LAW·COMMISSION
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May 2015, Wellington, New Zealand | ISSUES PAPER 38

NATIONAL SECURITY INFORMATION IN PROCEEDINGS

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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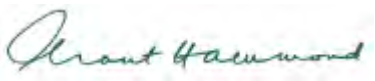
Foreword

New Zealand takes the right to access to justice very seriously. At the same time, New Zealand is also not immune from the threat of terrorism that increasingly permeates daily life in the 21st century. The need to counter terrorism has led some governments to take steps to restrict access to information that, if disclosed, could threaten national security. This has in turn led to some courts and commentators calling for greater protection of the rights to natural justice and open justice as these are values that lie at the heart of the democratic framework that we believe terrorists seek to undermine. It is timely for New Zealand to consider how, as a society, we wish to balance these interests of protecting national security and upholding the right to natural justice and what roles we consider the Crown and the judiciary should play.

As in all its projects, the New Zealand Law Commission must bear in mind two goals - the best access to justice possible for all and ensuring that New Zealand's legal structure is robust enough to adapt to the changing needs of modern society. This reference to review how national security information is dealt with in court proceedings embodies the potential tension between these two goals. However, we believe there is ample scope to reconcile the fundamental right to justice on the one hand and the need to protect national security on the other hand. This is our challenge, and we invite the public to assist us.

This issues paper deals with issues of considerable public importance such as when the Crown should have the ability to refuse to disclose information in court proceedings, which strikes at the very heart of the open justice principle. We invite submissions as to what amounts to legitimate national security concerns (for example, protecting intelligence-gathering partnerships and methodology) and what responses can help mitigate the impact that non-disclosure of national security information might have on what are fundamental principles of our rule of law system. Our aim is to ensure the procedure is clear and effective when legitimate national security concerns necessitate that the Crown's disclosure obligations be altered.



Sir Grant Hammond
President

Call for submissions

Submissions or comments (formal or informal) on this issues paper should be received by **30 June 2015**.

Emailed submissions should be sent to:
securityinformation@lawcom.govt.nz

Written submissions should be sent to:
National Security Information in Proceedings
Law Commission
PO Box 2590
Wellington 6011
DX SP 23534

Alternatively, submitters may like to use the pre-formatted submission template available on our website at www.lawcom.govt.nz.

The Law Commission asks for any submissions or comments on this issues paper on the review of the National Security Information in Proceedings. Submitters are invited to focus on any of the questions. It is certainly not expected that each submitter will answer every question. The submission can be set out in any format, but it is helpful to specify the number of the question that you are discussing.

Will my submission be publicly available?

Release on Law Commission website
A summary of submissions will be published on the Law Commission website to further public debate on the review. Where submissions are summarised, key points may be expressed while respecting privacy, commercial sensitivity, and other interests. The Commission may refer to submissions in its reports. If you wish your feedback to be confidential, please clearly indicate this. We will endeavour to respect your wishes, subject to the Official Information Act 1982 (see below).

Official Information Act 1982
The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus, copies of submissions made to the Law Commission will normally be made available on request. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

If you request confidentiality, we will contact you in the event that we receive a request for your submission under the Official Information Act 1982.

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Chapter 1
Setting the scene

INTRODUCTION

1.1 This paper is about the kinds of protections that the Crown can claim over information that might prejudice national security interests if disclosed in criminal, civil, or administrative proceedings. The normal position is that individuals should have available to them the information that forms the basis of decisions that affect their rights. In both civil and criminal court cases, they are entitled to know and to test the evidence on which the Crown relies and that might assist their case. It is also an important value of our legal system that courts operate openly and that the public, as well as the parties, are entitled to know what is happening in them and to know the reasons for decisions reached.

1.2 The law currently allows the Crown to restrict evidence it would otherwise be required to make available to a court or tribunal and the other parties to the proceedings where the disclosure of this information might prejudice national security.[1] Similarly, in administrative decisions made by Ministers and public officials, the decision maker might possess information that cannot be disclosed. In this review, we consider whether there are some circumstances where the decision maker should be able to take into account information of this sort even where it is not made fully available to the person whose interests are affected.

1.3 New Zealand's geographic isolation does not protect the country from the increasing threat posed by international terrorism. An important role for the New Zealand Government is to work closely with its international allies for the purpose of gathering intelligence about potential terrorist activities both in New Zealand and overseas. This necessitates that the information gathered and the methods by which it is gathered are kept secret. This project considers how withholding information on the grounds of national security may affect the fundamental values of natural justice and open justice, and to what degree (if at all) these values should be limited when there is a threat to New Zealand's national security. The answers may depend on the kinds of proceedings that are underway, the nature of the decision in question or the rights that are being determined.

THE REVIEW

1.4 The Law Commission has been asked to undertake a first principles review of the protection of classified and sensitive national security information in the course of criminal, civil and administrative proceedings that determine individuals' rights, and as appropriate, make recommendations for reform. This review looks at the protection, disclosure, exclusion and use of relevant classified and sensitive national security information in such proceedings.

1.5 As part of the review the Law Commission is considering whether legislation is needed to provide a process by which national security information may be disclosed and used in court (including criminal trials) and in tribunal proceedings and administrative decisions (and

1 The Criminal Disclosure Act 2008, the law of public interest immunity and the Evidence Act 2006 are discussed further in Chapters 3–5.

appeals against decisions) in a way that protects the information while maintaining principles of natural justice.

1.6 The purpose of this review is to understand and simplify the way national security information is treated in the context of court proceedings and administrative decisions so as to ensure both natural justice and national security are protected. This review is not intended to propose any new substantive actions or rights.

1.7 The Law Commission is considering, among other things, the approaches of other jurisdictions under which national security information can be admitted but not disclosed to affected parties or defendants (or only disclosed to a special advocate acting on behalf of such parties).

1.8 As well as analysing the various issues raised by the terms of reference, we make a number of preliminary proposals in the paper as to how those issues might be best resolved. This, however, is only an issues paper. These proposals are not final recommendations. Indeed, the point of providing proposals at this stage is to elicit comment and submissions that will feed into the Law Commission's final report. Details on how to make submissions can be found on page iv and submissions are open until 30 June 2015.

STRUCTURE OF THIS PAPER

1.9 The primary issue for this project is how to manage proceedings and administrative processes given the presence of national security information relevant to the question being determined. This requires a range of different interests to be accommodated, including:

- public safety and security;
- New Zealand's international information-sharing relationships;
- natural justice and open justice protections;
- fair trial rights; and
- the independence of the courts and tribunals.

1.10 Chapter 2 explores the nature of these interests. Chapter 3 examines the issues that arise in a criminal context, Chapter 4 addresses administrative decisions and appeals and Chapter 5 addresses civil proceedings. Chapter 6 then develops reform proposals, drawing on our review of other jurisdictions throughout the paper.

1.11 However, it is first necessary to consider two preliminary questions:

- What sort of information are we concerned with?
- How is this information likely to be relevant in court proceedings?

NATIONAL SECURITY INFORMATION

1.12 Several statutes contain provisions that limit the disclosure of information when the disclosure would adversely affect New Zealand's national interests. We refer to this information as "national security information" for brevity. This issues paper does not seek to exhaustively list the sort of information that might be captured by current provisions limiting disclosure, nor do we consider that it is necessary to create a precise definition of such information at

this early stage. Definitions will also differ depending on their purposes. Drawing on existing instruments,[2] our focus is on information that, if disclosed, might risk prejudice to:

- New Zealand's security;
- defence operations;
- New Zealand's international relationships, including information-sharing relationships;
- the ability to prevent, investigate, detect and prosecute offences;
- the safety of any person, both in New Zealand or overseas; and
- vital economic interests, including interests related to international trade.

1.13 The fact that disclosure might adversely affect one of these interests will not be the sole determiner of whether information should be withheld. Other compelling interests are at play such as fair trial rights, open justice and the right of citizens to hold government to account through court proceedings. Chapter 2 discusses these interests in more detail and explores why they are so important, and how they are relevant to this project - in particular, the protection of national security as justification for limiting natural justice and fair trial protections.

1.14 It is useful to bear in mind the fact that the seriousness of the risk to national security is also relevant. A significant risk rather than the mere existence of a risk may be necessary. This paper explores how significant the risk must be and who decides.

1.15 In 2001, Sir Geoffrey Palmer said that human rights and national security protections can be considered as complementary rather than opposing values. In his view, national security comprised:[3]

> ... freedom from interference; freedom from terrorist attack, freedom from deliberately incited racial violence, freedom from espionage which itself threatens basic freedoms such as privacy, freedom from the kind of genuinely subversive activity which is aimed – not just in theory but in fact – at destabilising or overthrowing the very democratic system upon which the exercise of civil liberties depends.

1.16 The breadth of this statement demonstrates how difficult it can be to define "national security" with any clarity. In addition, it highlights the difficulty of creating a fair process for reconciling the potentially conflicting interests of protecting national security on the one hand and individuals' rights relating to natural justice on the other. We return to this issue in Chapter 2.

WHEN MIGHT NATIONAL SECURITY INFORMATION BE USED IN PROCEEDINGS?

1.17 To fall within the scope of this review, the national security information must be used in a way that directly affects an individual's rights or obligations such that we might ordinarily expect the information to be provided to the person concerned. There are three main areas of relevance to this project: criminal proceedings; administrative decisions taken by Ministers and public officials; and civil proceedings (including judicial review and proceedings before tribunals). It is important for us to stress that this review is not concerned with the use and protection

2 These include requests for information under the Official Information Act 1982 and the Privacy Act 1993, and proceedings under the Passports Act 1992, Customs and Excise Act 1996, Terrorism Suppression Act 2002, Immigration Act 2009 and Telecommunications (Interception Capability and Security) Act 2013. The transfer of public records to the National Archives under s 21 of the Public Records Act 2005 may be deferred (under s 22) pursuant to a Ministerial certificate if transfer would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence or prejudice to the security or defence of New Zealand. Information can be excluded from the annual report of certain organisations if the Minister in question believes the information will be likely to prejudice a particular interest including national security interests: see New Zealand Security Intelligence Service Act 1969, s 4J(4); Government Communications Security Bureau Act 2003, s 12(4); and Inspector-General of Intelligence and Security Act 1996, s 27(4).

3 Geoffrey Palmer *Security and Intelligence Services - Needs and Safeguards* (Department of the Prime Minister and Cabinet, May 2001).

of national security information in other contexts such as the negotiation of international agreements or overseas defence deployments.

Criminal proceedings

1.18 As is discussed in Chapter 3, national security information may form part of background investigations that lead to criminal proceedings but will not necessarily be disclosed to the defence or introduced as evidence.

1.19 To be disclosed, information must be relevant to proceedings. Information will be relevant if it supports or rebuts or has a material bearing on the case against the defendant.[4] If information is relevant but disclosure would prejudice national security, the prosecutor may withhold it under section 16(g) of the Criminal Disclosure Act 2008. If the national security information is able to clear the defendant from blame or even point to a doubt, yet the prosecution seeks to have the information withheld, the position is more difficult. Under section 30(1)(b) of the Criminal Disclosure Act 2008, the court can order information be disclosed where the interests in favour of disclosure outweigh the reasons for withholding.

1.20 The Evidence Act 2006 contains provisions that enable the prosecution to use evidence while partially limiting disclosure to the defendant. However, this is subject to the requirement to ensure a defendant has a fair trial.

Administrative decisions

1.21 National security information may of course also be relevant to administrative decisions in respect of a person's rights, obligations or interests. New Zealand law provides for information of this nature to be relied upon when making certain decisions under the Immigration Act 2009, the Passports Act 1992, the Customs and Excise Act 1996, the Terrorism Suppression Act 2002 and the Telecommunications (Interception Capability and Security) Act 2013. Given the nature of these decisions, reaching a properly informed decision may require taking into account national security information that cannot be disclosed to the person affected (for example, if an individual is refused a visitor visa because of concerns that they have been involved in terrorist activities).

1.22 Alternatively, as with criminal proceedings, national security information may also be used to spark an investigation that gathers other information that does not raise disclosure concerns. The national security information may therefore be useful even if it is not provided to or taken into account by the decision maker.

1.23 There is also the possibility in administrative proceedings that national security information may be helpful to the affected person. For example, in a claim for refugee status based on political persecution, it is possible that national security information available to the decision maker could also support the applicant's claim.

1.24 There are some general principles relating to public access to information to be kept in mind. The Privacy Act 1993 provides that individuals are entitled to have access to personal information held by government agencies,[5] although disclosure may be refused if to do so would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence or prejudice the security or defence of New Zealand.[6] The Official Information Act 1982 can be used by individuals to access information relevant to their case

4 Criminal Disclosure Act 2008, s 8.

5 Privacy Act 1993, s 6, principle 6.

6 Privacy Act 1993, s 27.

(though not personal to them), though similar grounds for non-disclosure are contained in that Act also.[7] Where administrative decisions fall within the scope of the New Zealand Bill of Rights Act 1990, the natural justice protections captured under section 27 may also require a certain level of disclosure.

1.25 Ministers and public officials might rely on national security information when making decisions that affect people's rights. The Immigration Act 2009 is the best example of legislation in New Zealand that contains a special procedure to be used where national security information is relevant. Where national security information is to be relied on in certain decisions relating to visas, entry permission, refugee and protection status, detention, or deportation; the person subject to the decision must receive a summary of allegations arising from the national security information.[8] If the decision maker has relied on national security information and the decision is prejudicial to the person concerned, reasons must be given and include, among other things, the fact that national security information was relied on and the right to be represented in any appeal by a special advocate.[9]

1.26 Where an appeal or review is sought of a decision and national security information is relied upon, the Immigration Act 2009 provides for a closed process in the Immigration and Protection Tribunal or the senior courts. The process authorises the use of special advocates and establishes a procedure by which national security information is summarised and provided to all parties to the case.[10]

1.27 Under this process, national security information can only be disclosed to the Immigration and Protection Tribunal, a court or a special advocate. Neither the Tribunal nor any court may require or compel the disclosure of national security information in any proceedings under the Act, even where they consider that the information does not meet the criteria for classification.[11] A summary of the allegations arising from the national security information must be provided to the affected person or the information cannot be used. If proceedings involving national security information go before the Tribunal or a court, the Tribunal or court must approve that summary.[12]

1.28 The special advocate must be provided with access to the national security information relied upon, and the special advocate may lodge or commence proceedings on behalf of the affected person and participate in the closed sessions from which the person is excluded.[13] The Immigration Act provisions for decisions and proceedings involving national security material have not yet been used.

Civil claims involving the Crown

1.29 Proceedings may be brought against the Crown under statute, general civil law and by way of judicial review. The Crown may also bring civil claims, for example a claim against a public servant for breach of confidentiality. The Law Commission previously considered the use of national security information in such proceedings in our review of the Crown Proceedings Act 1950. In that review we considered the role of public interest immunity, which allows the

7 Official Information Act 1982, s 6.

8 Immigration Act 2009, s 38.

9 Immigration Act 2009, s 39.

10 Immigration Act 2009, ss 240–271.

11 Immigration Act 2009, s 35(3). Pursuant to s 241 the Tribunal may however ask questions relating to classification, and information may be declassified during proceedings (s 41).

12 Immigration Act 2009, s 242.

13 Immigration Act 2009, s 263.

Crown to exclude information from proceedings if necessary to protect national security.[14] The present review provides an opportunity to more fully address this area.

1.30 There are very few cases in New Zealand where national security information has been relevant in proceedings involving the Crown. New Zealand has not yet had a case in which the Crown has sought to rely on national security information to rebut or support a civil claim, without making it available to the claimant. Such cases would raise significant issues.

1.31 The ability to take a claim against the Crown has developed as a means of holding the Crown accountable. There is concern that this will be circumscribed if the Crown is seeking to rely on evidence without disclosing it in open court, or to exclude evidence that assists the claimant.[15]

WHAT HAPPENS IN OTHER COUNTRIES?

1.32 The three jurisdictions with similar legal systems and to which New Zealand most often looks for guidance - Canada, the United Kingdom, and Australia - have all developed closed procedures using special advocates or security-cleared counsel. The procedures adopted have met with varying degrees of public acceptance and the extent to which they are used likewise varies.

1.33 The United Kingdom has both public interest immunity and has more recently enacted the Justice and Security Act 2013. The Act outlines the closed materials process for dealing with national security information in proceedings (often undertaken in the immigration context). In relation to public interest immunity, it is for the court to determine whether the information should be disclosed or not. The United Kingdom's highest court has emphasised that this must be an ongoing review process. The court may subsequently amend its decision and determine that information initially withheld must be disclosed.[16] This allows the court to continually monitor proceedings to ensure compliance with natural justice protections.

1.34 Prior to the Justice and Security Act 2013, closed material proceedings had been used in the United Kingdom in immigration tribunal and employment court cases. The Justice and Security Act 2013 has extended closed material proceedings to civil courts, which means the Crown is now able to use national security information to defend itself without those materials becoming public.

1.35 Canada has both a legislative scheme relating to the use of security-cleared special advocates in immigration proceedings, and a common law public interest immunity framework. In relation to public interest immunity, a specific group of Federal Court judges make determinations as to non-disclosure of information claimed to be classified. Non-disclosure decisions are not reviewable by another court. Instead, the relevant trial court judge (different to the judge who determined non-disclosure) undertakes an ongoing review of whether or not the non-disclosure order continues to be compatible with natural justice protections. If the judge considers this not to be the case, there are a range of measures the judge can use to redress the imbalance in favour of the other party, including a stay of proceedings.

1.36 The Canadian Immigration and Refugee Protection Act 2001 establishes a special advocate system for use in determining immigration matters. Special advocates are legal representatives with security clearance who are appointed to review the information in question in order to

14 Law Commission, *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014). See Chapter 7 for a discussion of public interest immunity.

15 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2011] QB 218.

16 *R v H and C* [2004] UKHL 3.

challenge its relevance, reliability and sufficiency. They receive administrative support and resources from the Minister of Justice.[17]

1.37 Australia relies on common law public interest immunity and the National Security Information (Criminal and Civil Proceedings) Act 2004, which provides that the Attorney-General can issue a non-disclosure certificate if the Attorney-General considers that the disclosure is likely to prejudice national security (defined broadly as including national security, defence security, international relations and law enforcement).

1.38 In relation to public interest immunity, an application can be made at any time in proceedings (usually supported by a sworn affidavit from the relevant minster), and the court then weighs up the competing interests for and against disclosure.[18]

WHERE TO FROM HERE?

1.39 This review brings into focus the separation of powers and the respective roles of the independent judiciary and the executive. In most cases, an assertion that information cannot be disclosed will originate from the Crown. Traditionally, the courts have afforded considerable deference to a claim by the Crown that disclosure of material will prejudice national interests such as security, defence, and international relations.[19] However, recent trends in favour of open justice and more extensive judicial supervision leave the current position under New Zealand law uncertain.

