BINGHAM CENTRE FOR THE RULE OF LAW
JUSTICE AND SECURITY BILL
BRIEFING FOR THE HOUSE OF COMMONS

1. The Justice and Security Bill follows on from the Justice and Security Green Paper (Cm 8194), published in October 2011. The Bingham Centre for the Rule of Law has at no point endorsed the proposals in the Bill but, throughout both the pre-legislative and the legislative stages of the Bill, we have sought to engage constructively, arguing that **minimum safeguards** should accompany any system of closed material procedure (CMP). Our proposals were reflected in reports by the JCHR and the HL Constitution Committee. [1] We have also proposed amendments to the Bill which have been accepted by the Government.[2] **We continue in that spirit now to urge two further amendments be made to the Bill in the House of Commons if the Bill is to be enacted**.

2. **Our core concern are the proposals in clauses 6 and 7 that closed material procedure (CMP) be made available in ordinary civil litigation**.

3. In the leading case of *Al Rawi v Security Service* the UK Supreme Court was clear that CMP departs from the fundamental common law principles of open justice and natural justice.[3] Departures from fundamental common law principles of justice should be contemplated only where shown to be necessary and, even then, only when attended with all availible safeguards.

4. The Bill has the potential vastly to expand the use of CMP in the UK's courts beyond anything which could be justified and without adequate safeguards. By contrast with deportation cases, and control order/TPIM cases, a system of CMP is not necessary in ordinary civil claims in order to enable the Government to take measures necessary to combat threats to national security: there is no national security justification for the CMP proposals in clauses 6 and 7 of the Bill.

House of Lords amendments to clause 6

5. As first introduced into Parliament, clause 6 of the Justice and Security Bill would have provided for CMP to be used in civil proceedings on the application only of the Secretary of State. The court would have been required to grant such an application where the proceedings in question would otherwise have obliged any party to disclose material whose disclosure would be damaging to national security. As amended, clause 6 now provides:

[1] JCHR, *Justice and Security Bill*, 4th report of 2012-13, HL 59, HC 370 (November 2012). House of Lords Constitution Committee, *Justice and Security Bill*, 3rd report of 2012-13, HL 18 (June 2012).

[2] On the 2nd day of the Bill's Report Stage in the House of Lords: see HL Deb, 21 November 2012, cols 1811 ff.

[3] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, para 14 (Lord Dyson).

a. First, that CMP may be used in civil proceedings on the application of any party to those proceedings or on the court's own motion (clause 6(1)), thus ensuring that CMP is not a 'trump card' only available when it suits the Government but also when the Government might prefer not to have judicial scrutiny of its documents.

b. Secondly, that the court now has a discretion as to whether to grant an application that proceedings go into a closed process, which ensures that it will be the courts, and not the Secretary of State, who manages the process (clause 6(2)).

c. Thirdly, in exercising that discretion the court must consider, among other matters, whether the degree of harm to national security caused by any disclosure of material outweighs the public interest in the fair and open administration of justice and, crucially in our view, a court may adopt a CMP only "if a fair determination of the proceedings is not possible by any other means" (clause 6(2)(c) and (d)). This ensures that CMPs are used only in those cases where truly fairness demands it, and as a last resort.

6. These are essential minimum safeguards, without which the scheme envisaged by clause 6 would have been seriously unfair (and, for that reason, liable to have been successfully challenged in the courts).

Further amendments required: clause 7

7. Whereas clause 6 concerns decisions about which cases may adopt a CMP, clause 7 concerns the way in which such cases will then operate.

8. It is clear that clauses 6 and 7 must be understood together: they relate very closely to one another. A number of the safeguards necessary to make clause 6 fair are also necessary to make clause 7 fair.

