



The Bingham Centre for the Rule of Law

From the Director, Professor Sir Jeffrey Jowell KCMG QC

Charles Clore House, 17 Russell Square
London WC1B 5JP, United Kingdom

Tel: 020 7862 5151 Fax: 020 7862 5152
email: info@biicl.org www.biicl.org

Rt Hon Lord Wallace of Tankerness
Advocate General for Scotland
House of Lords
London
SW1A 0PW

23 July 2012

Dear Lord Wallace,

Justice and Security Bill

We would like to raise an issue with the Government arising from an amendment to the Justice and Security Bill moved by Lord Thomas of Gresford. The amendment was the subject of an exchange between Lord Thomas and yourself during the third day of Committee stage in the House of Lords, on 17 July (HL Deb, cols 135-38).

The amendment (number 54 on the marshalled list) would provide for a new clause in the Bill, in the following terms:

"Disclosure of information

The disclosure of information in civil proceedings pursuant to an order of the court is to be regarded for the purposes of the Security Service Act 1989 or the Intelligence Services Act 1994 as necessary for the proper discharge of the functions of the Security Service, the Secret Intelligence Service or (as the case may be) the Government Communications Headquarters."

As Lord Thomas acknowledged, this amendment was proposed by the Bingham Centre for the Rule of Law in its briefing paper on the Bill entitled "Minimum Safeguards" dated 5 July 2012. We attach a copy of this paper for your convenience.

Lord Thomas drew attention to the case of *Evans v Secretary of State for Defence* [2010] EWHC 1445 (Admin). The relevance of that case (and it is not the only case) to the amendment is as follows. The issue was whether the Secretary of State for Defence was acting lawfully in transferring UK-captured detainees to the Afghan Security Service. In that case, as Lord Thomas explained, the Secret Intelligence Service was not a party to the proceedings. However a search of relevant government agencies and departments for the purposes of the proceedings revealed that the Secret Intelligence Service held documents relevant to the issue in that case.

Because the Secret Intelligence Service was not a party to the proceedings and their own conduct was not impugned, it was contended by them, through First Treasury Counsel, that there was a statutory bar on disclosure arising under section 2 of the Intelligence Services Act 1994.

The issue was the subject of some discussion in open court. Lord Thomas was correct in stating that the court did not accept the argument being put forward on behalf of the Secret Intelligence Service. It is also right to say, nonetheless, that the court was not ultimately asked to rule on the question. This is because the Government and the claimant accepted that the material could be considered in a closed process (a closed process was also used to consider other material over which PII claims had been upheld: see generally paragraph 8 of the judgment which records this). In other words, disclosure by the Secret Intelligence Service into a closed process was accepted by them as not breaching section 2 of the 1994 Act.

The purpose of the Amendment proposed by the Bingham Centre is to ensure that if a similar case arose again the material could still be considered in CMP. As presently drafted, the position of the Security and Secret Intelligence Services, at least, would be that it could not be. This is because clause 6 at present provides for the use of CMP only where material is otherwise disclosable but would be ruled inadmissible because it would be covered by PII. The position of the Secret Intelligence Service (as per the *Evans* case) is that such material is not disclosable in proceedings that concern other emanations of the Crown in which its conduct is not impugned.

In response to Lord Thomas, you raised the following concerns:

"[The Evans case] is a case that I wish to consider in the light of what my noble friend has said. If the effect of this amendment would be to treat the disclosure into any civil proceedings, regardless of the identity of the parties or the subject matter of the proceedings, as somehow part of the proper discharge of the agencies' functions, that would conflict with the agencies' need and ability to operate in secret." [col 137]

We are grateful for your willingness to reflect further on this issue.

We would like to reassure you about your concerns. In the first place if the Agencies hold material that is relevant to a challenge to the legality of central government action it is already the case that that material is prima facie disclosable even where the case is not brought against the Agencies themselves. The Crown is a single entity. If another part of the Crown, such as the Secretary of State for Defence, is sued then all documents relevant to the legality of the Secretary of State's conduct that are held by the Crown, whatever department or agency holds the material, are prima facie disclosable.

An obligation on the Agencies to disclose material arises in cases where the Agencies are not themselves the defendants only very exceptionally (*Evans* is an example). Such an obligation is subject to the court being satisfied that the material is properly relevant to the determination of the issues and ordering its disclosure (subject to CMP or PII). In such a scenario it is hard to understand how it could not be in accordance with the proper functions of the Agencies to allow the court to consider the material to determine the legality of Government conduct.

There is no risk of material being disclosed into the public domain contrary to national security interests because the material would be subject to CMP (or PII).

This was precisely what happened in the *Evans* case. In the *Evans* case the Secret Intelligence Service accepted, quite properly, that the court should consider the material which they held that was relevant to the legality of the decision of the Secretary of State for Defence, and that the 1994 Act was no bar to it being considered in a CMP. The amendment would simply ensure that this would continue

to be the position in the future, given that there is now a real question-mark over whether a CMP may lawfully be held by consent of the parties (as occurred in *Evans*).

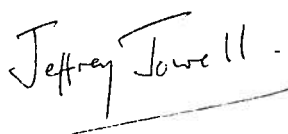
The position expressed in the Justice and Security Green Paper was that a CMP would enable the courts to consider all relevant material when considering the legality of Government conduct. As it presently stands, clause 6 would arguably prevent the court from doing so in cases in which the Security and Secret Intelligence Services were not defendants.

We have one final point. We have at all times proceeded on the basis that the Intelligence Services accept that where their conduct is impugned in proceedings that it is within their proper functions to disclose relevant material. However, that is a position that they have adopted as a matter of practice and is not clearly embodied in legislation. Furthermore, there is an obvious lack of clarity as to the boundary between circumstances in which their conduct is impugned and those in which it is not. The Bingham Centre's proposal would clarify this position in making clear that it is within the proper functions of the Agencies to disclose (subject to CMP or PII) material which a court considered to be relevant to civil proceedings. For the reasons we have explained we do not consider the amendment would affect any alteration to current practice, but would prevent the clock being turned back. It would not lead to any risk that more material would be placed into the public domain than hitherto.

We recognise that these issues are complex. But we emphasise that they are important. We reiterate our gratitude that the Government will think further about these points, as they may be points that had not previously been considered. Indeed, we anticipate that it was not the Government's intention to make CMP less widely available than it has hitherto been.

We would be very glad to meet with you or your officials to discuss the amendment or, indeed, any aspect of our briefing paper.

Yours sincerely,

A handwritten signature in black ink that reads "Jeffrey Jowell". The signature is written in a cursive style and is underlined with a single horizontal line.

Professor Sir JEFFREY JOWELL QC
Director of the Bingham Centre for the Rule of Law

Dr TOM HICKMAN and Professor ADAM TOMKINS
Fellows of the Bingham Centre for the Rule of Law
(Dr Hickman was Junior Counsel in the *Evans* case)

Enc.

cc.

Lord Beecham; Baroness Berridge; Lord Falconer of Thoroton; Lord Faulks; Lord Hodgson of Astley Abbots; Lord Pannick; Lord Lester of Herne Hill; Lord Marks of Henley-on-Thames; Lord Thomas of Gresford.