1.40 A range of different procedures have been adopted in other jurisdictions in an attempt to preserve fair trial rights and open justice whilst affording appropriate protection to national interests. The procedures vary in complexity and involve such mechanisms as restricting who may be present at the hearing, the appointment of security-cleared special advocates, judicial examination of the national security information, and processes of summarising the national security information into a form that can be provided to the other parties to the proceedings without disclosing prejudicial material (known as "gisting").

1.41 The questions for this review, on which we seek public submission, can be thought of as revolving around the following key issues:

- *The nature of the information* - what information can be withheld or otherwise treated differently and when (or in which kind of proceedings).
- *The decision maker* - who ought to decide what information is treated differently (a judge, a Minister of the Crown, the Attorney-General or the security services).
- *The process used* - how that information should be treated (withheld, redacted or "gisted" and given to the other party, or referred to a special advocate).

1.42 It may be that different processes might be appropriate depending on whether the proceeding is criminal, civil or administrative, the nature of the rights in question, and whether these rights can be adequately protected without giving full access to the affected party.

17 Immigration and Refugee Protection Act SC 2001 c 27, s 85.1(2)(b).

18 Nicola McGarrity and Edward Santow "Anti-terrorism laws: balancing national security and a fair hearing" in Victor V Ramraj and others (eds) *Global Anti-Terrorism Law and Policy* (2nd ed, Cambridge University Press, Cambridge (UK), 2012) at 136–138 argue that there are significant failings in the public interest immunity process. These include the lack of guidance for the courts in assessing a public interest immunity claim as to the weighing exercise that should take place between the rights of the individual and public national security concerns, lack of guidance as to appropriate evidentiary standards, lack of a mechanism to indicate that a public interest immunity application may be forthcoming in proceedings and lack of alternative or partial measures that can be used in place of granting full public interest immunity.

19 *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [30].

Chapter 2
Interests to be taken into account

INTRODUCTION

2.1 The overall objective for this review is to develop mechanisms to facilitate the use of national security information in proceedings and administrative decision making, so that natural justice rights are protected, open justice is maintained as far as possible, the disclosure of national security information does not create unacceptable security risks, and a workable accommodation between the different interests is achieved.

2.2 This chapter examines what look to be incongruous interests of protecting national security on the one hand and ensuring the right to natural justice for individuals on the other. As noted in Chapter 1, human rights and national security may be viewed as complementary rather than opposing values. Accordingly safeguarding human rights, which in this project are primarily the right to natural justice and open justice, may in fact provide us with a framework in which the protection of national security within court proceedings can be achieved. In other words, in what ways might natural justice protections be construed to ensure that national security information remained secure while also ensuring the right to natural justice and open justice is assured?

2.3 Much can be said about the individual components of natural justice both at the domestic and international levels. Rather, our intention is to highlight the characteristics of natural justice that are relevant to this project so that readers can comment on these matters when making submissions.

2.4 This chapter will look at how natural justice and open justice rights are captured under New Zealand law in the New Zealand Bill of Rights Act 1990 (NZBORA) and then turn to consider what is meant by "protecting national security" before looking at how the two concepts interact. It will then analyse how a rights-based framework could facilitate law reform in this area. We will examine the different natural justice protections asking how each would be threatened by the use (or restriction on the use) of national security information in court proceedings but also consider how each protection could be adapted to facilitate the use of national security information.

THE NEW ZEALAND BILL OF RIGHTS ACT 1990

Natural justice protections under section 27 of NZBORA

2.5 Section 27 of NZBORA gives guidance on the scope of natural justice as recognised in New Zealand. Drawing upon international instruments, including the International Covenant on Civil and Political Rights (ICCPR), section 27 provides that:[20]

20 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

...

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

2.6 The right to natural justice as protected under NZBORA requires decision makers to uphold procedural fairness.[21] Namely, section 27(1) protects a right to natural justice where there is:

(a) a determination or decision;

(b) that is adjudicative in nature;

(c) that is made by a tribunal or another public authority;

(d) that has the legal authority to make the relevant judgment; and

(e) the judgment in question relates to the legal rights of an individual (not a group).

2.7 In other words, section 27(1) seeks to ensure that the Crown has no unfair procedural advantage over the individual in question.[22] In the context of criminal trials and once an individual has in fact been charged with a crime, NZBORA also provides for minimum standards of criminal procedure (section 25) and the right of persons charged (section 24).[23]

2.8 NZBORA gives legislative effect to the rights-based framework under which justice is to be achieved in New Zealand and may only be subject to reasonable limits. The sorts of things that may impinge on natural justice as expressed in section 27 could include:[24]

- withholding from the person concerned the information that is to be relied on in reaching a particular decision;
- limiting the opportunities for a person to make written or oral representations to the decision maker;
- not allowing the person to attend the hearing or cross-examine certain witnesses;
- not allowing the person to have legal representation at the hearing;
- not providing the person with the reasons for the decision (thereby inhibiting a person from deciding whether they will challenge the decision).

2.9 Under the common law, the principles of natural justice apply even if there is no express reference to natural justice or the rights protected under NZBORA in the rules and regulations of a tribunal or public authority.[25] The Privy Council has stated that "natural justice is but

21 *R v Barlow* [1996] 2 NZLR 116 (CA). For example in *R v Duval* the Court of Appeal stated that "a person's right to the observance of the principles of natural justice under section 27 of the [Bill of Rights] Act [includes] ... a fundamental principle that persons must know the case against them and have an opportunity to answer that case". The individual must be told what charges they face and why so that they can prepare and give a defence to those charges: *R v Duval* [1995] 3 NZLR 202 (HC) at 205.

22 In the High Court, McGechan J said that s 27 seeks "to place the Crown in the same position in relation to litigation as private individuals ... away from the privileged position which the Crown historically enjoyed": *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 55.

23 For example, s 24(d) adequate time and facilities to prepare a defence; s 24(f) the right to receive legal assistance without cost if the interests of justice so require; s 24(g) the free assistance of an interpreter if the person charged cannot understand or speak the language used in court. Chapter 3 looks at s 25 in more depth.

24 "Introduction to sections 27(1) to 27(3): The right to justice" (2004) Ministry of Justice < www.justice.govt.nz > .

25 *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA) at 471.

fairness writ large and juridically, fair play in action"[26] and, given that it is a flexible concept, what is fair will "depend on the relevant circumstances of each and every case".[27]

2.10 The observance of natural justice is also reflected for example in courts' procedural rules to ensure a fair hearing for all parties, in the laws of evidence[28] and in the requirements for public officials to give reasons for their decisions in certain contexts. Yet both domestic and international law envisage circumstances where these protections may be impinged upon due to a risk to national security.

2.11 States do not have an unfettered discretion in determining what amounts to an issue of national security or in what circumstances the right to natural justice can be set aside. However, international commentary suggests that natural justice protections can be derogated from on the grounds of national security if the claim of national security is embedded in a rule of law and human rights framework.[29] The Special Rapporteur on Human Rights and Counter Terrorism, for example, argued that exclusion of the press and public can be done on the grounds of national security if such exclusion is "accompanied by adequate mechanisms for observation or review".[30]

Reasonable limits to protected rights

2.12 Sections 4 and 5 of NZBORA provide the statutory framework in which derogation from the rights protected under the Act is permissible.

2.13 Section 4 of NZBORA provides that the courts shall not hold the provision of any enactment to be invalid or ineffective or fail to apply any provision simply on the basis that "the provision is inconsistent with any provision of this Bill of Rights". Although the courts cannot decline to apply the statute in question, they can comment as to inconsistency or incompatibility with NZBORA.[31]

2.14 Section 5 of NZBORA provides that the "rights and freedoms contained [in the Act] may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The test for what amounts to a reasonable limit that can be demonstrably justified was set out by the Supreme Court in Canada in 1986 in *R v Oakes* as being:[32]

(a) for a sufficiently important purpose to justify negating the right;

(b) rationally connected to the purpose for doing so;

(c) no more than reasonably necessary in order to achieve its purpose; and

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26 *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718; cited with approval in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

27 *P v Department of Child, Youth and Family Services* [2001] NZFLR 721 (HC) at 753 per Potter J.

28 Criminal Disclosure Act 2008; Evidence Act 2006.

29 Nowak Manfred *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (1st ed, N P Engel, Kehl, 1993) at 212; and United Nations High Commissioner for Refugees *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (4 September 2003).

30 *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/63/223 (2008) at [30]. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (which were adopted by leading international law, national security and human rights experts based on international law standards) declare that "a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions": see *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* E/CN4/1996/39 (1996) at art 1, principle 2(a).

31 For a discussion of the role of ss 4 and 5 see Susan Glazebrook *The New Zealand Bill of Rights Act 1990: Its Operation and Effectiveness* (paper presented to the South Australian Legal Convention, Adelaide, 22–23 July 2004) at 55.

32 *R v Oakes* [1986] 1 SCR 103; approved and applied in *Watson v Electoral Commission* [2014] NZHC 666.

(d) not disproportionate in its effect on the individual to whom it applies.

2.15 Section 5 is statutory confirmation that "individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community".[33] The economic, social or political costs of infringement must however be able to be justified. Ultimately this project seeks to determine at what point it would be demonstrably justifiable to impose limits on natural justice protections for reasons of national security (in other words what are the national security interests that would amount to demonstrable justification) and what would reasonable limits on natural justice protections look like in our democracy?

2.16 This dilemma was indirectly touched upon by the Human Rights Commission (HRC) in its 2013 Report to the Prime Minister.[34] In the context of referring to the Telecommunications (Interception Capability and Security) Bill the HRC discussed the use of classified information in procedural matters where it was envisaged that a special advocate could be used in the absence of the defendant (or defendant's counsel).[35] The Report considered that "conducting proceedings in the absence of the defendant raises issues about the breach of the right to natural justice in section 27(1) NZBORA".[36] The HRC believed that such a limitation on the natural justice protections set out in section 27 amounted to an "unjustified and a disproportionate response to the need to protect classified security information".[37] The Ministry of Justice took a contrary view in their vet of the Bill under NZBORA.[38]

2.17 For the purposes of this project, we consider that there may be some security interests that could justify altering usual court procedures. This leads to further questions: first, what level of risk to national security would justify a departure from the natural justice protections under section 27 and second, how could court proceedings be conducted to give maximum effect to the right to natural justice despite the limits in place to protect national security?

PROTECTING NATIONAL SECURITY

What does "protecting national security" mean?

2.18 A significant part of the debate as to when natural justice and open justice protections can be reasonably infringed upon is what we in fact mean when we say that "protecting national security" may justify these rights being set aside.

2.19 On some conceptions, national security cannot justify encroachment of basic freedoms because it contains an inbuilt requirement that those freedoms be upheld. There has been extensive international commentary on this issue, relevant to the present review. We have drawn particularly on a recent report by the European Parliament, which showed the variety of

33 *R v B* [1995] 2 NZLR 172 (CA) at 182.

34 Human Rights Commission *Report to the Prime Minister: Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interception Capability and Security) Bill, and Associated Wider Issues Relating to Surveillance and the Human Rights of People in New Zealand* (9 July 2013).

35 This related to the Telecommunications (Interception Capability and Security) Bill 2008 (108-2). In its NZBORA vet on the Bill, the Ministry of Justice specifically noted that "in considering whether these provisions are justifiable under s 5 of the Bill of Rights Act we take into account that they would apply only to applications for a compliance order or a pecuniary penalty order against telecommunications providers. The Bill also allows the court to appoint a barrister or solicitor (with appropriate security clearance) as a special advocate to represent the defendant's interests. The special advocate can have access to the classified security information. The court may also approve a summary of the classified security information to be given to the defendant." Taken together the Ministry of Justice considered the limitation on s 27(1) was justifiable. See Crown Law Office *Telecommunications (Interception Capability and Security) Bill: Consistency with the New Zealand Bill of Rights Act 1990* (3 May 2013) at [13]–[14].

36 Human Rights Commission, above n 34, at [33].

37 The Commission noted that its concerns were especially significant because it was unclear if a special advocate would be appointed; Human Rights Commission, above n 34, at [33].

38 See Crown Law Office *Telecommunications (Interception Capability and Security) Bill: Consistency with the New Zealand Bill of Rights Act 1990* above n 35.

constitutional frameworks and the divergence in approach, even within democratic countries with similar security interests.[39]

2.20 In the European Parliament report it was noted that there is no legislative definition of national security in the United Kingdom.[40] The House of Lords (then the highest court of the United Kingdom) however has commented that national security includes protection of democracy, military defence, the legal and constitutional systems of the state, and in taking measures against a foreign state.[41] At the heart of democracy is the maintenance of the principle of natural justice, which creates a paradox within the definition: how can national security justify a departure from natural justice protections if it includes a requirement to uphold democratic principles?

2.21 While the New Zealand courts have not yet been called upon to define national security, we expect that they will also face difficulties in pinning down the concept although there are varying definitions in use.[42] The term clearly includes protection against major security threats, but where should the line be drawn?

2.22 Some European nations have statutory definitions, some of which include matters such as economic, ecological, territorial and political threats. The Dutch National Security Strategy 2007, for example, states that "national security is at stake when one or more of the country's and/or society's vital interests are threatened to such an extent that potential societal disruption could occur".[43]

2.23 Ultimately, the European Parliament report concluded that "conceptual fuzziness leads to accountability deficits of the executive and intelligence communities".[44] The Report noted with concern this lack of critical assessment by judicial authorities. In our view, a lack of clarity about what national security does and does not include makes it more difficult to assess a claim by the relevant government or intelligence agency that national security is under threat. This may inhibit oversight and review of the authorities responsible for classifying and excluding information on the basis of national security, which in turn may encourage wariness as to the use of secret materials in judicial processes.

2.24 Part of the difficulty is that there may be degrees of threat to national security, and degrees of importance to national security interests. A broad definition may be appropriate in some contexts (for example, in giving the defence force powers to act in a natural disaster) but not in other contexts (for example, where national security is being advanced as a reason to limit individual rights in a particular court proceedings). This suggests that, for the purposes of this review, we need to be aware of the potential breadth of security interests while also accepting that they should not all receive the same level of deference.

The role of the Crown in protecting national security

2.25 Intelligence agencies and the Crown are, in New Zealand, products of a robust democratic process that cherishes accountability and transparency. The rule of law requires that all

39 Directorate-General for Internal Policies *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Parliament, September 2014).

40 At 32.

41 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 (HL) at [16]–[17].

42 For example on the Protective Security website national security is defined as "a term used to describe the safety of the nation from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on New Zealand's defence system, acts of foreign interference or serious organised crime, as well as the protection of New Zealand's borders": New Zealand Security Intelligence Service "Glossary" Protective Security Requirements < www.protectivesecurity.govt.nz > . Another example is the definition of "security" found in s 2 of the New Zealand Security Intelligence Service Act 1969. See Chapter 6 for further discussion on this point.

43 Directorate-General for Internal Policies, above n 39, at 34.

44 At 35.

branches of government act within the confines of their proper functions, and any law reform proposal must ensure these limits are respected. In our view, transparency facilitates good governance and legitimacy and should be a priority even in the context of a threat to national security.

2.26 New Zealand may be geographically isolated, but it is neither socially nor politically isolated, and the country's interaction with other states impacts the daily life of New Zealanders. The Crown (as the executive branch of government in New Zealand) seeks to promote and strengthen the country's international relations not just for defence purposes but in order to foster strong economic and trade relations.

2.27 The potential threat to national security goes further than the question of whether the substantive content of the information should be disclosed (for example, the specific details of a document or phone call). The notion of protecting national security must also take into account the importance of New Zealand's intelligence-gathering partnerships and the confidence our allies have in us as well as the methodologies and sources used and the potential consequences of these being made public.

2.28 New Zealand has international obligations in terms of assisting in the global response to combating terrorism, and the possibility of a terrorist threat on our territory cannot be discounted. These obligations must be remembered when painting a picture of the range of interests to be taken into account in this project. Accordingly, it is important to bear in mind that the reasons the Crown may have for claiming information has national security implications may be more nuanced than simply keeping control of the information in question.

New Zealand's obligations in gathering and sharing intelligence information

2.29 The Terrorism Suppression Act 2002 encapsulates both New Zealand's pre-existing obligations[45] and those obligations that arose post the September 11 attacks pursuant to United Nations Security Council Resolution 1373 (2002), which binds all United Nations members. The Crown must act in a manner that satisfies these obligations.

2.30 Article 2(d) of Resolution 1373 places New Zealand under a positive obligation to "prevent those who finance, plan, support or commit terrorist acts from using [New Zealand] for those purposes against other states or their citizens". There are three features arising out of New Zealand's obligations under Resolution 1373 that are relevant here.

2.31 First, there is an obligation on states to gather and share intelligence information for the purposes of identifying and preventing terrorist plots and conspiracies. Article 2(b) requires New Zealand to take "necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information". Article 2(f) provides that states must provide:

> the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

2.32 Article 3(a) calls on states to "find ways of intensifying and accelerating the exchange of operational information". Article 3(b) goes on to say that states should "cooperate on administrative and judicial matters to prevent the commission of terrorist acts". The cumulative effect of these provisions is to place New Zealand under an obligation to establish and maintain procedures and paths for information-sharing and international co-operation against terrorism.

45 Such as the International Convention for the Suppression of Terrorist Bombings 2149 UNTS 256 (opened for signature 12 January 1998, entry into force 23 May 2001).

Article 3(c) expressly refers to the use of "bilateral and multilateral arrangements and agreements" for this purpose.

2.33 The second and related obligation is that states are called upon to uphold standards of international human rights law and rule of law principles to bring perpetrators or those alleged to be involved with terrorist activities to justice. These standards apply equally to the collection and acquisition of information for these purposes. Article 3(b) refers to the exchange "of information in accordance with international and domestic law". Article 3(f) specifically refers to "conformity with the relevant provisions of national and international law, including international standards of human rights" in relation to ensuring that the refugee claims process is not abused by individuals with links to terrorist activities (or in order to facilitate further terrorist activities). There are two clear imperatives captured by Resolution 1373: the prevention and suppression of terrorism on the one hand and the maintenance of international legal standards on the other.

2.34 The third feature of Resolution 1373 that is relevant to this project represents the crossroads of those two imperatives, as states must work together to bring perpetrators to justice. Article 2(e) says states shall "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice ... and that the punishment duly reflects the seriousness of such terrorist acts". Article 2(f) goes on to require states to "afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings". Arguably, an inherent tension exists between prosecuting individuals suspected of terrorist offences and protecting the source of intelligence that would enable prosecution of these individuals while also upholding legal standards relating to natural justice.[46]

2.35 One of the ways that the Crown seeks to fulfil New Zealand's obligations is by designating terrorist entities and individuals in order to prevent the financing of, participation in and recruitment to terrorist entities. The designation process is twofold. First there are those entities and individuals listed according to United Nations Security Council Resolution 1267 and second, pursuant to Resolution 1373, New Zealand actively identifies and designates entities to be added to the list.[47]

2.36 This is an example of where the Crown's attempts to uphold New Zealand's international obligations may conflict with human rights obligations relating to the use of national security information. The Ministry of Justice has stated that its practice is to only use unclassified or open-source information when preparing a case for designation as a terrorist entity. This raises issues when the Security Council designations rely on classified information and individuals included on the list are only provided summaries of the information rather than access to the evidence itself.[48]

46 In its Select Committee Report on the Terrorism Suppression Amendment Act 2007, the Foreign Affairs, Defence and Trade Committee noted that there were "particular concerns related to procedural fairness and the human rights of designated persons, and whether these rights should be overridden to protect New Zealand's national security". The Committee agreed that "processes involving special advocates and security-cleared counsel would add additional elements of protection but consider[ed] that the inclusion of such procedures in the [Terrorism Suppression] Act should not be considered in isolation" and recommended that the procedures for use of classified information in the Immigration Act should be taken into account: Terrorism Suppression Amendment Bill 2007 (105-2) (Select Committee Report, 2007) at 5. The Terrorism Suppression Act 2002 is discussed in further detail in Chapter 4.

