things:

1. It would introduce Closed Material Proceedings (CMPs) into civil law for the first time. This means that a claimant would be shut out of his or her own case.
2. It would remove the court's ability to order the disclosure of "sensitive" information, which includes information relating to national security. This would make it harder to uncover official wrongdoing in matters such as the kidnap and torture of others.
3. It would make changes to the Intelligence and Security Committee (ISC). This purports to make the Committee more independent and accountable to Parliament. In fact, it does little of either.

This paper is a revised summary of an earlier report by the same authors, *Neither Just nor Secure*. This was published in January 2013, shortly before the Justice and Security Bill was debated in the House of Commons.

Copies of the full report are available and can be requested from emma@cps.org.uk

INTRODUCTION

Last May, the Government introduced the Justice and Security Bill. This proposed that courts should be able to hear cases involving national security in secret ("CMPs"); and in the absence of the party bringing the claim, breaking with the fundamental legal principle that a claimant should be able to hear the case made against him or her.

In November 2012, the House of Lords added a number of amendments – by overwhelming majorities – that were recommended by the JCHR. These introduced additional safeguards on the use of CMPs. In the Commons, the Government rejected these amendments and introduced their own, which no longer reflect the JCHR's recommendations.

WHAT IS NEEDED

The effect of the Lords amendments, made at Report stage in November 2012, need to be restored. Five other amendments would also greatly improve the legislation.

Restoring the Lords' amendments

Four amendments are needed to restore the original Lords' amendments. These are supported by the JCHR, most of the legal profession and the Special Advocates. These are the people who best understand the pernicious consequences of CMPs – they have practical experience both of Public Interest Immunity (PII) and CMPs. The Special Advocates strongly oppose the Bill:[1]

"The introduction of such a sweeping power could only be justified by the most compelling reasons and, in our view, none exists."

1. **CMPs must be a last resort.** A judge should try to obtain justice by all other means before shutting a party out of court. The original Lords amendment stated that a judge should not order a CMP unless he or she considers that "a fair determination of the proceedings is not possible by any other means." In the Commons, the Government replaced this clear statement of principle with a vague "fair and effective" test as a gateway to CMPs. This is well short of the "last resort" intention of the Lords.

2. **The court, not the Secretary of State, should consider whether a claim for PII could have been made in relation to the sensitive material.** The Bill currently says that the court may not order a CMP unless it is satisfied that the Secretary of State has first considered whether a claim for PII could be made. A careful reading of this reveals its defects. This is asking a judge to work out whether someone else has been exercising his discretion, not the judge exercising his or her own. The original Lords amendment said that "the court must consider whether a claim for public interest immunity could have been made." That must be right.

3. **A court should balance the public interest in national security against the public interest in fairness and open justice.** In deciding whether to order a CMP, a judge should be permitted to balance the degree of harm to the interests of national security if the material is disclosed against the public interest in the fair and open administration of justice. The Lords added this safeguard, and the Government removed it. Judges have shown themselves to be well-capable of exercising their judgment.

[1] *Special Advocates' response to the Justice and Security Green Paper*, p. 2.

4. **The excluded party should have the right to a compulsory summary (gist) of secret material.** The court should require that a summary of the closed evidence be provided to the excluded party.[2] This should be sufficient to enable him or her to give effective instructions to his or her legal representatives and special advocates. This is what judges can do now without prejudicing national security. It was recommended by the JCHR. If the Bill is passed as currently drafted, gisting would end in CMP cases.

Improving Part 2 of the Bill

Three related issues that the Lords did not consider, but which are vital to improving Part 2 of the Bill, are the review and renewal provisions. These are consistent with the JCHR's proposals.

5. **Requiring a periodic review of the Bill.** Under pressure in the Commons, the Government has conceded a review provision, but only one review after five years. The Bill is a radical departure from fundamental constitutional principles. Therefore, its effects should be reviewed periodically to assess its continued effectiveness and necessity. The JCHR proposed periodic reviews.

   Such reviews will also reduce the chances of the misuse of CMPs. An executive that knows that its decisions will be retrospectively examined will be more likely to keep to the spirit of the legislation's original purpose.

6. **Ensuring the independence of the reviewer.** The reviewer of the legislation must be independent and should be appointed only after approval of the JCHR or the President of the Supreme Court. In other words, the Secretary of State and the JCHR/President of the Supreme Court must jointly agree on the appointment. The authors prefer the JCHR, for which there is a new precedent.[3]

7. **The Bill should contain a periodic renewal clause.** The Government successfully opposed the introduction of any renewal clause. The controversial terrorism legislation of the 1980s required renewal every year. In our view, this new legislation should require periodic renewal once every Parliament, with a debate taking place in light of the Independent Reviewer's conclusions.

