



## Media Briefing on The Crown in Court (NZLC R 135, 2015) – Part 2 National Security Information in Proceedings

1. The central policy issue we grapple with in this part of the Report is how to manage proceedings where classified and security sensitive information may be relevant to the issue at hand but its disclosure might prejudice national security, while ensuring that fair trial rights and the principles of natural justice are upheld.

### The case for reform

2. There are a number of inconsistencies and gaps within the current law controlling how national security information is dealt with in proceedings. These need to be addressed to provide a more workable and cohesive regime.

### *Civil proceedings*

3. National security information can currently be withheld by the Crown under the doctrine of public interest immunity and not disclosed to the other party in civil proceedings. Under section 27(3) of the Crown Proceedings Act 1950, if the Prime Minister determines that national security information is too prejudicial to disclose, he or she can issue a public interest immunity certificate. Traditionally these certificates were treated as decisive, although there has been some uncertainty around the level of judicial deference to be given to the certificate and the role of judges in viewing the underlying material if a certificate is challenged.
4. However, the issue has not been squarely before the courts in New Zealand since 1999. The practice has developed considerably in the United Kingdom and judges now customarily review the underlying material as part of the assessment of whether the certificate has been properly made. If a case were to arise in New Zealand, we speculate that the courts could well take the approach adopted in the United Kingdom.
5. It is also unclear how the certificate process under section 27(3) of the Crown Proceedings Act relates to the more recently enacted provisions in the Evidence Act 2006 that cover national security information. Under section 70 of the Evidence Act, information relating to “matters of state” may be excluded from proceedings “if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information”. Section 70 of the Evidence Act thus takes a different approach than section 27(3) of the Crown Proceedings Act because the judge is clearly tasked with weighing the factors, and deciding whether national security information must be disclosed to the other party.

6. Reform is needed to remove the existing ambiguity between the Evidence Act and the Crown Proceedings Act so that it is clear how national security information should be dealt with by the courts. At present there are two areas that lack clarity: the applicable procedure for assessing and challenging claims of public interest immunity, and the roles of the government and the courts in deciding whether sensitive information should be disclosed. In addition, principles of fairness suggest that public interest immunity should be reformed. The non-Crown party currently has inadequate opportunity to challenge any claim of public interest immunity given that they cannot see the information, even though their rights or interests may be prejudiced by such a claim.

### ***Criminal proceedings***

7. In relation to criminal cases the Criminal Disclosure Act 2008 sets out a modern and robust framework for non-disclosure of national security information. However, the defence has little opportunity to present arguments for disclosure, and the judge has little assistance in making his or her decision on whether information should be disclosed.

### ***Administrative decisions affecting rights***

8. There are a number of statutory regimes in place (for example, the Immigration Act 2009, the Passports Act 1992 and the Terrorism Suppression Act 2002) that provide that national security information can be taken into account by decision-makers without disclosing that information to the affected person. Closed court procedures have been established by legislation to hear challenges where national security information has formed part of the decision under review.
9. There are inconsistencies in approaches taken and some new regimes have been enacted in response to particular issues rather than in a coherent and principled way. Some of the regimes do not provide adequate safeguards for the person seeking to review a decision that affects them. In addition, many of the regimes do not give the courts sufficient control over how to manage the use of security information in proceedings while also protecting the fair hearing rights of the non-Crown party.

### **Recommended reforms**

10. When national security information is relevant to proceedings, there needs to be a clear process for determining how it is to be managed. The objective of our review has been to develop mechanisms for ensuring that a workable accommodation between the different interests is achieved in such cases.
11. There will be situations where disclosure of national security information to the non-Crown party presents serious risks to New Zealand's security interests, and it is justified to withhold the information. However the question then arises as to whether the information should be taken into account by the decision-maker, and if so, how it is to be tested before the court and how the interests of the non-Crown party will be represented.