47 New Zealand Police "Terrorist Designation Process" (3 November 2010) < www.police.govt.nz > at [7].

48 Ministry of Justice "Counter-Terrorism Measures" < www.justice.govt.nz > at [59]. The European Court of Justice has discussed the process of relying on classified information in making designations in Case T-85/09 *Kadi v European Commission* [2010] ECR II-5177 noting the conflict between human rights protections and the fulfilment of international obligations.

2.37 Obligations also arise pursuant to New Zealand's status as a party to the UKUSA Communications Intelligence Agreement, which is a multilateral agreement on the exchange and sharing of intelligence information.[49] The agreement sets out the terms of continued collaboration by "five eyes" or "FVEY" partners (the United States, the United Kingdom, Canada, Australia and New Zealand). Co-operation "is dependent on ... adherence to the provisions" listed.[50] Specifically, paragraph 5 notes that the parties agree to "the exchange of information regarding the methods and techniques involved in the operations outlined" but "upon notification of the other party, information may be withheld by either party when its special interests so require". The receipt of intelligence from New Zealand's FVEY partners depends on mutual respect of non-disclosure requests.

2.38 In our view, these aspects of the FVEY arrangement demonstrate the tension between the benefits to be received from ongoing active participation in shared intelligence arrangements with other nations on the one hand and the potential pressure that the conditions of receipt and participation may place on New Zealand (specifically the Crown) in terms of using that intelligence on the other hand.

2.39 One reason the Crown may be reluctant to have national security information disclosed in court proceedings is because this could have implications for New Zealand's obligations to its intelligence sharing partners. Disclosure of substantive information may not in itself pose a security risk but could inadvertently lead to the uncovering of intelligence-gathering tools and techniques, for example the identification of an undercover intelligence agent or informer whose safety would then be at risk.

2.40 The Crown has obligations and responsibilities that are wide ranging and on the face of it can be contradictory. A consistent theme throughout is the responsibility to protect New Zealand and its citizens, both from external threats and from the risk of executive over-reach and procedural unfairness. The question is what law reform would, in the scope of this project, best help the Crown to meet all these obligations and responsibilities?

A RIGHTS-BASED FRAMEWORK FOR REFORM

2.41 Any proposals for legal reform that arise from this project will be concerned with rights that, in New Zealand, are protected under NZBORA, the common law, and international human rights instruments. We therefore turn to consider a rights-based framework into which any law reform can be placed.

2.42 There are two potentially conflicting interests in this project: natural justice rights (as captured in NZBORA and discussed below) and demonstrable justifications for limiting those rights (notably whether provisions for protecting disclosure of national security information would amount to a reasonable limit as per section 5 of NZBORA).

2.43 The starting point is that limitations on rights need to be justified and failing to disclose evidence that is relevant in court proceedings or administrative decision making, on the grounds of a threat to national security, must be justified. A culture of justification contributes to "principles of good government, such as transparency, accountability, rational public development, attention to differing interests and so on".[51] Adopting this approach, this paper

49 This was an arrangement between the United States and the United Kingdom, entered into post World War II and subsequently expanded to include New Zealand, Australia and Canada. Known as "five eyes" or FVEY, this arrangement relates to the acquisition of signals intelligence, which is principally concerned with the interception of communications.

50 Appendix J "Principles of UKUSA Collaboration with Commonwealth Countries Other than the UK" in *UKUSA Communications Intelligence Agreement* (1955) at [8].

51 Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 554.

seeks to frame the debate around the following questions (on which we also seek public feedback):

(a) What should the test be for determining what information is sufficiently prejudicial to national security to justify withholding it, or having it only released into a closed procedure?

(b) Should it be the role of the court or the Crown to decide whether national security information is disclosed to affected parties in proceedings, withheld, or partially released in proceedings?

(c) How to reconcile the use of national security information in court proceedings with protection of natural justice and open justice rights and the extent to which limits on these rights can be justified?

2.44 The challenge is to ensure that any rights that are viewed as fundamental are protected in a substantive sense while recognising that at the same time there may be circumstances that allow the procedural protections to be limited in the way envisaged by section 5 of NZBORA. The law reform proposals in this paper therefore seek to ensure that the following aspects of natural justice, which are considered to be fundamental principles, are upheld:

(a) The decision maker should be unbiased in respect of the matter before them.

(b) Decision makers must give those affected by the decision the opportunity to be heard.

2.45 These principles are reflected in international human rights obligations and in the constitutional documents of many countries.[52] It should be noted that the right of access to and equality before the courts applies equally to all individuals, regardless of immigration status.

2.46 We now consider the relevant natural justice protections in more detail in order to understand the scope of each right, to identify to what extent the law reform proposed in this project may impact on each right and finally to propose potential measures that could both protect the information in question and uphold natural justice protections at the same time.

Open justice and the public hearing principle

2.47 In an earlier project, the New Zealand Law Commission considered the principle of open justice and concluded that:[53]

> ... the principle of open justice goes to the very existence and health of our political and legal institutions. It is regarded as an important safeguard against judicial bias, unfairness and incompetence, ensuring that judges are accountable in the performance of their judicial duties. It is also thought to maintain public confidence in the impartial administration of justice by ensuring that judicial hearings

52 Article 8 of the *Universal Declaration of Human Rights* GA Res 217A, III (1948) provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention of Human Rights] provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The Fifth Amendment to the United States Constitution says "no person shall be deprived of life, liberty or property without due process of law" and the Sixth Amendment expressly provides, in the context of criminal prosecutions, that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense". Section 7 of the Canadian Charter likewise states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice".

53 The Law Commission looked at the question of open justice and considered that, as a general rule, the courts conduct their business publicly unless this would result in injustice. The procedure by which a case is determined must be transparent, and there should not usually be a limit on the publication of fair and accurate reports of proceedings; Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [1.1]–[1.5].

are subject to public scrutiny, and that: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done".

2.48 Open justice must necessarily permeate all political and legal institutions, and thus the principle of open justice must include not just civil and criminal proceedings but also administrative decisions to the extent this is possible. Open justice provides a record of proceedings assisting in exposing potential abuses of power or irregularities in proceedings and providing assurance when proper processes were followed. To the extent that open justice is present, we consider there to be a stronger culture of justification and accountability.

2.49 There is a clear link between open justice and public proceedings, but public proceedings do not guarantee that open justice has been achieved. Administrative decisions, such as the decision to grant a passport, often occur without formal court proceedings that could be classified as public, yet openness and transparency remain fundamental requirements and should be strived for at all times. Care needs to be taken by decision makers to ensure that principles of open justice and natural justice are consistently applied.

2.50 The starting point or the "default setting" for both civil and criminal proceedings is one of openness. Open justice requires:[54]

(a) the machinery of justice to be subject to independent scrutiny by people who can verify whether the rule of law is being applied; and

(b) procedural fairness to be accorded to all parties such that they are aware of the evidence against them and given the opportunity to rebut that evidence.

2.51 However, we note that the principle of open justice is not absolute.[55] There are exceptions to it, which result from an even more fundamental principle that the chief object of the judicial system is to secure that justice is done. An example of measures to limit the principle of open justice is the steps taken to protect children and vulnerable witnesses.[56] Thus, situations sometimes arise in which doing justice in public could frustrate justice itself.[57]

Potential problems and possible solutions

2.52 Public proceedings provide a level of scrutiny and assurance that the party's rights are being respected and that there is no abuse of power by branches of government. It gives legitimacy to proceedings. However, if we accept that national security information may need to remain out of the public domain, it may then be necessary to exclude the public, the media and even the parties to the case from some parts of proceedings.

2.53 Possible measures that could be adopted in the context of proposed law reform include permitting a limited number of press members access to the court (having given a non-disclosure undertaking to the court)[58] and using screens to shield witnesses giving oral evidence relating to the national security information. In addition, any exclusion measures adopted should be kept to a minimum and proceedings closed only when the information in question is before the court.

54 McGarrity and Santow, above n 18, at 123.

55 Law Commission, above n 53, at [1.3].

56 Article 14 ICCPR, above n 20, notes this may be the case stating that exclusion of the public or press may be needed "when the interest of the private lives of the parties so requires".

57 McGarrity and Santow, above n 18, at 123.

58 As was done in the United Kingdom in *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861, [2015] EMLR 2; see Owen Bowcott "Selection of journalists to attend terror trial raises fears over press freedom" *The Guardian* (online ed, London, 13 June 2014); and Owen Bowcott "Key elements of secret terror trial can be heard in public, court rules" *The Guardian* (online ed, London, 12 June 2014).

Equality of arms

2.54 Equality of arms provides that the accused must have the opportunity to prepare and present its case, including challenging evidence, on the same footing as the prosecution.[59] It is viewed as equalising the playing field between the parties.[60] A party opposing a government is without doubt in a much weaker position given the combined resources of the state thus any inroads into the equality of arms principle require robust justification.

2.55 In New Zealand, the equality of arms principle is reflected in sections 24, 25 and 27 of NZBORA, the latter of which affirms that every person has the right to bring and defend and have civil proceedings heard against the Crown in the same way as civil proceedings against individuals.

2.56 Limiting the access of individuals to national security information relating to the case they are answering or promoting would likely infringe upon the equality of arms principle. However, steps may be taken to help mitigate any prejudice to the relevant individual, for example, effective summaries (or information "gists") can be given. Similarly, the courts can appoint a suitably trained, supported and prepared advocate to represent the interests of the individual. These and other options are considered in further detail.

Disclosure and discovery

2.57 The principle of disclosure is relevant because without sufficient knowledge of the Crown's case and the evidence to support that case, it is impossible for the individual to defend themselves or to present a counter-argument.[61]

2.58 Within the framework of criminal proceedings, equality of arms necessitates not just informing an individual of the charges being faced but also adequate disclosure of the material evidence to be relied up on by the prosecution.[62] There needs to be sufficient disclosure of the evidence that is relevant to the prosecution's case so the defendant is not surprised and can prepare arguments in advance.[63] The prosecution must make available all evidence that it will rely on in court or that is exculpatory.[64]

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59 United Nations Human Rights Committee *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial* CCPR/C/GC/32 (2007).

60 The United Nations Human Rights Committee has confirmed that "the right to equality before courts and tribunals, in general terms, guarantees ... those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination" at [8]. In other words, not just equal treatment before the courts but also equal treatment by the courts.

61 For example, if there was a breach of Article 7 ICCPR (the prohibition on torture), above n 20, "information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim".

62 For example, in *Foucher v France* (1998) 25 EHRR 234 (ECHR) at 34, the European Court of Human Rights stated that "according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent" which includes access to the case file and information therein.

63 The United Nations Human Rights Committee has clarified that article 14(3)(a) requires the defendant in criminal charges be informed of both the law and the "alleged general facts on which the charge is based": United Nations Human Rights Committee *Caladas v Uruguay* A/38/40 (1983) at 192. The Committee found that notice of the charges is necessary to enable the accused to act accordingly for example taking steps to secure release from imprisonment if the individual believes the charges are not warranted. The Committee found that sufficiency of detail is key.

64 For example, in *Peart v Jamaica*, the Court found that withholding evidence that someone else committed the crime was viewed as a clear breach of article 14(3). The United Nations Human Rights Committee specified that exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence such as indications that a confession was not voluntary: Human Rights Committee *Peart v Jamaica* CCPR/C/54D/464/1991 (1995).

2.59 Similarly, the failure to allow examination of witnesses has been viewed internationally as amounting to "a flagrant case of denial of fair trial rights".[65] In particular, in a criminal trial, where a person's liberty is in question (or if the individual faces a risk of deportation in the administrative context), there is a stronger case that "secret evidence and anonymous witnesses should not be used".[66] As discussed above, situations might arise where disclosing information would prejudice national security. One option to facilitate partial disclosure in this context is to use a security-cleared lawyer, known as a "special advocate", to represent the interests of the affected person. A special advocate may view the security information but is restricted in the extent to which they can communicate with the individual whose interests they represent.

2.60 In the *Al Rawi* case,[67] heard before the United Kingdom Supreme Court, Lord Kerr (a Justice of the Supreme Court), expressed reservations that using a special advocate is a viable option to ensure natural justice protections. His concerns related to restricting communication between the advocate and the affected individual, which Lord Kerr considered would then restrict the advocate's ability to challenge evidence. He stated that "to be truly valuable, evidence must be capable of withstanding challenge ... Evidence which has been insulated from challenge may positively mislead".[68] Lord Kerr preferred the continuation of public interest immunity to permit a "balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest".[69]

2.61 Natural justice necessitates a certain level of information being accessed by the affected party, and arguably simply granting access to the relevant information to a representative of the affected party would be insufficient. Submissions are invited as to whether disclosure to a special advocate would be sufficient to achieve this or whether additional measures are needed to ensure the special advocate has the power to challenge evidence and present a robust argument on behalf of the individual represented. This will be discussed further in Chapter 6.

Evidence obtained or presented contrary to evidentiary standards

2.62 In addition to the individual's right to have evidence disclosed, there is a prohibition against the use of evidence obtained contrary to international standards, for example through torture or compulsion.[70] It is difficult to imagine that this scenario could be a possibility in New Zealand. However, we suggest that the courts should be granted with significant discretion to equip special advocates with adequate facilities to test and challenge evidence (while retaining its confidentiality).

2.63 There is also the potential in closed proceedings for issues to arise as to the truth of evidence presented. This suggests that whatever mechanisms are used to protect national security

65 Human Rights Committee *Al-Labouani v Syrian Arab Republic*, Working Group on Arbitrary Detention, Opinion No 24/2008 A/HRC/13/30/Add1 at 46 (2010) at [27]. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia likewise held that these fair trial guarantees aim to put the accused in a position of "procedural equality in respect of obtaining the attendance and examination of witnesses with that of the prosecution. In other words, the same set of rules must apply to the right of the two parties to obtain the attendance and examination of witnesses" *Prosecutor v Kupreskic (Decision on Appeal by Dragan Papic against Ruling to Proceed by Deposition)* ICTY Appeals Chamber IT-95-16-AR733, 15 July 1999 at [24].

66 Amnesty International "Rights at Risk: Amnesty International's Concerns Regarding Security Legislation and Law Enforcement Measures" (2002) at 37. In a case where the accused was ordered to leave the courtroom during the questioning of an undercover and masked agent who was one of two main prosecution witnesses and the accused was not permitted to question the witness, the United Nations Human Rights Committee considered that the accused's right to question witnesses was "violated": United Nations Human Rights Committee *Koreba v Belarus* CCPR/C/100/D/1390/2005 (2010). Likewise, in its Concluding Observations of the Netherlands, the United Nations Human Rights Committee questioned the practice of using secret witnesses in cases where anonymity was requested on the grounds of national security: *Concluding Observations of the Human Rights Committee: Netherlands* CCPR/C/NLD/CO/4 (2009).

67 *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [93].

68 At [93].

69 At [93].

70 United Nations Human Rights Committee, above n 59. See also article 15 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

information that is presented as evidence, the evidence must still be able to be tested and challenged so that the decision maker can properly assess whether it is reliable and what weight it should be given.

Right to choose counsel

2.64 The right to choose counsel is relevant because it assists the individual to create a relationship of trust and confidence with the person(s) that will be representing the individual's interests and because it ensures that counsel is independent. In a time of high stress and with an outcome that can severely infringe the individual's freedom, finances and reputation, it is important that the individual is assisted by counsel who truly represents their interests. This also gives credibility to the process from the perspective of the affected individual.

2.65 The right to choose counsel is not absolute but any restrictions must have a "reasonable and objective basis".[71] Indeed the United Nations Human Rights Committee has stated that the equality of arms principle cannot be respected where the accused is "... unable to properly instruct his legal representative".[72]

2.66 It therefore becomes problematic if an individual cannot choose counsel to represent their interests. Appointing an advocate to act on behalf of the relevant party clearly limits the rights set out in sections 24, 25 and 27 of NZBORA including the fact that not having counsel of choice may impinge upon the right to present evidence as the individual wishes. On the other hand, the use of a court-appointed advocate (a "special advocate")[73] may at least ensure that the individual is represented at all times while allowing national security information to be considered.[74]

2.67 The House of Lords acknowledged that, although there may be circumstances where the appointment of special advocates is necessary, there are potential issues in relation to the ability of the client to instruct and communicate with counsel that can undermine the fair trial rights relating to legal representation.[75] Were special advocates to be used in a criminal trial, any provisions restricting communication with the defendant would be contrary to the express provision under Article 14(3)(b) of the ICCPR that everyone charged with a criminal offence shall have the "right to communicate with counsel of his own choosing" and the protections under section 23 of NZBORA.

2.68 If a special advocate model was to be adopted, comparing the experience of other jurisdictions may be useful. In Canada, special advocates are permitted limited communication with the affected party that they represent, while in the United Kingdom, there is no communication (except in the Employment Court context where there is communication but not about the substance of the closed material itself). In the United States of America, lawyers are security-cleared but continue to have ongoing consultation with their clients. A further alternative is for the court to monitor communication. These issues will be addressed in more detail in Chapter 6.

71 *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* above n 30, at [40]. The right to choose counsel as found in ICCPR, above n 20, art 14(3)(d).

72 *Wolf v Panama* CCPR/C/44/D/289/1988 (1992).

73 See Chapter 6 for a full discussion of special advocates.

74 There will likewise be a violation of article 14(3)(d) if the lawyer appointed fails to in fact advocate on behalf of the interests of the individual: United Nations Human Rights Committee *Estrella v Uruguay* A/38/40 (1983) at 150. The European Court of Human Rights has expressed a similar view, stating that "an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society ... if a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness": *S v Switzerland* (12629/87; 13965/88) ECHR 28 November 1991 at [48].

75 *Roberts v Parole Board* [2005] UKHL 45 at [83] on appeal from [2004] EWCA Civ 1031.

Independent and impartial court

2.69 The principle of having an independent and impartial court is relevant because fairness requires that the person making a decision on the rights of the parties does so without any bias that could influence the decision. This is an especially important protection in criminal proceedings where the outcome may affect an individual's right to liberty. In New Zealand judicial independence is considered a cornerstone of our court system. Accordingly, section 25(a) NZBORA affirms the right to an independent and impartial court in criminal proceedings.