9. Yet, while the House of Lords amended clause 6 they failed to make like amendments to clause 7. This, it appears, was wholly by accident: the critical Division in the House of Lords on clause 7 took place at 10.15pm on 21 November 2012. The equivalent divisions on clause 6 had taken place earlier that same evening between 6.15pm and 7.00pm. In the 10.15pm division on clause 7, 210 Peers voted (the amendment was defeated by 123 votes to 87). In the earlier divisions more than twice as many Peers voted (446, 423 and 407, respectively); in each of these divisions the amendment was accepted by very large majorities.

10. **An amendment is required to clause 7(1)(c), so that at page 6, line 6 the following is added: *"and that damage outweighs the public interest in the fair and open administration of justice"***. This amendment had cross-party support in the House of Lords. It is entirely consistent with the amendments

made to clause 6. Thus it cuts with and not across the grain of what the Government is seeking to do in clauses 6 and 7. This amendment would ensure that the Bill is consistent with a key constitutional principle recognised in English Courts since the celebrated case of *Conway v Rimmer*,[4] that claims of Government secrecy must be balanced against the principle of open justice. Without this protection, the courts would be **required** to keep secret even the worst abuses of power by British officials, were this ever to occur. Their hands would be completely tied: they would have to keep such matters secret.

11. Such a 'closed box' system is used in proceedings brought by the Government against terrorist suspects, in immigration and control order/TPIM cases. But in these contexts the wrongdoing of the state is not in issue. **It is contrary to basic principles of the rule of law for the courts to be required to impose blanket secrecy in civil claims against the Government, and for the court to have no power to order disclosure of wrongdoing by public officials**. The Justice and Security Bill is not concerned only with cases brought by suspected terrorists.

12. Suppose that in a military accident servicemen are killed; their widows, considering that the helicopter in which the servicemen were killed should never have been passed fit to fly, commence an action in negligence against the MOD. Under the Justice and Security Bill a trial such as this would be liable to be held under CMP. Irrespective of the outcome of their trial – that is, whether they won or lost – under the Bill the widows would run the risk of never being able to discover why the court ruled as it did.

13. It is critical to the fair operation of CMP that evidence is closed only when the damage that would be done by its disclosure outweighs the damage to the fair administration of justice that would be done by its non-disclosure.

The need for a Review

14. The second critical amendment would provide for a full independent review of the CMP system. There is no other country in the world which has such a system. It could cause unforeseen damage to the civil justice system. When Parliament enacted detention without trial in 2001 based on closed proceedings, it provided for the system to be reviewed by a committee of Privy Counsellors.

15. In the House of Lords it was thought that such a review could be carried out by select committees. But this is misconceived. Select committees do not have access to 'closed' judgments in cases in which CMP is used. **In our view it is vital that a system of review, which includes the independent reviewer of terrorism legislation, should be provided for in the legislation.**

[4] [1968] AC 910; in Scots law this principle was recognised as from 1956.

This briefing is co-authored by two Fellows of the Bingham Centre: Adam Tomkins and Tom Hickman, to whom any enquiries may be addressed:[5] adam.tomkins@glasgow.ac.uk; tomhickman@blackstonechambers.com

Further reading:

- Bingham Centre Response to Green Paper on Justice and Security (A. Tomkins and T. Hickman):

http://www.biicl.org/files/5829_bingham_centre_response_to_green_paper.pdf.

- "Minimum Safeguards": Bingham Centre Briefing for the House of Lords on the Justice and Security Bill, 5 July 2012 (T. Hickman):

http://www.biicl.org/files/5981_security_and_justice_bill_5_july_12_(briefing_note_final_final).pdf

- T. Hickman, "Justice and Security Bill: Defeat of Not a Defeat: That is the Question" UK Const. Law Group Blog (on the House of Lords' amendments):

http://ukconstitutionallaw.org/2012/11/27/tom-hickman-justice-security-bill-defeat-or-not-a-defeat-that-is-the-question/

[5] Dr Tom Hickman is a Barrister at Blackstone Chambers and a Reader in Law at University College London; Adam Tomkins is the John Millar Professor of Public Law at the University of Glasgow.