Norwich Pharmacal and the ISC

Two other amendments are necessary.

8. **The definition of "sensitive information" under the Norwich Pharmacal provisions should be amended.** The wide definition of material exempted from disclosure prompted the former Lord Chancellor Lord Mackay of Clashfern to object:

   "The definition of 'sensitive information' seems extremely wide, and I have questioned whether it is necessary to have it anything like so wide."

   Most of the legal profession agrees.

9. **The Chairman of the ISC should be elected, consistent with the Wright Committee proposal on parliamentary reform.** The ISC needs more independence from the executive. Election of the chairman by secret ballot in the House of Commons, subject to sensible safeguards, would bolster its authority. The Government has provided no plausible objections.

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[2] This was considered in part by the Lords.

[3] An innovative arrangement was put in place for the appointment of the chairmanship of the Office of Budget Responsibility: this is agreed jointly between the Treasury Select Committee and the Chancellor.

GOVERNMENT'S ARGUMENTS REBUTTED

The Government has, so far, not provided a strong argument for this legislation. Its main arguments in the Commons were as follows.

First, the Government claims that the US may reduce its intelligence exchanges with Britain unless the legislation in relation to *Norwich Pharmacal* is passed. There is no case where the British have disclosed any national security information against our allies' wishes. Nor have the Americans amended their laws or Constitution to accommodate the UK's need for secrecy. There is no evidence that they would, either. To the extent that this is a serious concern, there should at least be reciprocity.

Second, the Government insists that under PII, national security evidence is excluded entirely from the courtroom:[4]

"Public interest immunity... has one obvious defect. If a Minister obtains it, that means that the material is entirely excluded from the court, and neither party can rely on it."

This is not true. Lord Pannick QC has corrected this misunderstanding:

"It is on the premise – a wrong premise, with respect – that [the Minister] suggests that a CMP is preferable... The reality... is that the court has an ability applying PII to devise means by which security and fairness can be reconciled by the use of [other] mechanisms."

Third, the Government says that it has been forced to settle cases involving national security information because it cannot defend itself in open court without revealing sensitive evidence. The Government's evidence for this is fragile. It initially refused to allow David Anderson QC, the Independent Reviewer of Terrorist Legislation, to see the 20 cases to which it referred. Only after pressure was he allowed to see three cases, which he felt were chosen to "illustrate the Government's point of view."

Such cases may exist, but the Government has yet to provide the evidence, even to its own security-cleared intelligence watchdog.

Fourth, the Government says that it is paying out money to terrorists. It claimed:[5]

"It is completely naïve if you think that some of that money, as you have busily paid it out, has not quite possibly made its way to terrorist organisations."

This is unlikely to be true on two counts: none of the recipients of compensation in the Al Rawi, Binyam Mohamed, and al-Saadi litigation have been charged or convicted of terrorist offences before British courts or been made subject to anti-terrorist restrictions. The latter can be imposed on suspicion alone. In any case, if the Government thought this was a risk, it could have frozen the compensation monies under the Terrorist Asset-Freezing etc. legislation.

Fifth, the Government says that it has acceded to demands that the judge be given full discretion over whether to order a CMP. The Lords found the opposite to be the case and amended the Bill accordingly to protect open justice.

The Government replaced the Lords amendment with its own, which did not give enough discretion to the judge.

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4 Kenneth Clarke, Justice and Security Bill, Second Reading, 18 December 2012, col 716.

5 Kenneth Clarke, 12 February 2013, Oral evidence on the Justice and Security Bill before the JCHR.

Sixth, the Government claimed that the ISC would be more accountable to Parliament once the Bill's proposals were in place. This is not so.

The Bill appears to propose that members of the Committee would be appointed by Parliament. However, only members appointed by the Prime Minister would be put before Parliament. This cuts out the House of Commons' Committee of Selection altogether. Parliament would have little practical say in the nomination of members. It would be able to appoint only those who had been pre-approved by the Prime Minister.

The House of Commons Reform Committee (Wright Committee) concluded that the same reforms recommended to the system of election of members and Chairs of the House's select committees should be applied to the Intelligence and Security Committee. It proposed that the Chairman, instead of being chosen by members who have been nominated by the Prime Minister, should be elected by secret ballot of the House of Commons. Candidates wishing to stand would need to seek prior the formal consent of the Prime Minister. Election would make the Chairman more accountable to his or her fellow MPs. Election would also reduce the risk, and the perception of the risk, that the incumbent would be influenced by Prime Ministerial patronage.

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