2.70 An independent and impartial court or tribunal is one that is independent of the executive and legislative branches of government, or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.[76]

2.71 In practice, independence and impartiality are ensured by a number of statutory and non-statutory mechanisms. Legislation protects judicial tenure and financial security. Judges are appointed by the Governor-General on the recommendation of the Attorney-General,[77] and strong constitutional conventions apply to ensure that the advice of the Attorney-General is independent of political party considerations. Complaints about the conduct of judges are considered by an independent body.[78] The integrity of judges themselves and their adherence to the judicial oath is also a strong protection.[79] An independent and impartial judiciary safeguards against any transgression of government powers.

2.72 The principle of independence suggests that decisions about national security information should not be left solely to the preserve of the Executive. For the court to simply accept an assertion that information cannot be disclosed without undertaking further analysis would, in our opinion, be an unacceptable avoidance of the court's duty and responsibilities as captured in NZBORA.

2.73 It is suggested that it should be for the Crown (with input from the intelligence community) to assess what constitutes a threat to national security, but that the court should have a supervisory role when a security threat is claimed as a reason for departing from natural justice requirements. This would help create a "culture of justification"[80] as outlined above. Chapter 6 further considers how this might operate in practice.

THE RIGHT TO NATURAL JUSTICE IN THE FACE OF A RISK TO NATIONAL SECURITY

2.74 International commentary and case law suggests that there is a threshold by which the cumulative breach of due process rights[81] would make justice impossible but that the breach of one of the bundle of rights would not, of itself, preclude a fair outcome.[82] Context plays an important part in determining whether and to what extent the rights of the individuals can

76 United Nations Human Rights Committee, above n 59.

77 There are exceptions for example magistrates are appointed under the District Courts Act 1947 on the advice of the Minister of Justice.

78 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The Law Commission in its review of the Judicature Act 1908 expressed doubt as to whether this was a sufficiently robust approach: Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

79 See the Oaths and Declarations Act 1957, s 18.

80 Butler, above n 51, at 554 quoting Etienne Mureinik.

81 The full set of rights as provided for under the Universal Declaration of Human Rights, above n 52, and the ICCPR, above n 20, are: (1) notification of charges; (2) the presumption of innocence; (3) counsel of choice or state funded counsel who is effective and with whom confidential communications may be had; (4) prompt trial; (5) equality of arms; (6) interpreter; (7) presence at trial; (8) not be compelled to confess; (9) call and examine witnesses; (10) fair civil and criminal proceedings; (11) minimum fair trial protections even in times of national emergency; (12) independent and impartial judiciary; (13) public trial; (14) judgement made public; (15) benefit from a lighter penalty if one is available; (16) application of the maxim "no crime if no law"; (17) no double jeopardy; (18) right to appeal; (19) right to a remedy.

82 David Weissbrodt *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Brill Academic Publishers, Netherlands, 2001) at 153.

be limited without being undermined. This is equally true where the right to natural justice is seemingly threatened by a risk to national security.

2.75 For example, in the context of addressing whether the human rights under Article 14 of the ICCPR could be derogated from due to a state of emergency, the United Nations Human Rights Committee noted in General Comment 29[83] that states "must act within their constitutional and other provisions of law".[84] In other words states are required to follow a legal process to ensure any derogation is justifiable and can be shown to be so justifiable. To set aside rights protected under the ICCPR, the level of national security threat must be significant.[85]

2.76 Article 4 of the ICCPR recognises that in times of public emergency threatening the life of the nation, there may be exceptions to the protections listed in the ICCPR. However, the United Nations Human Rights Committee stated in General Comment 29 that "parties may in no circumstances invoke Article 4 of the Covenant as justification for deviating from fundamental principles of fair trial".[86] Any decision to set aside the guarantees in Article 14 requires taking into account the state's other international obligations and cannot be discriminatory.[87]

2.77 The viability of derogation is linked to the nature of the measures taken. The state in question must justify both the state of emergency and the derogation and the United Nations Human Rights Committee has previously opted not to legitimise derogations on the basis that there was insufficient "submission as to facts or law to justify such derogation".[88]

2.78 Derogation from the significant human rights protections afforded under the ICCPR is reserved for extreme circumstances. Certainly the requirement that there must be an officially declared state of emergency would preclude a government from relying on Article 4 as a means by which to set aside the protections in Article 14 in order to avoid disclosure of national security information.[89]

2.79 A potential or actual threat to national security presents a clear dilemma in terms of the extent to which natural justice and open justice rights are absolute.[90] Yet, the right to natural justice and the right to open justice are crucial because the rule of law is an important constitutional principle upon which New Zealand democracy is based.

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83 General Comments are highly authoritative interpretations of the law issued by the United Nations Human Rights Committee. Having signed the Vienna Convention on the Law of Treaties 1965 in 1970 (note article 31) New Zealand accepts the validity of General Comments as a tool for interpreting the law.

84 United Nations Human Rights Committee *General Comment No 29: Status of Emergency (Article 4)* CCPR/C/21/Rev1/Add11 (2001) at [2].

85 Some have gone so far as to say it must be a "grave ... political or military threat to the entire nation": Manfred, above n 29, at 212.

86 Amnesty International considers that "all criminal and administrative trials should be conducted in accordance with internationally recognized fair trial rights" but that the right to a fair trial "depends on the entire conduct of the trial" and "is broader than the sum of the individual guarantees" of due process that are given to an individual depending on the nature of proceedings for example the presumption of innocence in criminal proceedings: Amnesty International *Fair Trial Manual* ((2nd ed) Amnesty International Publications, London, 2014) at 118.

87 There is a two stage process whereby the country in question must first proclaim a state of emergency and secondly provide notification of the derogation due to the state of emergency proclaimed. Pursuant to Article 4, notification requires both informing the United Nations of the derogation and secondly providing reasons for it. The notification requirements are not merely technical. General Comment 29 clarifies that the proclamation "requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed". Notification requires specificity in particular the "date, extent and effect of, and procedures for imposing and for lifting any derogation under Article 4 should be fully explained in relation to every article of the Covenant affected by the derogation": United Nations Human Rights Committee *Consolidated Guidelines for State Reports under the ICCPR* CCPR/C/66/GUI/Rev2 (2001) at C3.

88 United Nations Human Rights Committee *Ramirez v Uruguay* A/35/40 (1977) at [17].

89 For a list of states that have declared a state of emergency and the type of emergencies for which declarations are made see *Question of Human Rights and States of Emergency: List of States Which have Proclaimed or Continued a State of Emergency: Report of the Office of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Decision 1998/108* E/CN.4/Sub.2/2005/6 (7 July 2005).

90 Although on the face of it the protections in Article 14 may be set aside in times of public emergency, the United Nations Human Rights Committee considers that because fair trial guarantees may not be set aside under international humanitarian law (that is the law that applies during times of war and war by its very nature is a threat to the life of the nation) certain fair trial rights should not be set aside even where the threat to the life of a nation exists: United Nations Human Rights Committee, above n 84, [11] and [16] . Indeed, fair trial protections have been codified in the four Geneva Conventions and two Additional Protocols.

2.80 The breach of a fair trial protection does not of itself lead to a failure to provide natural justice. However, where a fair trial becomes impossible (for example due to an accumulation of breaches), then the trial itself becomes void. Context is important in determining whether a fair trial can be maintained.[91]

2.81 If natural justice and open justice rights are undermined, this impacts not only on the individual in question but can have implications for society as a whole. Any exceptions to natural justice and open justice protections must therefore be preceded by debate, which is the goal of this project.

2.82 This chapter has illustrated that the range of national security interests that may come into play are varied and are subject to extensive international debate. We believe it is possible to protect those national security interests while also promoting principles of natural justice and open justice. Any law reform proposals to permit derogation from fundamental rights should be developed in a carefully monitored rights-based framework.

2.83 Before turning to consider the options for reform in Chapter 6, we now turn to consider the issues that arise when dealing with national security information in criminal and then civil and administrative matters.

91 *Barberà, Messegué and Jabardo v Spain* (10588/83; 10589/83; 10590/83) ECHR June 1994. For example, the issue in *Prosecutor v Karadzic* was whether the cumulative effect of disclosure violations prejudiced the defendant's right to a fair trial: *Prosecutor v Karadzic (Decision on Accused's Second Motion for New Trial for Disclosure Violations)* ICTY Trial Chamber IT-95-5/18-T 14, August 2014 at [16].

Chapter 3
Criminal proceedings

INTRODUCTION

3.1 The starting position in criminal law is that relevant material in the possession of the prosecution must be disclosed to the defence prior to the trial, and that, at trial, the defendant is entitled to examine all evidence put before the court.[92] This includes information gathered by the prosecution that undermines their case, such as inconsistent witness statements. Disclosure is a vital protection for the accused, allowing them to answer the case being brought and providing scope to question the prosecution's evidence and challenge their version of events. This is the context for the robust obligations now given statutory grounding in the Criminal Disclosure Act 2008, the Evidence Act 2006, and through the New Zealand Bill of Rights Act 1990 (NZBORA).

3.2 However, disclosure obligations have limits. The common law has long recognised the importance of protecting other interests, such as national security or the continued use of sensitive Police investigative methods.[93] These exceptions are now contained in statute.[94] Where one of the statutory grounds is met, information can be withheld or released in a modified manner (such as through anonymous witnesses giving evidence behind a screen where they may be at risk if their identities are divulged).

3.3 An important part of the background to this discussion is the need to ensure that our judicial system has the necessary tools to manage the trial of someone accused of a terrorist activities, in which national security information forms a key part of the evidence (for example, linking the individuals accused of a terrorist act in New Zealand to overseas terrorist entities). While this review is not focused exclusively on such cases, it provides an opportunity to examine current mechanisms for protecting security evidence if a case of this sort was ever to occur in New Zealand. As will be discussed further below, the Criminal Disclosure Act 2008, the Criminal Procedure Act 2011 and the Evidence Act 2006 provide grounds for withholding evidence that raises national security risks. This chapter will consider whether there is a need for additional mechanisms to protect national security information in criminal proceedings, taking account of the fundamental importance of ensuring a fair trial while also giving law enforcement agencies the necessary tools to protect public safety through investigating and prosecuting offences.

GUIDING PRINCIPLES

Fair trial rights

3.4 The purpose of a criminal trial is to allow evidence to be properly tested. In an adversarial legal system, evidence is tested by the defence counsel, who will advance arguments on behalf of

92 Criminal Disclosure Act 2008, s 13.

93 Exceptions are also available when important private interests arise, for example, the safety of witnesses.

94 The Criminal Disclosure Act 2008, while providing a comprehensive disclosure process, does not affirm its own status as a code, leaving the role of pre-existing common law rules unclear. The Evidence Act 2006 provides in s 10 that its provisions may be interpreted in light of the common law, so far as the common law is consistent with its principles. In practice, the withholding provisions of the Criminal Disclosure Act 2008 and the Evidence Act 2006 cover the same sorts of situations that would have previously given rise to a claim for common law public interest immunity. It is therefore questionable whether there is an ongoing role for this immunity in criminal proceedings.

the accused. This requires the defence to have access to relevant information obtained by the prosecution, including information that harms the prosecution case, both before proceedings commence and during the trial where evidence is presented.[95] There is also public interest in full disclosure of relevant information in criminal proceedings, as this is a core component of open justice, discussed above in Chapter 2.[96]

3.5 The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) both stipulate that in the determination of a criminal charge, everyone is entitled to a fair and public hearing by an independent and impartial tribunal.

3.6 The ICCPR also sets out minimum guarantees relating to criminal trials. Persons accused of a crime must be informed of the charges against them, must have adequate time and facilities for the preparation of a defence and the ability to communicate with a counsel of their choosing, are entitled to defend themselves in person or through legal assistance of their choosing, and are entitled to examine witnesses.[97]

3.7 In addition to New Zealand's own commitment to the values of fair criminal processes through the common law, these international human rights instruments strongly influenced the development of NZBORA. Section 27 provides that everyone has a right to justice in all proceedings, and section 24 lists the rights of a person charged with an offence including the right to adequate time and facilities to prepare a defence, as discussed in Chapter 2. Section 25 lists the minimum rights of an accused in a criminal trial, of which the following are relevant:

- The right to a fair and public hearing by an independent and impartial court (section 25(a)).
- The right to be presumed innocent until proved guilty according to law (section 25(c)).
- The right to be present at the trial and to present a defence (section 25(e)).
- The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution (section 25(f)).

3.8 Some of these rights are given more detailed effect in the Criminal Disclosure Act 2008, the Criminal Procedure Act 2011, and the Evidence Act 2006 discussed below.

3.9 International human rights jurisprudence does not readily permit departure from fair trial protections. For example, the European Court of Human Rights has said that "having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied".[98]

3.10 As the New Zealand Supreme Court noted in *R v Condon*,[99] "the assessment of the fairness of a trial is to be made in relation to the trial overall. A verdict will not be set aside merely because there has been irregularity in one, or even more than one, facet of the trial." The Court also noted that "the right to a fair trial cannot be compromised – an accused is not validly convicted if the trial is for any reason unfair." It is important for this review to keep these statements in mind. While there may be justifiable limits on the minimum standards of criminal procedure

95 The accused must also have access to the information so that they can give proper instructions to counsel.

96 See above at [2.48].

97 ICCPR, above n 20 art 14(3).

98 *Van Mechelen v Netherlands* (1998) 25 EHRR 647 (ECHR) at 691. In that case, the secret witness statements were the only evidence used by the Court in deciding that the accused were guilty.

99 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].

under section 25 of NZBORA, the overall conduct of proceedings must still be such as to ensure a fair trial.

Protection of other interests

3.11 Sometimes, the disclosure of relevant evidence will have implications for other important public interests. When other interests are in play, the court must seek an accommodation that will protect the accused's right to procedural justice.

3.12 Security agencies at times pass information to the Police to assist in criminal investigations and if the investigations lead to a prosecution, the national security information might give rise to disclosure obligations. If the information forms part of the background only, and is not relevant to an issue in the proceedings, it will not need to be disclosed. However, information would ordinarily be disclosed if it is material to the case against the defendant, unless there is a ground to oppose disclosure. There may be several reasons to oppose the disclosure of national security information. Most obviously, the information itself might be of a sort that presents an immediate risk to safety and security if made public. More commonly, the information might relate to the methods of information gathering by security agencies, and the disclosure of this evidence will undermine the ability to gather similar evidence in the future, or put an undercover agent in danger. Alternatively, the information may have been sourced through one of New Zealand's international security information-sharing relationships, and the disclosure might damage that relationship.

3.13 These issues could arise in the "worst-case scenario" criminal case of a terrorist attack. However, these issues also arise in more frequently occurring proceedings, such as the importation of illegal drugs. In any of these cases, the public interest in maintaining secrecy might be seen to outweigh the public and private interests in disclosure. For the purposes of this review, we are interested in where the lines should be drawn between the following responses:

(a) Excluding the evidence from the proceedings.

(b) Allowing the evidence to be used but with protective mechanisms such as partially redacting a document.

(c) Dismissing the proceedings.

3.14 It is our preliminary view that the trial judge is best placed to make these decisions, subject to the prosecution's ability to withdraw charges at any time. These decisions should be guided by the need to ensure a fair trial, the need to protect security information, and the public interest in prosecuting an offence. Legislation needs to give sufficient guidance to enable the trial judge to make these decisions in a principled manner, taking account of the particular facts of the case at hand. The process should focus on mechanisms to accommodate both sets of interests, and should therefore tend to enable evidence to be introduced with protections rather than being withheld or requiring the proceedings to be dismissed. The question is whether the current law provides for this or whether there is a need for reform. As the requirement of a fair trial is absolute (that is, no-one should be convicted of a criminal offence after an unfair trial), it is necessary to include the option of dismissing the proceedings. This is a backstop for the rare cases where national security evidence cannot be adequately protected through other mechanisms and cannot be excluded because doing so would result in an unfair trial.

INFORMATION SHARING BETWEEN SECURITY AGENCIES AND THE POLICE

3.15 The working relationship between the Police and the security agencies has evolved over many years. Section 8C of the Government Communications Security Bureau Act 2003 provides that one of the functions of the Government Communications Security Bureau is to co-operate with, and provide advice and assistance to the Police. Section 4H of the New Zealand Security Intelligence Service Act 1969 provides that for the purpose of preventing or detecting serious crime in New Zealand or any other country the Director of Security may communicate material that comes into the possession of the Security Intelligence Service to the Police or to any other persons, and in any manner, that the Director thinks fit.

3.16 There is an inherent dilemma. Security agencies have a mandate to gather information, and must protect their information-gathering capabilities, while the Police have a mandate to investigate and prosecute offences. It is in the public interest that security agencies tell the Police if they have information that suggests there is a threat to public safety. Security agencies may seek to protect their information through using classified information to generate unclassified information that is then passed to the Police, or selective declassifying of information that does not by itself pose a security risk if disclosed. They may also seek a commitment by the Police to protect the national security information that they do receive by withholding it under the available statutory provisions if a prosecution is brought.

3.17 One issue that creates a concern for both the Police and security agencies is the use of national security information as grounds for obtaining a warrant. For example, security agencies may have information obtained through covert surveillance that indicates an individual is planning to commit an offence. This information may be sufficient grounds for a Police warrant, which would then be used to obtain further evidence, but the agencies may be concerned that the covert information could enter the public domain if the warrant is later challenged and may therefore be hesitant about passing it on.

3.18 It is common for some passages in warrants to be redacted. The concern of security agencies is that this might not be sufficient. One option might be to provide a mechanism so that the grounds for issuing a warrant may be supressed if disclosure would create a national security risk.

QUESTION

Q1 How should national security information be protected when used as grounds for a warrant?

ISSUES ARISING FROM THE CURRENT LAW

Criminal Disclosure Act 2008

3.19 The Criminal Disclosure Act 2008 is directed at the disclosure of information by the prosecution to the defence before proceedings have begun.[100] Section 13 of the Criminal Disclosure Act 2008 requires the disclosure of any relevant information, unless there is a reason to refuse the disclosure. The prosecutor must disclose a list of information that is being withheld and the reasons, and if the defendant requests, they must also provide grounds in support

100 Prior to the Criminal Disclosure Act 2008, New Zealand had an uneasy patchwork of common law disclosure obligations combined with the Summary Proceedings Act 1957 and buttressed by the Official Information Act 1982 and the Privacy Act 1993. This raised several problems of application discussed in our previous reports on criminal disclosure. Law Commission *Criminal Procedure: Part One - Disclosure and Committal* (NZLC R14, 1990) and Law Commission *Criminal Prosecution* (NZLC R66, 2000).

(unless giving grounds would itself prejudice the protected interests that justify nondisclosure of the information in question).

