

## Justice and Security Bill

Report Stage, House of Lords – Monday 19 November 2012

*The Law Society is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law*

### Key points

The Justice and Security Bill seeks to implement three sets of changes: first, changes to the Intelligence and Security Committee; second, the extension of Closed Material Proceedings (CMPs) to all civil proceedings; and, third, the removal of the courts' *Norwich Pharmacal* jurisdiction in cases certified by the Secretary of State to involve 'sensitive information'.

The Law Society has serious concerns about the latter two changes as proposed in the Bill:

- **Extending closed material proceedings to civil proceedings:** The Society opposes the extension of CMPs into all civil proceedings, as it considers this to be a departure from the established common law principles of open and natural justice. However, should Parliament proceed with their implementation the Society is clear that the majority of the amendments recommended by the Joint Committee on Human Rights must be implemented.
- **Reforming the courts' *Norwich Pharmacal* jurisdiction:** The Society considers the current proposal – to remove the courts' jurisdiction to order a person involved in apparent wrongdoing by another person to disclose information about the wrongdoing if the information is 'sensitive information' to be too broad. However, recognising the requirements of national security, the Society proposes an alternative whereby the scope of the jurisdiction is addressed by a specific, limited exception solely on the grounds of national security.

### Extending closed material proceedings to civil proceedings

1. Clauses 6-11 of the Bill would extend the circumstances in which civil proceedings can be held under a 'closed material procedure' (CMP). At present the law recognises numerous circumstances, for example national security, where the public interest demands confidentiality. The Bill, however, enables the use of CMPs in civil proceedings generally.
2. The Society agrees with the report of the House of Lords Constitution Committee when it states that 'this is a constitutionally significant reform, challenging two principles of the rule of law: open justice and natural justice'<sup>1</sup>. In particular, the proposals challenge the established common law principle that all parties are entitled to see and challenge all of the evidence relied upon before the court and to combat that evidence by calling evidence of their own.
3. Reforms of the of the scale proposed to such important constitutional principles should not be undertaken unless by reference to sufficiently compelling evidence. **In the Society's view the Government has provided insufficient evidence and is therefore opposed to the extension of CMPs to all civil proceedings.**

<sup>1</sup> House of Lords Select Committee on the Constitution, *Justice and Security Bill*, 3<sup>rd</sup> Report of Session 2012-13, p. 3

4. However, should Parliament consider it necessary to proceed with their implementation, the Society would urge Members of the House of Lords to endorse the majority of the recommendations of the Joint Committee on Human Rights. In particular:
  - 4.1. Clause 6 of the Bill to be amended so that 'the court not the Secretary of State should have the power to make a declaration, whether on the application of either party or of its own motion, that the proceedings are proceedings in which a closed material application may be made to the court'<sup>2</sup>. This amendment would go some way in addressing the requirement of equality of arms and make it consistent with the Government's own justification for extending CMPs.
  - 4.2. That 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'<sup>3</sup>.

### **Reforming the courts' Norwich Pharmacal jurisdiction - the Law Society's alternative**

5. The Society accepts the Government's aim of providing reassurance to its intelligence partners as a legitimate objective. The Government has identified the courts' residual disclosure jurisdiction, generally known as its *Norwich Pharmacal* jurisdiction, to order a person involved (however innocently) in apparent wrongdoing by another person to disclose information about the wrongdoing as a potential risk. The Bill therefore seeks remove the jurisdiction in certain circumstances in order to avoid a situation where it could ever be required of the Government to disclose sensitive material to non-UK or security-cleared individuals.
6. The Society suggests that an alternative and proportionate response, instead of legislating to provide an absolute exemption from the jurisdiction for 'sensitive information', would be to amend the Bill to address instead the application of the *Norwich Pharmacal* jurisdiction by including a limited and specific exception on the grounds of national security.
7. Placing the *Norwich Pharmacal* jurisdiction on a statutory footing, with a detailed statutory definition of the test to be satisfied, would serve to increase legal certainty for both courts exercising the jurisdiction and intelligence partners. The Society believes that this would serve the legitimate objectives of reducing the risk of disclosures which might be damaging to national security and providing reassurance for international partners.
8. The Society believes that wholesale introduction of CMPs into civil trials is disproportionate to curing this one issue with the *Norwich Pharmacal* jurisdiction.

### **Impact on the legal profession**

9. The Law Society is concerned about the wider implications of CMPs on civil litigation and professional ethics: namely the practical effect on solicitors' ability to advise their clients in accordance with their professional duties when they are not privy to the information being used against their clients.
10. Legal advisors will have difficulty in advising their clients on the merits of a case and on the prospects of success if they cannot see the evidence on which the other party

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<sup>2</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-13, p. 18

<sup>3</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill*, Fourth Report of Session 2012-13, p. 23

relies. Nor will they be able to advise on the likely chances of an appeal. This undermines:

- 10.1. clients' right to legal assistance in the determination of their civil rights and;
- 10.2. obligations inherent in the fair trial guarantees of Article 6 of the European Convention on Human Rights.
11. This will have a knock-on effect on the costs regime which is so important in civil litigation. The general rule is that the losing party in litigation will have to pay a good proportion of the winner's costs, which can be substantial. Solicitors will be unable to advise their clients on the financial implications of winning or losing if they cannot see the evidence which will decide the case.
12. Solicitors will be unable to provide clients with accurate cost estimates if they are unable to assess the weight of the opposing evidence. Solicitors have strict ethical duties to keep their clients informed as to future costs. The new rules in costs management and budgeting will make it onerous to comply in non-CMP cases, let alone in CMPs where the difficulties will be multiplied and the task virtually impossible.
13. This will also affect the system of Part 36 offers, unique to civil litigation. The system is designed to promote early settlement by placing the risk of costs on the party that rejects a reasonable offer of settlement – overriding the general costs rule if necessary. The consequence of a litigator being unable to see crucial evidence means they are unable to advise on whether a settlement offer is reasonable. This will expose clients to undue risk of costs.
14. Furthermore, the costs reforms incorporated in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are predicated on the proper functioning of Part 36. Lord Justice Jackson highlighted the significance of Part 36 offers in his final report on the Review Of Civil Litigation Costs saying, 'It is manifestly beneficial that cases should settle, so as to avoid the further incurring of legal costs. Part 36 of the Civil Procedure Rules plays an important role in incentivizing parties to make settlement offers'. In fact, Lord Justice Jackson considers that Part 36 should be further enhanced. Thus, undermining the costs and Part 36 regime, by introducing CMPs, also undermines a fundamental principle on which 2012 Act relies.
15. If CMPs are to be extended then the Society reiterates the need, as called for by the Joint Committee on Human Rights, for 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'.

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