



Dr Hywel Francis MP
Join Committee on Human Rights
House of Commons
7 Millbank
London SW1P 3JA

1 October 2012

Dear Dr Francis,

Justice and Security Bill

Thank you for your letter of 12 September 2012, in which you referred to the potential extension of closed material procedures to all civil proceedings and asked for the views of the Bar Council about the implications of the Justice and Security Bill for the ability of barristers, both open counsel and special advocates, to comply with the Bar's Code of Conduct. The Bar Council has not been asked to express a view on the desirability or otherwise of any extension of closed material procedures to all civil proceedings and the views expressed below are accordingly confined to the narrow issue raised in your letter.

You should be aware that the Bar Council has delegated its regulatory functions to the Bar Standards Board, which is responsible for the content and enforcement of the Code, so you may also wish to contact them. However, the Bar Council, through its Professional Practice Committee, continues to provide advice on effect of the Code. I have consulted the Professional Practice Committee, and their view is outlined below.

The Code does not prevent barristers from acting as open counsel or as special advocates in cases where closed material procedures are adopted. Many barristers already do this, for example, in cases before the Special Immigration Appeals Commission.

Barristers acting as open counsel are obliged by paragraph 303(a) of the Code to promote and protect fearlessly and by all proper and lawful means the lay client's best interests. The closed material procedure obviously makes it more difficult to carry out this duty, since the barrister will not be aware of the closed material relied

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upon by the other party. Nevertheless, the barrister must promote and protect the lay client's best interests insofar as they are able.

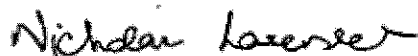
Barristers acting as Special Advocates (SAs) are appointed by the Attorney General (in the words of clause 8(1) of the Bill) "to represent the interests of" a party. That party is not the SA's client, and I note that clause 8(4) of the Bill provides that SAs are not responsible to the party whose interests they are appointed to represent, and that clause 11(1) provides that they are not that party's legal representative. Nevertheless, it is our understanding that barristers are appointed as SAs on the basis that, subject to the constraints imposed by the closed material procedure, it is their duty to promote and protect fearlessly, and by all proper and lawful means, that party's best interests. Again, those constraints, including in particular the inability to communicate with or take instructions from the party, obviously make it more difficult to promote and protect the party's interests, but the barrister remains under a duty to do so, insofar as they are able.

Whether acting as open counsel or as Special Advocates, barristers remain subject to the Code, including, for example, the duty to exercise their own personal judgment in all of their professional activities (paragraph 306) and the duty to withdraw from a case in specified circumstances, including if their instructions seek to limit their ordinary authority or discretion in the conduct of the proceedings (paragraph 603(c)) or if the matter is one in which they have reason to believe that it will be difficult for them to maintain professional independence or the administration of justice might be or appear to be prejudiced (paragraph 603(d)).

Obviously, conduct issues may arise on the facts of any particular case, and cases involving the closed material procedure are no exception. You may be aware, for example, of a well-publicised case in which the Special Advocates considered it to be their duty to withdraw from the case.

If you have any particular concerns about conduct issues which might arise in cases concerning closed material procedures, I would be happy to consider them further, via written correspondence or a meeting in Westminster.

Yours sincerely,



Nicholas Lavender QC
Vice Chairman Elect of the Bar Council England and Wales
Chairman of the Professional Practice Committee