3.20 Section 16 sets out reasons for withholding information. Of relevance to this project, section 16(1)(g) provides the following grounds for a prosecutor to withhold information:

> (g) the disclosure of the information would be likely to prejudice—
>
> (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
>
> (ii) 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…

3.21 Other grounds include that the disclosure is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences,[101] that the disclosure is likely to endanger the safety of any person,[102] that the material should be withheld to protect undercover Police officers[103] or witnesses[104] or victims,[105] and that the disclosure would be likely to facilitate the commission of another offence.[106] Material can also be withheld if disclosure would constitute a contempt of court,[107] if the material is protected by other rules of evidence[108] or disclosure would be contrary to the provisions of another enactment.[109] Finally, information need not be disclosed if it is publicly available or has been previously made available, if it does not exist, or if it is irrelevant.

Pre-trial hearing on disclosure

3.22 The initial decision whether to disclose or withhold information is made by the prosecutor. The defendant is then able to challenge this decision under section 30, which provides two possible avenues for objection. The first is that the reasons claimed for non-disclosure do not apply. The second is that, even though the information may be withheld (that is, the reasons apply), the interests in favour of disclosure outweigh the interests protected by withholding the information. Under section 30, the court may order disclosure of the information subject to "any conditions that the court considers appropriate". This affirms the court's role in weighing the competing interests under the Act. There is also case law to the effect that the court may view the information subject to the application.[110]

3.23 There is a disadvantage for the defence. They would be limited in their ability to present arguments for disclosure given that they would not have seen the information. The court would be put in a difficult position as it would not have the benefit of informed defence submissions when deciding whether to disclose information. This issue arises in respect of all grounds under section 16 but could be particularly problematic for the national security grounds because the court has less experience assessing these grounds and there is less case law to provide guidance on the appropriate balancing.

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101 Criminal Disclosure Act 2008, s 16(1)(a).
102 Criminal Disclosure Act 2008, s 16(1)(b).
103 Criminal Disclosure Act 2008, s 16(1)(d).
104 Criminal Disclosure Act 2008, s 16(1)(e).
105 Criminal Disclosure Act 2008, s 16(1)(f).
106 Criminal Disclosure Act 2008, s 16(1)(h).
107 Criminal Disclosure Act 2008, s 16(1)(i).
108 Criminal Disclosure Act 2008, s 16(1)(c) and s 16(1)(j).
109 Criminal Disclosure Act 2008, s 16(1)(k).
110 *Edwards v R* [2012] NZCA 375.

3.24 One possible solution would be to provide for a security-cleared special advocate to present arguments on behalf of the accused, or alternatively, a security-cleared amicus curiae to provide advice to the court to better inform their decision. The advantage of the special advocate is that they could view the information and form an independent view on both its level of security sensitivity, and the importance to the case being advanced by the defence. The special advocate would be able to advance the claim for disclosure on behalf of the defendant if the information was likely to assist their case. There would be procedural questions to be answered on matters such as the level of communication to be permitted between the special advocate and the defence's chosen counsel. These issues apply wherever a special advocate might be called upon and are addressed more comprehensively in Chapter 6.

QUESTION

Q2 Should there be a role for special advocates in a pre-trial hearing on disclosure under the Criminal Disclosure Act 2008?

Evidence Act 2006

3.25 The Evidence Act 2006 concerns the admissibility of information as evidence in civil as well as criminal proceedings.[111] Section 6 sets out its purpose as follows:

> The purpose of this Act is to help secure the just determination of proceedings by—
>
> (a) providing for facts to be established by the application of logical rules; and
>
> (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
>
> (c) promoting fairness to parties and witnesses; and
>
> (d) protecting rights of confidentiality and other important public interests; and
>
> (e) avoiding unjustifiable expense and delay; and
>
> (f) enhancing access to the law of evidence.

3.26 The guiding principle of the Act is that relevant evidence is to be admitted unless there is a statutory reason not to.[112] Evidence is relevant if it "has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".[113] There is therefore a two-stage analysis: first, is the information relevant, and second, is there any reason to depart from the general rule and exclude the evidence?

Excluding evidence

3.27 The Evidence Act 2006 contains exceptions to the general rule of admissibility, allowing relevant evidence to be excluded in order to protect other interests. Of particular relevance to this review are the grounds in section 69 and section 70. Section 69 gives the judge a broad discretion to exclude confidential information. This section has recently been interpreted to extend to information that the Police or security agencies hold in confidence.[114] Section 70 provides a protection for "matters of state". This gives the judge the discretionary power to direct that a communication or information not be disclosed if the judge is satisfied that the public interest in disclosure is outweighed by the public interest in withholding. Under section

111 The Evidence Act 2006 applies only to cases before a court, not to cases before a tribunal.

112 Evidence Act 2006, ss 7–8.

113 Evidence Act 2006, s 7(3).

114 *Dotcom v Attorney-General* [2013] NZHC 695 at [19]–[29].

52(2), an order under section 69 or 70 may be made on the judge's own initiative or on an application by an "interested person".

3.28 Section 70 cross-references the non-disclosure grounds in section 6 of the Official Information Act 1982. This addresses some of the same grounds that are covered in section 16 of the Criminal Disclosure Act 2008: security and defence, entrusting of information to the Government of New Zealand, maintenance of law and investigation of offences, and personal safety. It also allows information to be withheld if disclosure would seriously damage the New Zealand economy.[115] The judge must take account of the nature of proceedings when making a decision under section 69 or section 70, meaning that greater weight will be given to the interests in favour of disclosure in criminal cases compared with civil cases.

3.29 If the information is withheld under section 70, it will not be available to support the prosecution's case. It will be excluded from the proceedings and must not be taken into account in reaching a decision (even if the trier of fact is the judge who examined the evidence for the purpose of determining the disclosure question). There is no provision in New Zealand for evidence to be withheld from the accused, but also to be used against him or her.[116]

Protecting evidence used at trial

3.30 In addition to the provisions that allow evidence to be excluded, the Evidence Act 2006 also provides mechanisms to enable evidence to be admitted in ways that protect other interests. In the context of criminal proceedings, the question for this review is whether these tools are sufficient to address the potential use of national security information.

3.31 Of particular importance, section 52(4) of the Evidence Act 2006 gives the trial judge a broad discretion to limit the evidential use of "material relating to matters of State". Under this section, the judge may "give any directions that are necessary to protect the confidentiality of, or limit the use which may be made of ... any communication or information that is the subject of a direction under section 69 (confidential information) or section 70 (matters of State) ...". We are not aware of any case where this has been used. This section could be interpreted as giving the trial judge significant discretion to control the evidential use of national security information.

3.32 The Evidence Act 2006 also contains specific provisions to allow evidence to be given in modified form. These include the rules that allow for a witness to give evidence other than in open court (Part 3, Subpart 5 of the Act), and those that allow hearsay evidence in expanded circumstances compared with the common law (Part 2, Subpart 1 of the Act). The expanded scope for admissibility of hearsay would enable security agents to repeat information received from informers based overseas who are unable to present evidence on their own behalf. Sections 108 and 109 contain protections for undercover Police officers, allowing evidence to be presented without revealing identifying details. There are no analogous provisions for undercover security agents.[117] This is an area we consider could be usefully reformed.

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115 Official Information Act 1982, s 6(e).

116 We note for completeness that, under the National Security Information (Criminal Proceedings) Act 2004, Australian law allows evidence to be used against an accused in a criminal trial without the evidence being made available to the accused or the accused's lawyer. A certificate from the Attorney-General is required for evidence to be withheld in this manner. These provisions have been widely criticised by Australian academics and members of the bar, see for example Miiko Kumar "Secret Witnesses, Secret Information and Secret Evidence: Australia's Response to Terrorism" (2011) 80 Miss LJ 1371 at 1394; John von Doussa "Reconciling Human Rights and Counter-Terrorism—A Crucial Challenge" (2006) 13 JCULR 104 at 118; Luke Beck "Fair enough? The National Security Information (Criminal and Civil Proceedings) Act 2004" (2011) 16 Deakin LR 405; and *Faheem Khalid Lodhi v R* [2007] NSWCCA 360 at [21].

117 Spain, Germany and Sweden do not permit classified intelligence information to be used in court proceedings. However, provision is made for the introduction of "second-hand evidence" or "hearsay evidence" from witnesses (such as an intelligence officer or anonymous testifier) who have not in fact heard or seen the evidence: Directorate-General for Internal Policies *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Parliament, September 2014).

QUESTIONS

Q3 Do sections 69 and 70 of the Evidence Act 2006 provide sufficient guidance to a trial judge in determining whether to exclude national security information?

Q4 Should undercover security agents be able to use the same protections currently available to undercover Police officers, and give evidence anonymously?

Q5 Does the Evidence Act 2006 provide sound mechanisms for national security information to be used in a criminal trial in a controlled way that protects against risks associated with full disclosure, while still allowing for it to be properly tested, given the primacy that should be afforded to fair trial rights?

Criminal Procedure Act 2011

Suppression orders

3.33 Section 205 of the Criminal Procedure Act 2011 provides as follows:

> **Court may suppress evidence and submissions**
>
> (1) A court may make an order forbidding publication of any report or account of the whole or any part of the evidence adduced or the submissions made in any proceeding in respect of an offence.
>
> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
>
> ...
>
> (f) prejudice the security or defence of New Zealand.

3.34 This section affects how cases may be reported, both in law reports and in the news media, but does not affect how the case is heard. Conversely, section 197 of the Criminal Procedure Act 2011 contains the power for the trial judge to exclude the public, but not the defendant or their lawyers, from the court. The order must only be made if it is "necessary to avoid" one of the adverse outcomes listed, and only if a suppression order under section 205 is insufficient. Of relevance to this review, one of the grounds for "clearing the court" is that it is necessary to avoid prejudicing the security or defence of New Zealand. Under section 197(3), even if the court is cleared, the announcement of the verdict or decision and the sentence must take place in public. However, the court may decline to publicly state all the considerations taken into account if there are exceptional circumstances why these should be withheld.[118]

3.35 This section demonstrates how open justice is currently reconciled with other interests deserving of protection within our criminal law. We consider that the "necessary to avoid" test under this section is appropriate given the importance of open proceedings in criminal law.

Dismissing a charge

3.36 Section 147 of the Criminal Procedure Act 2011 enables the court to dismiss a charge before or during the trial. This does not expressly cover the situation that would arise where security interests require information to be withheld, but doing so would result in an unfair trial. An

118 While New Zealand has not yet had a case involving suppression of details of terrorist-type offending, this has occurred recently in the United Kingdom in the case of *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861, [2015] EMLR 2. For a discussion of the implications of suppression for open justice, with a particular focus on the role of reporting in news media, see Ian Corbain "Why is the crux of the Incedal case a secret? You're not allowed to know" *The Guardian* (online ed, London, 26 March 2015).

expansive reading of the powers in section 147 might allow for this, especially taking account of the obligations to give effect to fair trial rights under NZBORA.

3.37 It is necessary that proceedings can be dismissed in situations where there is highly relevant national security material because otherwise there is a risk that either security interests or fair trial rights will become seriously compromised. For clarity, it may be desirable to amend section 147 of the Criminal Procedure Act 2011 to make this explicit, and possibly also to amend section 30 of the Criminal Disclosure Act 2008 to provide that dismissing the case is a possible resolution if security interests are sufficient to justify nondisclosure under section 16, but withholding the information would prejudice a fair trial. In most cases we would expect the prosecution to withdraw the charges however these powers would be available as a backstop.

QUESTIONS

Q6 Do the current provisions allowing suppression orders provide for proper balancing of national security interests on the one hand and open justice interests on the other?

Q7 Is there a need to make explicit the expectation that criminal proceedings will be discontinued if there is no other way to protect national security evidence and avoid prejudice to the accused, for example, through giving the judge the power to order that proceedings be dismissed rather than information disclosed?

JUDICIAL BALANCING

3.38 Decisions to exclude evidence will be guided by the judge's duty to ensure a fair trial for the accused, and consequently to prevent information from being taken into account if it is unfairly prejudicial. While the public interest in prosecuting an offence is greatest when the offence is serious, the stakes are also highest for the accused person when the potential sentence is severe. For the purposes of this review, we are primarily concerned with the fair trial implications of withholding evidence that assists the defence case, or conversely, introducing incriminating evidence without allowing it to be properly tested.

3.39 The Evidence Act 2006 gives the trial judge the task of determining when it is in the interests of justice to allow evidence to be used even though it cannot be fully disclosed in open court, and when it is in the interests of justice for evidence to be excluded because the finder of fact will not be able to adequately assess reliability in the circumstances. There is a need for mechanisms to allow information gathered by security agencies to be presented as evidence while protecting the aspects of the information that would create risks for national security if disclosed. This is subject to the requirement that the evidence must be presented in a way that allows it to be properly tested, thereby protecting fair trial rights.

3.40 The current legislation presents a principled framework for reconciling the competing interests at hand. However, there are some areas that we consider could be usefully reformed, as indicated in the discussion above. We particularly invite consideration of whether the provisions allowing undercover Police officers to give evidence anonymously should be extended to undercover security agents. We also seek feedback on whether there is a need to provide additional specific powers to trial judges, for example, the power to appoint a special advocate in a claim under section 69 or section 70, or whether the current levels of judicial discretion are sufficient.

QUESTION

Q8 Are any further mechanisms, or any expansion of existing mechanisms, needed to enable national security information to be used as evidence in criminal trials, including for terrorist acts?

Chapter 4
Administrative decisions and review

INTRODUCTION

4.1 This chapter considers how national security information might be used and protected in administrative decisions made by officials, and in challenges to those decisions. It is concerned with situations in which information relevant to the decision would normally be disclosed to the affected person but for the fact that the information is sensitive.

4.2 We consider how national security information should be dealt with at the initial decision making stage, how the use of national security information should inform the review or appeal provisions available and what mechanisms could be established to facilitate an effective decision making process that upholds natural justice while protecting security information.

USING NATIONAL SECURITY INFORMATION FAIRLY IN ADMINISTRATIVE DECISIONS

4.3 Every person has the right to the observance of natural justice by any public authority that has the power to make a determination in respect of that person's rights, obligations or interests.[119] However, the particular context of the decision in question will affect the degree to which the requirements of natural justice might be derogated from or modified. Legislation can constrain how natural justice is given effect, but in the absence of an express intention to remove it, the common law obligation to comply with the requirements of natural justice will apply.

4.4 In some contexts where reliance on national security information is expected to be more common (such as immigration, the issuing of travel documents, and terrorism suppression), Parliament has already legislated to provide special procedures. These statutory procedures are discussed in more detail below. It is also possible that national security information might be used in other decisions made by Ministers or public officials. As discussed in Chapter 2, where national security information is relevant, there is a strong argument that it should be able to be taken into account by the decision maker.

4.5 Where national security information is used in an administrative decision by a government department, there are questions around how much of that information should be provided to the person affected, and at what stage that information should be provided in order to respect the person's right to natural justice.

4.6 It might not be possible to provide the person affected by the decision with the information relied on without risking national security. In such cases, the person's ability to respond to any allegations or concerns arising from the information will be restricted. Even once a decision is made, it still might not be possible to give the person the full reasons for the decision, hampering their ability to decide whether or not to appeal or challenge the decision. This last factor is especially important where a person must weigh up their prospects of success against the risks (financial or otherwise) of bringing appeal or review proceedings.

119 New Zealand Bill of Rights Act 1990, s 27(1).

4.7 Different approaches to ensuring that natural justice is respected at the initial decision making phase are already enacted in legislation.

Immigration Act 2009

4.8 The Immigration Act 2009 places controls on the way in which "classified information" (as defined in the Act) can be used by the Minister or a refugee and protection officer for the purposes of making certain decisions.[120] Before information can be used the Minister must first determine if the information relates to matters of security or criminal conduct.[121]

4.9 Where classified information might be relevant to a decision under the Act, the Minister can request a briefing from the Chief Executive of the agency that holds the information, however, the content of that briefing is determined by the Chief Executive.[122] The Act also provides that the Minister may seek the assistance of a security-cleared assistant.[123] The briefing provided to the Minister must be balanced. It must not be misleading due to the omission of relevant information, and must include any classified or non-classified information that is favourable to the person affected. The Chief Executive also has an ongoing obligation to provide further relevant information as it becomes available until the decision concerned is made or subsequent proceedings are completed.[124] The Chief Executive may also withdraw, update or add to the classified information provided to the Minister at any time. Where this happens the Minister must repeat the assessment of whether or not the information is relevant before the information can be used.[125] If the information, or part of it, is withdrawn the decision maker (either the Minister, refugee and protection officer, or the Tribunal) must disregard the withdrawn information when making their decision.

4.10 Where classified information is used to make certain decisions, the person affected must be given a summary of the national security information before a decision is made. The content of the summary is agreed between the Chief Executive of the relevant agency and the decision maker (the Minister or refugee and protection officer). Crucially, for the purposes of making the relevant decision, the classified information can only be relied on to the extent that the allegations arising from it can be summarised.[126]

4.11 If an adverse decision is made relying on classified information, the person affected must be told that such information was relied on, the reasons for the decision (as far as can be done without disclosing the information), what appeal rights they have, and that they can be represented by a special advocate if an appeal is available. Reasons must be given in writing.[127]

Telecommunications (Interception Capability and Security) Act 2013

4.12 Part 2 of the Telecommunications (Interception Capability and Security Act 2013 (TICSA) relates to the interception duties of network operators. Under this Part, national security information is not disclosed to the person or body affected at the initial decision making stage.[128]

120 Classified information may only be used for decisions relating to visas, entry permission, detention, deportation, or determinations relating to refugee and protection status: Immigration Act 2009, s 39.

121 Immigration Act 2009, s 33(1).

122 Immigration Act 2009, ss 34(1)(a) and 34(1)(b).

123 Immigration Act 2009, s 34(1)(b).

124 Immigration Act 2009, ss 36(1)(c) and 36(2).

125 Immigration Act 2009, s 37.

126 Immigration Act 2009, s 38.

127 Immigration Act 2009, s 39.

128 Telecommunications (Interception Capability and Security) Act 2013, s 19.

However, the Act provides a review mechanism to enable scrutiny of the decision and the information by a court and the appointment of special advocates to assist in the process.[129]

New Zealand background: Ahmed Zaoui

4.13 The circumstances surrounding the issuing of a security risk certificate in respect of Mr Ahmed Zaoui in 2003 and his subsequent detention provide a useful backdrop to the discussion of the issues in this chapter by highlighting several of the interests that come into play.

4.14 Mr Zaoui arrived in New Zealand in December 2002 and claimed refugee status. In March 2003 the Director of the NZSIS provided a security risk certificate[130] concerning Mr Ahmed Zaoui to the Minister of Immigration. The certificate relied on classified security information that indicated to the Director that Mr Zaoui was a threat to national security. Mr Zaoui's claim for refugee status was initially rejected but was granted on appeal to the Refugee Status Appeals Authority. However, because of the security risk certificate, Mr Zaoui continued to be detained after this determination.