### *New approach for civil proceedings*

12. The Report recommends a staged process for dealing with information identified by the Crown as national security information. The first stage would be a closed preliminary hearing, in which the non-Crown party would be represented by a security-cleared special advocate. The non-Crown party and their counsel would be excluded from the closed preliminary proceedings. The purpose of the closed preliminary hearing would be to consider whether the substantive hearing should include any departures from ordinary processes, in order to protect the national security information.
13. In the closed preliminary hearing, the court would first consider whether the information falls within the definition of national security information. We have defined national security information to mean information that, if disclosed, would be likely to prejudice:
  - a. the security or defence of New Zealand; or
  - b. the international relations of the Government of New Zealand; or
  - c. the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.
14. If satisfied the information comes within this definition the court would then consider whether the security risks of disclosure justify withholding the information when weighed against the interest of the non-Crown party in receiving the information. If non-disclosure is found to be justified, the enquiry turns to the question of whether the information should be excluded from proceedings or whether the information should be admitted into a closed procedure during the substantive hearing. As with the closed preliminary hearing, a closed hearing for the substantive case would exclude the non-Crown party and their counsel, and the interests of the non-Crown party would instead be represented by a security-cleared special advocate.
15. The closed procedure for the substantive hearing would only be ordered if the Court is satisfied that the national security information is sufficiently relevant to the proceedings that it is in the interests of justice to use a closed procedure rather than to exclude the information.
16. These reforms would replace public interest immunity certificates currently issued under section 27(3) of the Crown Proceedings Act. Instead, the court will decide whether information that would previously have been withheld on that basis should be withheld or alternatively protected in a closed court process. The Report recommends establishing a panel of security-cleared special advocates with the necessary experience to perform the role.

### *Appeals and judicial review of administrative decisions*

17. In applications for judicial review or appeals of administrative decisions where national security was taken into account, there will inevitably be relevant information that the Crown seeks to withhold from the affected person on security grounds. Currently, some statutes require a closed hearing for any

substantive review or appeal of these administrative decisions. In our view, a better approach to balancing the various interests at stake would be achieved under the approach outlined above for civil proceedings. The current automatic adoption of a closed procedure allows the Crown to have the benefit of using the information without disclosing it to the affected person. We propose instead that the decision of how to protect information should be made by the judge with regard to the degree of prejudice to the parties and the nature of the security interests.

18. In some cases, the use of a closed procedure may be the best way of ensuring that the information is protected and the case can be heard fairly. We envisage that a closed procedure would be used where there would be significant security risks of disclosing the information to the affected party and where the proceedings cannot be fairly determined without examining the secure materials.

### ***Criminal proceedings***

19. We consider that the use of closed procedures in criminal trials would not be in accordance with New Zealand's commitment to fair trial rights which has always emphasised the importance of the accused knowing the charges that are made against him or her, and having access to relevant information needed to defend those charges. The approach in respect of criminal proceedings should continue to be that set out in the Criminal Disclosure Act. Information that has not been disclosed to the defence must not be used against the defendant to prove a charge.
20. However, we recommend that the Criminal Disclosure Act be amended to provide for the use of special advocates in the pre-trial stages to assist the judge in determining whether information should be withheld. As with civil proceedings, the special advocate could view the national security information and then, if there are grounds, challenge the claim for non-disclosure. The court would benefit from having this type of assistance from a lawyer representing the defence perspective when trying to assess the material.
21. We also recommend a new provision to introduce anonymity protections for sources who provide information on matters of national security and for intelligence officers working for New Zealand or international intelligence agencies. This will be an important tool for ensuring that national security interests are protected while enabling those involved with the security and intelligence agencies to give evidence in open court.

### ***Reforms affecting administrative decision-making***

22. We consider that reform is required in administrative decisions that affect a person's rights where national security information is taken into account in making the decision and cannot be provided to the person affected. First, we recommend that, if an individual would otherwise be entitled to receive information taken into account in a decision that affects their rights, but for the fact that the information must be withheld for security reasons, the individual should be entitled to receive instead a summary of the information. The

summary serves the purpose of providing the affected person with straightforward and prompt access to the information about why the decision was made. Existing legislative regimes would need to be amended to give effect to this reform (the Immigration Act already contains this requirement).

23. Second, we suggest that the existing oversight powers of the Inspector-General should be better integrated into the framework for administrative decision-making. Persons with a right of complaint to the Inspector General in respect of administrative decision should be notified of this right.

### ***Courts, security and judges***

24. We recommend in the report that all court proceedings involving national security information should, with some specific exceptions, be heard in High Court. We do not think it necessary to security-clear judges and acknowledge problems in doing so. A proper separation between the branches of government and the independence of judicial officers must be maintained. Limiting cases to the High Court ensures that only a small group of senior judges will hear these cases and this would allow expertise to develop. Court staff involved with such hearings would need to have security clearance to an appropriate level.
25. The terms of reference precluded the Commission from making recommendations with respect to purely operational matters, including funding and administrative arrangements to institute an appropriate system for protecting sensitive security information in proceedings. We have therefore not made any recommendations in respect of facilities. However, we do observe that the courts hearing cases do need to have access to appropriate secure facilities to deal with and store secure material. We also consider that, to maintain the proper separation between branches of government, it is important that the necessary secure facilities and services are provided within the court system administered through the Ministry of Justice.