

Justice and Security Bill

Second Reading, House of Lords, Monday 15 June 2012

The Law Society ('the Society') is the representative body for 155,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law

Key points

The Justice and Security Bill is the product of the Green Paper on Justice and Security, published in October 2011. The Society has serious concerns about two sets of changes proposed in the Bill:

- **Extending closed material procedure to civil proceedings** – In the Society's view this undermines the principles of open and natural justice, as well as presenting serious practical difficulties for legal practitioners involved in such cases.
- **Reforming the Courts' *Norwich Pharmacal* jurisdiction** – The Society considers the current proposal to be too broad, but recognising the requirements of national security, 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 Procedures to all 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 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'¹. In particular the provision challenges the principle that all parties be 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. In the Society's view there is not enough evidence suggesting that current laws and procedures do not provide sufficient protection against disclosures of security sensitive material that might damage national security or give rise to a real risk of such harm occurring to justify the measures proposed in the Bill.

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

4. The Law 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.
5. The Society suggests that an alternative and proportionate response, instead of introducing CMPs, would be for Government to amend this Bill to address instead the application of the *Norwich Pharmacal* jurisdiction by including a limited and specific exception on the grounds of national security.

¹ House of Lords Constitution Committee, (2012), *Justice and Security Bill Report* [online], available here: <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/18.pdf>

6. 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 Law 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.
7. 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

8. 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.
9. 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 relies. Nor will they be able to advise on the likely chances of an appeal. This undermines:
 - 9.1. clients' right to legal assistance in the determination of their civil rights and;
 - 9.2. obligations inherent in the fair trial guarantees of Article 6 of the European Convention on Human Rights.
10. 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.
11. 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.
12. 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.
13. 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

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