4.15 Mr Zaoui requested a review of the security risk certificate by the Inspector-General of Intelligence and Security. In conducting the review, the Inspector-General concluded that Mr Zaoui had no right to a summary of the allegations underlying the certificate because to do so would involve the disclosure of classified information.[131]

4.16 Mr Zaoui sought judicial review of this determination on the basis that the decision was unlawful, ultra vires, and in breach of the right to justice under section 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA). The High Court held that Mr Zaoui was entitled to a summary of the allegations that formed the basis of the conclusion that he was a risk to national security.[132] Subsequent appeals to the Court of Appeal[133] and Supreme Court[134] did not challenge this finding.

4.17 In dealing with the question of classified information relied upon by the Director of the NZSIS, the Inspector-General appointed two special advocates to represent Mr Zaoui's interests. The special advocates had access to all of the classified information but were prevented from disclosing this material to Mr Zaoui and were unable to seek instructions based upon it.

4.18 This case was the first time special advocates were used in New Zealand.[135] However, the use of special advocates was not fully tested as following the appointment of a new Director of the NZSIS in 2007, the security risk certificate was withdrawn.

4.19 The facts of the *Zaoui* case illustrate the competing interests involved in this area. There is a strong public interest in ensuring that the Crown can use national security information where it is relevant to a decision that has national security implications. This is balanced by the acknowledgment of the need to ensure a person affected by a decision can challenge that decision in a meaningful way. The holding by the courts that a person affected by a decision is entitled to receive at least a summary of the reasons for that decision, and the decision of the

129 Telecommunications (Interception Capability and Security) Act 2013, s 105.

130 In 1999, the Immigration Act 1987 was amended by section 35 of the Immigration Amendment Act 1999 to introduce procedures allowing the Director of the New Zealand Security Information Service (NZSIS) to issue a "security risk certificate" in respect of a foreign national seeking to enter or remain in New Zealand: Immigration Act 1987, s 114D. Prior to the 1999 changes, decision makers in New Zealand had not been able to withhold information about non-citizens, as persons to be deported had the right to access all information relevant to their case.

131 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [4].

132 *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC).

133 *Zaoui v Attorney-General*, above n 131.

134 *Zaoui v Attorney-General* (No2) [2005] NZSC 38, [2006] 1 NZLR 289.

135 Lani Inverarity "Immigration Bill 2007: Special Advocates and the Right to be Heard" (2009) 40 VUWLR 471 at 473.

Inspector-General to appoint special advocates pursuant to a general statutory power to regulate the procedure of inquiries as he or she saw fit were significant developments in this regard.

4.20 Following the *Zaoui* proceedings, changes were made to New Zealand's immigration legislation to give more statutory guidance about how national security information can be used in decisions on immigration and refugee status whilst attempting to provide appropriate protection to the right to natural justice and the principle of open justice. It is arguable that some aspects of the procedure adopted do not go far enough with respect to the protection of fundamental rights. In particular, the fact that the special advocate has no apparent input into the production of the summary is one feature that may need to be reconsidered. Involving the special advocate in the summarising process would enable the affected person's interests to be taken into account and would, in our view, encourage a more robust approach to the inclusion of information in the summary.[136]

Issues in administrative decisions

4.21 Officials working with national security information at the initial decision making stage will understandably exercise great care when deciding whether or not to release the information. They are likely to err on the side of caution and not disclose information if there is any doubt as to the risk posed. There is unlikely to be an independent person to assess the validity of an assertion that the information is national security information and the decision to withhold information will therefore normally depend solely on the department's assessment of the risk to national security.

4.22 Complaints to an Ombudsmen,[137] the Privacy Commissioner,[138] and the Inspector-General of Intelligence and Security[139] might provide some degree of independent assessment of the Crown's assertions of prejudice to national security. However, any complaint will likely take place after the decision has been made, and any power those independent bodies might have to order the production or disclosure of information is subject to a Cabinet override.[140]

4.23 The particular circumstances of a decision have the potential to vary significantly depending on the power relied on and the role of the decision maker. Some decisions must be made urgently in order for the decision to have any effect. In other cases providing the person with notice of the decision might frustrate the purpose of the legislation. Any reform proposal would need to be flexible enough to account for a variety of different contexts.

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136 The Supreme Court's decision in *Zaoui v Attorney-General*, above n 134, also illustrated how tension may arise between questions of national security risk on the one hand and protecting what are considered as fundamental human rights on the other. The Crown accepted at [76] that it was "obliged to act in conformity with obligations under Articles 6(1) and 7 ICCPR and Article 3 of the Convention Against Torture" as expressed under New Zealand law in s 72 and s 114 of the Immigration Act 2009 and found in NZBORA. The Court held the view that the Minister could not therefore order that Mr Zaoui's continued presence constituted a threat to national security necessitating deportation (pursuant to s 72 Immigration Act 2009) where there were "substantial grounds for believing that as a result of the deportation the person would be in danger of being arbitrarily deprived of life or of being subjected to torture or cruel, inhuman or degrading treatment or punishment", at [93]. International protections relating to refugees and the prohibition against torture are just two of the fundamental human rights obligations that New Zealand is bound by and that will need to be kept in mind in the context of this project and in reconciling how to deal with information that cannot be disclosed for reasons of national security.

137 Ombudsmen Act 1975; and the Official Information Act 1982.

138 Privacy Act 1993.

139 Inspector-General of Intelligence and Security Act 1996.

140 Under s 20(1)(a) of the Ombudsmen Act 1975, the Attorney-General can issue a certificate that prevents an Ombudsman from requiring the production of documents or information the disclosure which would prejudice national security, defence, international relations, or the investigation or detection of offences. Where a recommendation has been made by an Ombudsmen, it must be complied with unless the Governor-General, by Order in Council, otherwise directs. Under s 31 of the Official Information Act 1982 and s 95 of the Privacy Act 1993, the Prime Minister (or the Attorney-General in matters relating to law and order) can prevent an Ombudsman or the Privacy Commissioner from requiring the disclosure or production of information that would prejudice important national interests (which include national security, defence, international relations or the investigation or detection of offences). Under s 26(3) of the Inspector-General of Intelligence and Security Act 1996, the Minister responsible for the intelligence agency concerned can prevent the disclosure of any information that might prejudice security, defence, international relations, or the safety of any person.

4.24 As an alternative to disclosing the national security information at the initial decision making stage, a summary of the information proposed to be relied on might enable the person to respond to any allegations or concerns before the decision is made. In cases of urgency, a summary might be used to provide further details of the reasons for the decision after it is made, thus enabling the person to make a more informed choice about appealing or judicially reviewing the decision.

4.25 In some cases, special advocates might potentially be able to represent a person's interests before a final decision is made. However, as is the case with summaries of national security information, their utility in any particular decision making process would be dependent on the nature of the decision and the timeframes available.

4.26 Administrative decisions must balance the procedural rights of the affected party with the need to make decisions efficiently. Mechanisms such as the use of summaries (or "gisting") and special advocates might result in additional administrative burdens. Decisions will take longer to make, and more resources may be required to facilitate the decision making process, which might not always be justified in the circumstances. Where the volume of decisions required is low, these additional burdens might be absorbed into and managed within existing administrative structures. However, this might not be the case if the volume of cases increases. Any reform proposals must therefore also take into account these practical implications.

STATUTORY PROCEDURES FOR APPEAL AND REVIEW OF ADMINISTRATIVE DECISIONS

4.27 This section of the chapter examines the procedures used by courts or specialist tribunals when hearing appeals or reviewing administrative decisions by Ministers and other public officials.

4.28 The Passports Act 1992, the Terrorism Suppression Act 2002, the Immigration Act 2009 and TICSA all authorise a form of closed process by which particular decisions under those Acts may be appealed or reviewed. The Customs and Excise Act 1996 provides another form of closed process that applies in very limited circumstances where a warrant to access information about "border-crossing persons" is relevant to any proceedings.

4.29 As mentioned above, the Immigration Act 2009 addressed some of the issues that emerged during *Zaoui*. It allows for closed proceedings, the summarising of national security information and the use of special advocates. Although these processes have not yet been tested, one subsequent piece of legislation (TICSA) has drawn on the special advocate model established by the Immigration Act 2009. Other legislation has adopted aspects of the Immigration Act 2009 procedure such as requiring the consideration of national security information in the absence of the affected person, and providing a summary of the national security information to the affected person.

4.30 Below we discuss some of the key features of the existing statutory models. We note that the procedures that apply when national security information is relevant in administrative proceedings are not consistent across different Acts. While all of the regimes discussed below anticipate a closed process whereby the national security information is considered in the absence of the affected person, their lawyers and the public, a variety of different measures are available to minimise the prejudice that may arise as a result.

Issues of scope and definition

What types of decision can engage the statutory closed process?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
Visas, permission to enter New Zealand, refugee and protection status, and deportation (s 33(2)).	Designating an entity as a "terrorist entity" or an "associated entity" (ss 20-32). Applications for forfeiture of property (s 55). The detention of goods by Customs and the taking control of property by the Official Assignee (ss 47A-51).	Any matter relating to the administration or enforcement of the Act (s 101). Issuing enforcement notices for serious non-compliance with a duty under the Act (s 90) and applications to the court for a compliance order (s 92).	Issuing, cancelling, revoking and suspending New Zealand travel documents on the grounds of national security (currently in cl 1-8 of the temporary provisions).	Disclosing documents relevant to an application by the Chief Executive for a warrant to search and view information about border-crossing persons (s 38M).

4.31 The Acts generally attempt to specify the types of proceedings that can use the closed process. The Customs and Excise Act 1996 procedures are only available in the limited circumstance where the Chief Executive resists a request for disclosure of information relating to an application to search and view information relating to "border-crossing persons". The request might arise as a result of proceedings challenging the validity of the warrant but are not necessarily limited to such proceedings.[141] Under the Passports Act 1992, the closed procedures are only available in respect of a limited set of decisions made on the grounds of national security. However, under the Terrorism Suppression Act 2002, the scope of decisions that can utilise the closed procedure are much wider.

How do the Acts define the information that can be subject to the closed process?

4.32 The Passports Act 1992,[142] TICSA,[143] and Terrorism Suppression Act 2002[144] refer to the information that can be subject to the closed procedure as "classified security information". The Immigration Act 2009 uses the slightly different term "classified information".[145] The Customs and Excise Act 1996 doesn't refer to the information by a specific term. Despite these minor differences, all five Acts adopt the same approach to defining the information that needs to be protected under the closed process.

4.33 Under each Act, information must satisfy two elements in order to fall within the category of information that can be subject to the closed process.

4.34 The first element is that the information must be of a particular kind, specifically it:

(a) might lead to the identification or provide details of, the source of the information, the nature, content or scope of the information or the nature or type of the assistance or operational methods available to the relevant agency; or

(b) is about particular operations that have been, are being or are proposed to be undertaken in pursuance of any of the functions of the relevant agency; or

141 Customs and Excise Act 1996, s 38M.

142 Passports Act 1992, s 29AA.

143 Telecommunications (Interception Capability and Security) Act 2013, s 102.

144 Terrorism Suppression Act 2002, s 32.

145 Immigration Act 2009, s 7.

(c) has been provided to the relevant New Zealand agency by the government of another country or by a government agency of another country or by an international organisation and is information that cannot be disclosed by the relevant New Zealand agency because the government or agency or organisation by which the information has been provided will not consent to the disclosure.

4.35 The second element is that the information, if disclosed, would be likely to;

(a) prejudice the security or defence of New Zealand or the international relations of New Zealand; or

(b) prejudice the entrusting of information to New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or

(c) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(d) endanger the safety of any person.

4.36 The factors listed under the second element are also the conclusive reasons for withholding information in section 6 of the Official Information Act 1992 with the notable exception of serious damage to the economy of New Zealand. In Chapter 6 we consider further the interests that might justify using a closed process.

Decision making powers

When can the closed process be used?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
If "classified information" is involved, the Tribunal or courts must use a closed process (ss 242-244, 252-256).	If the Attorney–General requests and the court is satisfied that it is desirable to do so for the protection of the "classified security information", the court must hear the case in the absence of the affected entity, their lawyers and the public (s 38(3)-(b)).	If the Attorney-General requests and the court is satisfied that it is desirable to do so for the protection of the "classified security information", the court must hear the case in the absence of the non-Crown party, their lawyers, the public and journalists (s 111(2)(b)). The court also has a discretion to exclude any person from the whole or part of the proceedings, including the non-Crown party, their lawyer and the public (s 104(1)(c)).	If the Attorney–General requests and the court is satisfied that it is desirable to do so for the protection of the "classified security information", the court must hear the case in the absence of the affected person, their lawyers and the public (s 29AB(1)).	The closed process must be used in respect of every application for a warrant to search data on border-crossing persons (s 38M).

4.37 Under the Immigration Act 2009, the use of the closed process for appeals or review appears to be mandatory upon confirmation that the information meets the definition of "classified information" in the Act, although the Tribunal or court may decide that the information is not relevant or does not meet the definition of "classified information". Under the Terrorism Suppression Act 2002, TICSA and the Passports Act 1992, the courts have some discretion when deciding if it is desirable for the purposes of protecting the information to exclude non-Crown parties from the hearing.

Who determines whether information meets the definition required to engage the closed process?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
The Tribunal or court determines if the information meets the definition of "classified information" and whether it is relevant ss 243, 254).	The head of the agency that holds the information certifies that the information meets the definition, but the court determines relevance (s 32).	The head of the agency that holds the information certifies that the information meets the definition, but the court determines relevance (s 102).	The head of the agency that holds the information certifies that the information meets the definition, but the court determines relevance (s 29AA).	The Act does not specify.

4.38 Under the Passports Act 1992, the Terrorism Suppression Act 2002 and TICSA, the head of the agency that holds the information is empowered to certify that the information is of a certain kind and would be likely to have a particular prejudice if disclosed. Under the Immigration Act 2009 the head of the relevant agency certifies the classified information meets the definition, but the Tribunal or court must also consider if the classified information meets the definition.

4.39 Under all of the procedures, the court decides if the information is relevant to the matters under consideration. If the court decides that the information is not relevant to the particular matter under consideration, closed processes will not be needed.

4.40 The Customs and Excise Act 1996 does not specify when the closed processes will be engaged. One plausible interpretation is that the court will determine these matters following the receipt of submissions from the Chief Executive of the Customs Service.

4.41 Under the procedures above the decision that the information would prejudice an important national interest if disclosed can have wide-reaching consequences for the conduct of the case. This is particularly so where the existence of national security information might in itself be sufficient to trigger a closed process.

4.42 It is therefore arguable that legislation should clarify the extent to which a person affected by a decision that relevant information is classified can challenge that decision (if at all) and how any dispute as to the validity of classification is to be resolved.

Does the court have the power to determine what information is to be released in the hearing?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
The court has no power to direct the disclosure of "classified information". The court must keep it confidential and may only disclose it with the consent of the agency head (s 259(3)).	The court has no power to direct the disclosure of "classified security information".	The court has no power to direct the disclosure of "classified security information". The court must keep it confidential and may only disclose it with the consent of the agency head (s 103(3)).	The court has no power to direct the disclosure of "classified security information".	The judge must order production of the documents sought unless they are satisfied that the information falls within the definition in s 38N.

4.43 The Crown has the final say as to whether or not national security information will be disclosed. While not explicit in the Customs and Excise Act 1996, the Crown would still be entitled to rely on a claim for public interest immunity.

Which body determines the outcome of the closed proceedings?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
The Immigration and Protection Tribunal hears first appeals (Part 7). Subsequent appeals and judicial review applications are heard by the High Court (ss 245, 247).	The High Court determines judicial review applications or other proceedings relating to a designation (s 33) and matters relating to seizure and forfeiture (ss 54, 55).	The High Court determines applications for compliance orders (s 92) and can impose pecuniary penalties for serious non-compliance with a duty under the Act.	The High Court determines appeals and applications for judicial review of decisions under the Act (s 28 and cl 8 of temporary provisions).	A District Court Judge must determine an application to access the relevant information (ss 38M(4), (9), (10)).

4.44 In each of the procedures discussed above an independent adjudicator makes the final decision as to the substantive matter under consideration. However, this does not mean that the court has the ability to direct the disclosure of information that has been certified by the head of agency as being "classified security information" or "classified information".

Features of the closed process

For information that is not released, is a summary used, and if so, how?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
The Chief Executive of the agency that holds the information must develop and provide a summary of the allegations arising from the "classified information" and provide it to the Tribunal or court for approval (ss 242, 256).	The Attorney-General produces a summary of the "classified security information" (s 38(4)).	The Attorney-General produces a summary of the "classified security information" (s 111).	The Attorney-General produces a summary of the "classified security information" (s 29AB(2)).	The creation of a summary is not provided for in the legislation.
The Tribunal or court **must** approve or modify the summary.	The court **must** approve the summary unless the summary itself would disclose the information.	The court **may** approve the summary unless the summary itself would disclose the information.	The court **must** approve the summary unless the summary itself would disclose the information.	
Once approved, the summary must be given to the other party and the special advocate.	Once approved the summary must be given to the other party.	Once approved the summary must be given to the other party.	Once approved the summary must be given to the other party.	

4.45 The Acts differ with respect to who produces the summary and how much control the court or tribunal has over its content. Special advocates are not permitted to be involved in the production of the summary under the Immigration Act 2009 procedure.[146] There also appears to be no power under the Passports Act 1992, Terrorism Suppression Act 2002 and TICSA for the court to refuse to approve a summary on the grounds it provides too little information, although TICSA would appear to grant the court a greater discretion. In this regard, the provisions of those three Acts are nearly identical save for the fact that TICSA provides that the court may approve the summary, while the Passports Act 1992 and the Terrorism Suppression Act provide that the court must approve the summary. This is a legally significant difference as the use of "may" could potentially be interpreted to give the court the power to reject a summary on the grounds it does not contain enough information.

146 Immigration Act, s 242(7).

Are special advocates provided for, and what is their role?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
Appointed in each case by the person affected by the decision (s 265). The court or Tribunal may also appoint a special advocate to assist the court (s 269) and a special advisor to advise the court (s 270).	Not provided for in the legislation.	Appointed by the court if it is satisfied that it is necessary to properly prepare and commence proceedings and to ensure a fair trial takes place (s 105).	Not provided for in the legislation.	Not provided for in the legislation.
Can commence proceedings, make oral and written submissions and cross-examine witnesses (s 263).		Can commence proceedings, examine and cross-examine witnesses, make oral and written submissions and assist in the settlement of the proceedings (s 107).		
Once provided with the "classified information", the special advocate can only communicate with the person affected by the decision and their lawyer via the Tribunal or court (s 267).		Once provided with "classified security information", the special advocate can only communicate with the non-Crown party on terms that the court orders (s 109(3)).		

4.46 Only the Immigration Act 2009 and TICSA provide express authority for the appointment and use of special advocates. These two regimes adopt different approaches with respect to the appointment and roles of special advocates.

4.47 In its Select Committee Report on the Terrorism Suppression Amendment Act 2007, the Foreign Affairs, Defence and Trade Committee noted problems "related to procedural fairness and the human rights of designated persons, and whether these rights should be overridden to protect New Zealand's national security". The Committee agreed that "processes involving special advocates and security-cleared counsel would add additional elements of protection" but recommended that the issue be given further consideration following the enactment of amendments to the Immigration Act 2009 relating to the use of classified information in decisions under that Act.

Is it possible for information to be taken into account without that information being made available to the person affected?

IMMIGRATION ACT	TERRORISM SUPPRESSION ACT	TICSA	PASSPORTS ACT	CUSTOMS AND EXCISE ACT
No. The Tribunal or court may only rely on "classified information" to the extent that the allegation arising from the "classified information" can be summarised without disclosing it (ss 242(3), 256(3)).	Yes. A court must determine the proceedings on the basis of all information available to it, regardless of whether or not that information has been provided to the other parties (s 38(2)).	Yes. The court must determine the proceedings on the basis of all information available to it, regardless of whether or not that information has been provided to the other parties (s 111(1)).	Yes. The court must determine the proceedings on the basis of all information available to it, regardless of whether or not that information has been provided to the other parties (s 29AB(3)(b)).	Not explicitly addressed.

4.48 The Immigration Act 2009 procedure is the only one to expressly state that information not disclosed to the person affected cannot be used by the court or Tribunal. The Passports Act 1992, TICSA and the Terrorism Suppression Act 2002 require the court to consider all information available, including information that has not been disclosed. The Customs and Excise Act 1996 does not explicitly address the matter.

Issues arising in existing statutory closed procedures for appeals or reviews

4.49 The tables above illustrate the variance in closed processes adopted in different areas. Below, we discuss the key issues that arise from these procedures.

Information can be used but not disclosed to the person affected

4.50 Procedures under the Passports Act 1992, the Terrorism Suppression Act 2002, and TICSA require the court to determine the case based on all information available to it, regardless of whether or not that information has been disclosed to the person affected. The Customs and Excise Act 1996 does not address this issue.

4.51 This feature of the procedures has obvious implications for the principles of natural justice and for open justice. Special advocates, which are discussed in the next section, can mitigate some but not all of the difficulties that arise where information is not disclosed to the person affected but is still considered by the court. However, the Passport Act 1992 and the Terrorism Suppression Act 2002 make no express provision for the appointment of special advocates. Without a special advocate, evidence is before the court that has not been seen by any person representing the interests of the person affected. The court would not have the benefit of informed submissions from counsel for the affected party.

4.52 We are concerned that the provisions in the Terrorism Suppression Act 2002 may not adequately protect the rights of the affected party. The procedure provided for has also been the subject of comment by the United Nations Human Rights Committee (UNHRC). In its 2010 Concluding Observations on New Zealand's compliance with the International Covenant on Civil and Political Rights (ICCPR) the UNHRC expressed concern "at the designation procedures of groups or individuals as terrorist entities and at the lack of a provision in the (Terrorism Suppression (Amendment)) Act to challenge these designations, which are incompatible with article 14".[147] Notably, the UNHRC identified and noted concern about the introduction of law that permitted the courts "to receive or hear classified security information against groups or individuals designated as terrorist entities in their absence".[148]

4.53 In its 2015 draft response on the next round of reporting to the UNHRC, the Ministry of Justice gave the assurance that "although the TSA now provides for closed proceedings involving classified security information no such proceedings have taken place". Instead, "New Zealand's practice is to prepare all statements of case for designation as a terrorist entity using open-source or unclassified information".[149]

4.54 This answer raises concerns. As mentioned above, a properly informed decision may sometimes require that national security information be taken into account. Simply relying on open-source information would potentially involve ignoring relevant information and only defers the problem until a case arises where open-source information is insufficient but there is a clear national security impetus for a designation. An additional concern is that this approach might

147 *Concluding observations of the Human Rights Committee: Consideration of reports submitted by States parties under article 40 of the Covenant* CCPR/C/NZL/CO/5 (2010) at [13].

148 At [13].

149 Ministry of Justice, above n 48, at [59].

inadvertently obscure the real reason for the decision from the person affected and the public, resulting in a further infringement of the principles of natural justice and open justice.

4.55 The Immigration Act 2009 adopts a different approach to the other models. Information that is not disclosed or summarised cannot be considered by the court or Tribunal, and people affected also have the benefit of special advocates to represent their interests. In this respect, the approach taken in the Immigration Act 2009 appears to offer the greatest protection for fundamental rights amongst the statutory models current in force.

4.56 We therefore seek submissions on whether or not a standard process should apply across all legislation that authorises a form of closed proceedings.

Ability of special advocates to provide adequate representation

4.57 While TICSA and the Immigration Act 2009 make express provision for the use of special advocates, statutory regimes for passports, customs and terrorism suppression are silent on their appointment or any potential functions or obligations.

4.58 A fundamental impediment to the provision of effective representation, which is at the heart of much of the criticism of closed procedures generally, is the express prohibition on special advocates discussing the national security information with their clients. When combined with the other restrictions on communication discussed below, the special advocate must attempt to represent a person without being able to take instructions on information that might be central to the case against them.

4.59 Both TICSA and the Immigration Act 2009 place restrictions on the special advocates' ability to take instructions from their client. Under TICSA, the special advocate may only communicate directly with their client with the approval of the court. Under the Immigration Act 2009, communication can only be made via the court. Such restrictions obviously have implications both for administrative efficiency and for the ability of the special advocate to seek and receive instructions from their client. However, we also acknowledge that these restrictions play a protective role with respect to special advocates. They establish clear boundaries around how the special advocate might interact with their client. It avoids placing the special advocate in a position where they must make on-the-spot judgements as to a risk to national security when speaking to their client. It also insulates special advocates from any allegation that they might have inadvertently disclosed information that might pose a threat to national security.

Summaries of national security information

4.60 The summarising of the national security information to be provided to the excluded party is a key means by which the potential unfairness of a closed process can be mitigated. Two key issues arise from the creation of a summary:

(a) Who has input into the production of the summary?

(b) Who ultimately approves it?

4.61 In the procedures discussed above, the courts have a varied degree of supervision over the summary. In the Passports Act 1992 and the Terrorism Suppression Act 2002, the only apparent ground for refusing to approve the summary is that the summary itself would disclose classified security information. TICSA appears to grant the court a little more freedom to refuse to approve the summary, but the extent of that freedom is unclear.

4.62 The Immigration Act 2009 procedure is notably different. In proceedings before the courts and the Tribunal that involve classified information, the Tribunal or court is entitled to modify,

not merely approve, the summary produced by the Chief Executive without the apparent restrictions imposed in the Passports Act 1992 and the Terrorism Suppression Act 2002.

4.63 While it is possible that the courts might take an expansive view of their supervisory role (and it is of course hoped that the Crown would ensure the maximum amount of information is disclosed to the other party), we consider that, given the importance of the contents of the summary, this supervisory role should be more clearly set out in statute.

4.64 In addition, there should ideally be an opportunity for someone (most likely a special advocate) to challenge the content of the summary on behalf of the affected party. In this regard, we believe the Immigration Act 2009 procedure is deficient, as special advocates are expressly excluded from the process of producing the summary.[150] By contrast, no such prohibition appears to exist in relation to TICSA proceedings.

Gaps in statutory processes

4.65 The Acts above differ in the extent to which some key elements of a closed process, such as the appointment of special advocates, is expressly authorised.

4.66 In order to ensure a fair hearing, the courts might therefore be required to rely on their inherent powers[151] to supplement the statutory procedures, whether by appointing a special advocate where no statutory authority to do so exists or devising some other procedure. However, as discussed in Chapter 5 in the context of general civil proceedings, rather than requiring the courts to rely on their inherent powers on a case-by-case basis, considerable benefit might be gained from establishing a generic system that can be used by different courts and tribunals as needed.

4.67 In the absence of any proceedings under the legislation discussed above, it is unclear how the courts will apply the individual statutory schemes. The Acts discussed above[152] make provision for the Chief Justice and the Attorney-General to agree any general practices and procedures that may be necessary to implement the special procedures in those Acts to protect the national security information.

INTERNATIONAL COMPARISON

United Kingdom

4.68 The United Kingdom provides a closed process for appeals on administrative immigration decisions through the Special Immigration Appeals Commission (SIAC). This hears appeals against decisions of the Secretary of State for the Home Department from people who are denied entry into the country, are being deported or have been deprived of their citizenship on national security grounds.

4.69 The Special Immigration Appeals Commission Act 1997 is a brief piece of legislation. It authorises the making of rules to regulate the conduct of appeals, with particular reference to a power to make rules that enable a hearing to take place without the appellant or their representative being present, being given full particulars of the reasons for the decision that is the subject of the appeal, and a power enabling the SIAC to give the appellant a summary of evidence that is taken in their absence.[153]

150 Immigration Act, s 242(7).

151 Courts in New Zealand have powers that are ancillary to the court's jurisdiction. These powers can be used to regulate proceedings before the court and ensure that it can give effect to its jurisdiction, see *Zaoui v Attorney-General*, above n 131 at [35].

152 With the exception of the Customs and Excise Act 1996.

153 Special Immigration Appeals Commission Act 1997 (UK), s 5.

4.70 Much of the procedural detail, including disclosure of the national security information, the functions of the special advocate and restrictions on communication with the represented party, is found in the Special Immigration Appeals Commission (Procedure) Rules 2003.

4.71 SIAC operates on the presumption of an open court. Where the sensitive nature of information being used makes it necessary, the legislation authorises the appointment of a special advocate – being "a person to represent the interests of an appellant in any proceedings before SIAC from which the appellant and any legal representative of his are excluded".[154]

Canada

4.72 Canadian legislation provides for the use of special advocates in immigration processes.[155] Special advocates in the Canadian scheme are legal representatives with security clearance who are appointed to review the information in question in order to challenge its relevance, reliability and sufficiency.[156] They receive administrative support and resources from the Minister of Justice. Special advocates may challenge the claim "that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person".[157] Having viewed the information in question, the special advocate may then only communicate with another person about the proceeding with the judge's authorisation and subject to any conditions imposed.[158]

4.73 The powers of the special advocate include making submissions on evidence, cross-examining witnesses and "with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national".[159] Accordingly, the range of options that are open to the special advocate to protect the interests of the individual are significant, including seeking further disclosure.[160]

4.74 The judge cannot overturn a non-disclosure order that was made by the government on national security grounds. However, the judge can order a stay of proceedings. The powers afforded to the court and special advocate in Canada are thus broader than in New Zealand and arguably strike a better balance between protecting the interest of the public and ensuring a fair process for the individual in question.[161]

4.75 In its 2014 decision in *Harkat v Canada,* the Supreme Court emphasised that the courts have the power to allow special advocates to communicate with the affected party following access to the classified information when it was necessary to ensure fairness in the proceedings.[162]

4.76 The Supreme Court stated that the judge has:[163]

> ... a sufficiently broad discretion to allow all communications that are necessary for the special advocates to perform their duties. The broad discretion ... averts unfairness that might otherwise result from the communications restrictions ... The judge should take a liberal approach in authorizing

154 Special Immigration Appeals Commission Act 1997 (UK), s 6.

155 Kent Roach "Secret Evidence and Its Alternatives" in Aniceto Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (Springer, Dordrecht, 2012) at 187.

156 Immigration and Refugee Act SC 2001 c 27, s 85.1(2)(b).

157 Immigration and Refugee Act SC 2001 c 27, s 85.1(2)(a).

158 Immigration and Refugee Act SC 2001 c 27, s 85.4(2).

159 Immigration and Refugee Act SC 2001 c 27, s 85.2(c).

160 Similar to Canada, Denmark adopted legislation in the 2009 Aliens (Consolidation) Act. Section 45(e) assigns a special advocate to represent the rights of a person in immigration proceedings, the fees of which come within the legal aid rules. Having viewed the relevant information, the special advocate may not communicate with the person, but the person (or counsel) may communicate to the special advocate in writing.

161 Under the 1985 Canada Evidence Act, the Attorney-General may issue a certificate prohibiting disclosure after court ordered release. This is subject to judicial review.

162 *Canada (Citizenship and Immigration) v Harkat* 2014 SCC 37; [2014] 2 SCR 33 at [66]–[73].

163 At [69]–[71].

> communications and only refuse authorization where the Minister has demonstrated, on a balance of probabilities, a real—as opposed to a speculative—risk of injurious disclosure. As much as possible, the special advocates should be allowed to investigate the case and develop their strategy by communicating with the named person, the named person's public counsel, and third parties who may bring relevant insights and information. Second, the named person and his public counsel can send an unlimited amount of one-way communications to the special advocates at any time throughout the proceedings.

4.77 Canadian academic Kent Roach has noted that there have been several instances where the special advocates have been successful in identifying inconsistencies in secret evidence, showing that the Canadian Government had "over-claimed" secrecy. Further documents have been released as a result. Special advocates in Canada have successfully challenged the admissibility of evidence obtained under torture.[164]

4.78 It is noted that, while special advocate legislation applies only to immigration proceedings, special advocates have in fact been used in public interest immunity proceedings and extradition proceedings.[165]

4.79 The Canadian system appears, as Roach said, to strike a balance between judicial oversight and sufficient scope for adversarial challenge to protect the individual's interests.[166]

SCOPE FOR REFORM IN NEW ZEALAND

Administrative decisions

4.80 The contexts in which officials and Ministers make first instance decisions can vary in significant ways. For instance, decisions are made pursuant to different powers, relate to different subject matter, are made under different circumstances and exigencies and require different administrative systems. In respect of these kinds of decisions, there would be considerable obstacles to a single process under which decisions involving national security information should be made.

4.81 A more workable option might be to clarify that decision makers have the ability to utilise special advocates or produce summaries of national security information in appropriate circumstances. It will then be for the decision maker to decide if, in the circumstances of the particular decision, such mechanisms should be used. Where a decision is appealed or judicially reviewed, the availability of these mechanisms might be an element the courts would be entitled to take into account when deciding if the principles of natural justice were complied with in that particular case.

164 Roach, above n 155, at 188.

165 At 189.

166 However, following the shooting at Parliament Hill Ottawa in October 2014 legislative changes have been proposed in the 2015 Bill-C51 colloquially known as the Anti-Terror Bill which would introduce tighter controls relating to the protection of classified information in immigration proceedings.

4.82 Where initial decisions are subsequently appealed or challenged in a court or tribunal, there is an argument for establishing a generic system that can be used to allow the national security information to be taken into account in a manner that protects both the information and the individual's right to procedural fairness, to replace existing inconsistent systems. This is explored in Chapter 6.

QUESTION

Q9 Should elements of administrative decision making processes involving national security information be standardised at the initial decision making stage?

Statutory procedures for appeal and review of administrative decisions

4.83 It is a positive feature of the New Zealand statutes described above that they provide mechanisms to mitigate some of the unfairness to people affected by decisions involving national security information. However, as none of these procedures have been used as of yet, our analysis of them is based on inferences as to how the procedures might operate and be interpreted by the courts and tribunals.

4.84 The mechanisms and procedures provided for are inconsistent in some respects, and we query whether or not the different approaches are justified by reference to the particular subject matter of the decision or the process by which it is challenged. For example, while all five New Zealand statutes discussed above identify the same interests as needing protection[167] and relate to proceedings before an independent court or tribunal, we query the justification for the differences in approach adopted in relation to the appointment or roles of special advocates as between the Immigration Act 2009, TICSA, and the Passports Act 1992.

4.85 Furthermore, a small distinction in language relating to the production of the summary in TICSA as opposed to the Passports Act 1992 and the Terrorism Suppression Act 2002 ("the court must approve the summary"[168] as opposed to "the court may approve the summary"[169]) may result in quite different interpretations. We question whether such differences are necessary and suggest that one generic set of provisions applying at the court or tribunal stage may be preferable. A generic system could also apply in new areas of law if these arise.

4.86 We also think that it is questionable whether some of the procedures adequately protect the affected person's right to natural justice. For example, the absence of an express system for the appointment of special advocates in the Terrorism Suppression Act 2002 creates uncertainty around how a challenge would be dealt with by the courts and whether a special advocate might be appointed under inherent jurisdiction. Likewise, the varied level of scrutiny over the contents of the summary, or assertions by the Crown that information is national security information, raises questions over how effective such summaries would be in helping to protect natural justice rights.

167 The security and defence of New Zealand, international relations, the provision of information on the basis of confidence from other countries and international organisations, and preventing harm to any person.

168 Passports Act 1992, s 29AB(2)(a).

169 Telecommunications (Interception Capability and Security) Act 2013, s 111(3)(a).

QUESTIONS

Q10 Should there be a single framework that applies to all reviews or appeals of administrative decisions that involve national security information?

Q11 What features should such a single framework provide for? Should it involve special advocates, summaries of national security information or any other mechanisms to help ensure a fair hearing?

Q12 Should courts or tribunals reviewing administrative decisions be able to consider information that has not been disclosed to the parties to the case?

Chapter 5
Civil proceedings

INTRODUCTION

5.1 This chapter considers how national security information might be used and protected in general civil proceedings to which the Crown is a party, either as respondent or claimant.

5.2 In this chapter, the term "general civil proceedings" refers to those proceedings that are not covered by Chapter 4 (appeals and challenges to administrative decisions). They include private law claims,[170] some applications for judicial review, proceedings under the New Zealand Bill of Rights Act 1990 and employment proceedings.

5.3 The ability to bring civil proceedings against the Crown is an essential element of the rule of law by which citizens ought to be able to obtain legal redress when the government has breached individual rights or has failed to comply with its legal obligations. Holding the Crown to account for its actions in open court is an important process, the possibility of which serves to encourage the Crown to act within the law.

ESTABLISHING CLOSED PROCESSES AND APPOINTING SPECIAL ADVOCATES ON A CASE-BY-CASE BASIS

5.4 Some of the areas where national security information might become relevant to decision making have already been addressed by legislation (discussed above). However, as has been demonstrated by the recent litigation involving Mr Dotcom and employment law proceedings brought by Mr Zhou, national security information may still be relevant in general civil proceedings against the Crown. These two sets of proceedings are discussed in detail below.

5.5 Section 27 of the Crown Proceedings Act 1950 and section 70 of the Evidence Act 2006 enable national security information to be withheld in civil proceedings where the Crown asserts that the disclosure of information would be prejudicial to important national interests or contrary to the public interest. As outlined in our earlier Issues Paper *A New Crown Civil Proceedings Act for New Zealand,*[171] it is not clear whether common law public interest immunity continues as well, nor is it clear how the provision in the Crown Proceedings Act 1950 and Evidence Act 2006 relate to each other.

5.6 There is no statutory authority that would allow national security information to be taken into account by the court or decision maker but not disclosed to the affected party in general civil proceedings. Where national security information does become relevant or potentially relevant, the courts have relied on their inherent powers and the consent of the parties to establish closed processes on a case-by-case basis. This could include the consideration of national security information in the absence of one of the parties, the appointment of special advocates or the summarising of national security information.

170 Such as claims for breach of contract or suing in tort.

171 Law Commission, above n 14.

Dotcom v Attorney-General

5.7 The ongoing litigation relating to the search of Mr Dotcom's home in January 2012 is the most current example of national security information being relevant in civil proceedings.[172] During the course of proceedings regarding the lawfulness of the search and subsequent activities of the Police, information came to light that showed that the Police were given reports based on interceptions of the claimant's communications unlawfully obtained by the Government Communications Security Bureau (GCSB).

5.8 As noted by Winkelmann J in her 5 December 2012 judgment,[173] the fact that the Police were provided with information based on interceptions caused difficulties in the proceedings. The information was likely to be relevant and should have been available at prior hearings. However, the Crown claimed that disclosure of the communications would prejudice New Zealand's national security interests.

5.9 The Court appointed Stuart Grieve QC as an amicus, although his role is more akin to that of a special advocate. His role is to:[174]

> ... assist with consideration of the relevance of that information to the proceeding and if the information is relevant, to assist the Court with assessing the claim to confidentiality, and finally, if confidentiality claims are upheld, to advance such arguments on behalf of the plaintiffs as can be advanced in reliance upon that material.

5.10 A key feature of the system established is that it is created under the inherent powers of the court rather than a statutory regime and is therefore dependent upon the continued co-operation and consent of the parties. A further significant factor is that, despite the Crown acknowledging that the interception of the claimant's communications was unlawful, the claimant has publicly stated that he is not willing to settle.[175] When the plaintiffs sought access to the classified material despite the involvement of the special advocate, the Crown brought a section 70 Evidence Act application to maintain confidentiality over the classified information. This application has yet to be heard.

Zhou v Chief Executive of the Department of Labour

5.11 Another relevant example is in the context of employment proceedings. Mr Zhou was an immigration officer employed by the Department of Labour. He was dismissed from his employment after the Chief Executive of the Department of Labour withdrew his security clearance upon receipt of information from the New Zealand Security Service (NZSIS). Mr Zhou commenced a personal grievance for unjustified disadvantage and unjustified dismissal in the Employment Relations Authority, which was removed to the Employment Court due to the presence of novel questions of law relating to security clearances for public sector employees. The Director of the NZSIS was joined as an intervener to the proceedings.[176]

5.12 The Department of Labour resisted disclosure of some information and claimed public interest immunity. Mr Zhou's counsel asked the Employment Court to examine the withheld documents to determine whether the claim to public interest immunity could be maintained. The proposal anticipated that the Court would be assisted by special counsel, with security clearance, being appointed to also view the material and make submissions for Mr Zhou to the Court.

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172 *Dotcom v Attorney-General* CIV 2012-404-001928.

173 At [3].

174 At [16].

175 Rob Kidd, Hamish Rutherford and Francesca Lee "Dotcom joins rally against GCSB" *Stuff.co.nz* (< *www.stuff.co.nz* >, New Zealand, 27 July 2013).

176 *Zhou v Chief Executive of the Department of Labour* [2010] NZEmpC 162, [2010] ERNZ 400.

5.13 The Employment Court ruled that it had the power to appoint special advocates, relying on Regulation 6(2)(b) of the Employment Court Regulations, which enables a form of procedure "as the Court considers will best promote the object of the Act and the ends of justice". The Court considered that the appointment of special advocates was "no different in principle to the power to impose the conditions that the Court frequently directs upon disclosure and inspection of sensitive documents including by requiring undertakings as to confidentiality, specifying the return of all copies of documents, requiring the redaction of privileged parts of documents and the like".[177]

5.14 The Court decided that it was premature to determine whether or not to appoint special advocates as the case was still at the disclosure and inspection stage.[178] The Court considered that the Crown's claim for public interest immunity should be determined before moving on to consider whether or not special advocates should be appointed.

5.15 The Court was never required to address either point as the proceedings were resolved by the parties.

Section 52(4) Evidence Act 2006

5.16 Section 52(4) of the Evidence Act 2006 grants the judge a broad discretion to give any directions necessary to protect the confidentiality of or limit the use that may be made of information that is subject to a direction under section 70 (relating to matters of state).[179]

5.17 To date, this section does not appear to have been used in civil proceedings in respect of information subject to a direction under section 70 of the Evidence Act 2006. It therefore remains to be seen how the courts will interpret the scope of this power.

Issues arising from a case-by-case approach

5.18 In the absence of a statutory model under which national security information can be considered and protected, the courts are placed in a difficult situation. The options are for the Crown to rely on a claim for public interest immunity and remove the relevant information from the case entirely, or for the court to rely on its inherent powers (or, if applicable, the general power in section 52(4) of the Evidence Act 2006) to develop a procedure by which the national security information can be used and protected but that also affords appropriate respect to fair trial rights, natural justice and the principles of open justice. A third option, which is plainly untenable from a security perspective, is for the national security information to be disclosed to the parties.

5.19 For the reasons below, as a matter of policy, we do not think that the courts should be left to grapple with the development of such procedures on a case-by-case basis. Further guidance should be given.

5.20 In *Al Rawi v Security Service,* the United Kingdom Supreme Court ruled that the courts could not require the use of a closed process in the absence of statutory authority and without the consent of all parties. It was held that the inherent power of the courts to regulate their own procedures were still subject to limitations. The closed process advocated for in that case involved a departure from fundamental principles of natural justice and the Supreme Court

177 *Zhou v Chief Executive of the Department of Labour* [2011] NZEmpC 36 at [76].

178 At [82].

179 Section 70 of the Evidence Act 2006 enables the court to order that relevant documents not be disclosed on the grounds that to do so would prejudice matters of state. Section 70 is discussed in more detail in Chapter 3 of this paper.

considered that was an area for Parliament, rather than the courts, to develop. The question was left open as to whether a closed material process could be used by the consent of the parties.[180]

5.21 Ad-hoc procedures based on consent have the potential to result in significant administrative and financial cost. If one party withdraws their consent or ceases to co-operate part way through the process the other party will have incurred unnecessary cost, proceedings will have been delayed and administrative resources needlessly expended.

5.22 Case-by-case development (whether by consent or under section 52(4) of the Evidence Act) results in uncertainty. Judicial opinion may differ, resulting in different cases adopting slightly different processes. The roles of the judge, court staff, special advocates, intelligence and security agencies and the claimant must be re-established each time a new case arises. Therefore, neither prospective parties to a claim nor the public have a clear idea of the process by which the claim will ultimately be determined.

5.23 These issues, along with the repercussions such procedures have for natural justice and international obligations as well as the financial and administrative burden that accompanies them, present a strong argument for a legislative response to the use of national security information in civil proceedings. While the broad discretionary powers under s 52(4) could be interpreted to give a judge scope to respond to the use of national security information in the case at hand, a more certain process would have the advantage of clarity and predictability.

INTERNATIONAL BACKGROUND

5.24 In this section, we note the different approaches adopted in the United Kingdom and Australia. Both jurisdictions have attempted to facilitate the use of national security information in civil proceedings in a way that protects the integrity of the information, but also affords appropriate protection to natural justice rights.

United Kingdom: Justice and Security Act 2013

5.25 The Justice and Security Act 2013 authorises a generic closed material procedure (CMP) by which information may be considered by the court, special advocates and the Crown but not disclosed to the non-Crown party. The Act is supplemented by a comprehensive set of rules found in Part 82 of the Civil Procedure Rules that modify the procedural rules that would normally apply to a civil case.

5.26 CMPs can apply to any proceeding (other than a criminal proceeding) in the higher courts.[181] A CMP is ordered if disclosure of material in an open court would be damaging to interests of national security[182] and if "it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration".[183]

5.27 Special advocates may adduce evidence, cross-examine witnesses, make applications, seek directions from the court and make written submissions.[184] Court permission is needed to communicate with the individual whose interests are being represented. The represented party may write to the special advocate, but the advocate can only acknowledge receipt of the communication.[185]

180 *Al Rawi v Security Service*, above n 67.

181 Justice and Security Act 2013 (UK), s 6.

182 Justice and Security Act 2013 (UK), s 8.

183 Justice and Security Act 2013 (UK), s 6.

184 Civil Procedure Rules (UK), r 82.10.

185 Civil Procedure Rules (UK), r 82.11.

5.28 Following examination, a summary of the information is provided to all excluded parties where it is possible to do so without damaging national security.[186]

5.29 The special advocate process has been the subject of criticism. The limited contact between a special advocate and the party they represent is a major source of criticism, as it significantly impedes the special advocate from taking instructions from the represented person and in turn their ability to properly represent their interests.

5.30 One of the most severe criticisms of both the Justice and Security Act 2013 specifically and the use of CMPs more generally is that, although the sensitive material will be used as evidence (as opposed to the evidence being excluded if public interest immunity is successfully claimed), failing to disclose it to one party may prejudice procedural fairness and result in an unfair outcome. This was noted by the United Kingdom Supreme Court with the observation that "evidence which has been insulated from challenge may positively mislead".[187] One possible way to overcome such a risk is to encourage greater disclosure of evidence in the summary provided by the special advocate. Lord Neuberger proposed that both open and closed judgments be given with as much information as possible to explain how the closed materials were important in reaching the relevant decision.[188] He considered that, as government lawyers have a duty to the court as well as their client, all efforts should be made to avoid CMPs.[189]

5.31 Issues also arise in relation to the workload for a special advocate who is appointed as the sole advocate but may be required to consider a large quantity of information. In its Justice and Security Green Paper,[190] the United Kingdom authorities noted that concerns were raised about late provision of materials to special advocates hindering their work. The security clearance process necessarily limits the available pool of special advocates, and the time taken for advocates to familiarise themselves with complex cases is considered to lengthen proceedings.

5.32 The Justice and Security Act 2013 was introduced at a time of great public interest as to the extent to which the Government of the United Kingdom had been implicated in alleged torture and extraordinary rendition of individuals suspected of links with terrorist networks. It followed a series of high-profile cases[191] where the Government was forced to settle for millions of pounds outside of court. For example, in 2010, the Court of Appeal ordered publication of national security information that showed that the Government had known of torture being carried out at the Guantanamo Bay facilities against British citizen Binyam Mohamed.[192] Cases such as this provided the impetus for the Act but also contributed to a climate of distrust at the time it was adopted.

5.33 The experience in the United Kingdom illustrates how difficult it can be for a government to protect its citizens, fulfil its international obligations and at the same time maintain human rights standards. Examining the political, social and legal context in which the Justice and Security Act 2013 was introduced, also provides insight into why the Act has proven unpopular, which can in turn help inform the New Zealand experience if a special advocate procedure akin to that in the United Kingdom is adopted here.

186 Civil Procedure Rules (UK), r 82.14.

187 *Al Rawi v Security Service*, above n 67 at [93].

188 *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38; [2014] AC 700 at [69].

189 At [70].

190 Cabinet Office *Justice and Security: Green Paper* (Government of the United Kingdom, October 2011).

191 Including *Bank Mellat v Her Majesty's Treasury (No 1)*, above n 188.

192 *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, above n 15.

5.34 In the first year after the Justice and Security Act 2013 was introduced the Government applied for CMPs five times, three of which were granted.[193] The fact that the Act is often invoked in the context of civil claims for damages arising out of alleged torture and practices of extraordinary rendition with complicity by the United Kingdom Government further promotes negative associations.

5.35 Attempts by the courts to mitigate public concern over the extent to which CMPs undermine principles of open justice have only led to increased criticism. For example, in 2014, the Court of Appeal overturned an attempt by the Crown Prosecution Service to try *Crown v AB and CD* (later renamed *Guardian News and Media Ltd v Incedal*) in secret, but the measures imposed by the Court led in turn to criticism by NGOs, MPs and media.[194] The Court of Appeal determined that the opening statements and final verdicts were to be made public and that "a few accredited journalists" were able to follow the proceedings and report after legal arguments were completed, with any notes taken by the reporters to be stored at the Court. *The Guardian* newspaper made the argument that such measures of closing procedures and excluding the press were inconsistent with the rule of law and principles of democratic accountability.[195]

5.36 The use of so-called secret evidence has tended to occur in trials where the allegations are intricately caught up in wider societal debates relating to human rights, civil liberties, national defence and even the machinations of domestic politics. This further muddies the waters, making an objective assessment of the 2013 Justice and Security Act's utility in terms of facilitating the use of national security information in court proceedings difficult.

5.37 Thus even where a well-developed special advocate procedure has been adopted, there are ongoing areas of concern that can lead to public criticism. The experience in the United Kingdom illustrates that, despite allowing national security information to be heard in court, there are lingering concerns that special advocates do not necessarily guarantee the maintenance of natural justice principles.

Australia

5.38 Under the National Security Information (Criminal and Civil Proceedings) Act 2004, the Attorney-General can issue a non-disclosure certificate on the basis that disclosure of the information will be prejudicial to national security. The prosecution or defence must themselves alert the Attorney-General if they are aware of that potential.

5.39 Where national security information is involved, the Attorney-General may give each potential discloser of the information in the proceeding any of:

(a) a copy of the document with the information deleted; or

(b) a copy of the document with the information deleted and a summary of the information attached to the document; or

(c) a copy of the document with the information deleted and a statement of facts that the information would or would be likely to prove attached to the document.

5.40 Where any of those copies are distributed the Attorney-General will also issue a certificate that describes the information and states that the potential discloser must not, except in permitted

193 Lawrence McNamara and Daniella Lock *Closed Material Procedures under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State* (Bingham Centre for the Rule of Law, Working Paper 2014/03, August 2014).

194 *Guardian News and Media Ltd v Incedal*, above n 58; see Bowcott "Selection of journalists to attend terror trial raises fears over press freedom", above n 58; and Bowcott "Key elements of secret terror trial can be heard in public, court rules", above n 58.

195 Bowcott "Selection of journalists to attend terror trial raises fears over press freedom", above n 58; and Bowcott "Key elements of secret terror trial can be heard in public, court rules", above n 58.

circumstances, disclose the information - they may only disclose the copy, or the copy and the statement or summary. Alternatively the Attorney-General on receipt of a notice may issue a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information.[196]

5.41 Similar options are available to the Attorney-General where the relevant information is not in the form of a document. In any case, the Attorney-General may decide not to issue a certificate. The Attorney-General's certificate and its conditions are, however, in effect only an interim measure. Where the Attorney-General issues a certificate, the court must hold a hearing to decide which of a number of orders should be made. The court can order that the information, regardless of its form, may or may not be disclosed in the proceeding or, where the information is in the form of a document, that a copy of the document may be disclosed with the information deleted, with or without a summary of the information attached, or may be disclosed with a statement attached summarising facts that the information would tend to prove.[197]

5.42 In deciding which order to make, the court must consider a number of factors including whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if the information were disclosed and whether any order would have a "substantial adverse effect" on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence.

5.43 Any risk to national security must be given the "greatest weight" in the court's consideration.[198] The hearing must be closed, and if the court considers that there is a risk of disclosure of the information that is the subject of the hearing (to the defendant or any legal representative of the defendant who does not have an appropriate security clearance) the court may order that that person (or persons) is not entitled to be present at those times. The defendant has a right to be heard regarding the question of non-disclosure.[199] Defence lawyers can apply for security clearance under the Act. Without it, they will not be allowed to view all the evidence.[200]

5.44 Under the statutory regime, although the court must take into account any adverse effects on the defendant's right to a fair hearing in a criminal trial, there is a clear burden on courts to "give greatest weight" in its considerations as to whether to allow disclosure to "whether having regard to the Attorney-General's certificate there would be a risk to national security" if the relevant information was disclosed.[201]

Conclusions

5.45 The United Kingdom and Australia have enacted legislation that attempts to grapple with the use of national security information in civil proceedings. However, the procedures they have enacted are quite different. As is evident from the experience in the United Kingdom, the particular context in which legislation is introduced can have a significant impact on the way in which a statutory scheme is developed and perceived.

5.46 We have noted the different approaches adopted in the United Kingdom and Australia but have not at this time conducted a detailed analysis of the way in which the provisions operate. At this stage of the review, we are interested in views the public might have on whether an approach

196 Beck, above n 116, at 407.

197 At 407.

198 At 407.

199 At 408.

200 Clive Walker *Terrorism and the Law* (Oxford University Press, New York, 2011) at 263.

201 National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), ss 31(7) and 31(8).

similar to that adopted in the United Kingdom or Australia might be appropriate in the New Zealand context.

OPTIONS FOR REFORM

5.47 There is a good case for reform in respect of general civil proceedings. At the core of this argument is the fact that procedures that restrict or limit fundamental rights to natural justice and the principle of open justice should be established by Parliament. Other significant concerns are that the current practice of establishing procedures on a case-by-case basis has the potential to generate uncertainty over the process that might be adopted in any particular case and must rely on the ongoing co-operation and consent of all parties. There is an argument that a generic established procedure would also be both administratively efficient and more cost-effective.

5.48 A special advocate scheme may be capable of promoting principles of good governance, accountability and transparency. Special advocates both assist the court in reaching conclusions as well as representing the interests of the individual in question.

5.49 In the next chapter, we consider what kinds of models might be used. We will consider which features of the procedures adopted overseas might be drawn on to develop a model for the use and protection of national security information in administrative and civil proceedings and how to afford appropriate respect to natural justice rights.

QUESTIONS

Q13 Should the courts be able to consider national security information that has not been disclosed to one of the parties to a claim in civil proceedings?

Q14 Should New Zealand adopt a single overarching framework that applies to all civil proceedings?

Q15 What features should such a process have? Should the process use special advocates, security-cleared lawyers, summaries of the national security information, or other mechanisms to ensure the interests of the non-Crown party are represented?

Chapter 6
Reform – where to from here?

INTRODUCTION

6.1 This chapter explores the possible options for protecting national security information in proceedings, drawing on the experience of the United Kingdom, Canada and Australia as well as New Zealand's as yet untested Immigration Act 2009 provisions.

6.2 In exploring the possible options for reform, we consider the following underlying questions:

(a) What information is sufficiently prejudicial to national security to justify withholding it or having it only released into a closed procedure?

(b) Who should decide whether national security information is disclosed to affected parties in proceedings, withheld or partially released in proceedings – the courts or the executive?

(c) How should national security information be used in proceedings?

6.3 If New Zealand is to make greater use of closed proceedings, there remains the question of where to draw the line between the full disclosure of relevant material, disclosure in closed proceedings or refusing disclosure completely. One of the advantages of the closed proceedings model might be that it gives a procedure by which claims that material should not be disclosed can be examined. It also enables limited disclosure where the only other alternative would be non-disclosure.

6.4 As we discuss further below, we consider that, in criminal proceedings, the accused person should have the opportunity to fully answer the Crown's case against them. A prosecution should not proceed where non-disclosure of relevant evidence would lead to an unfair trial. However, in relation to civil and administrative proceedings it may be possible to fashion solutions that allow for partial disclosure.

WHAT INFORMATION NEEDS TO BE PROTECTED?

6.5 The first question is how to define what information should trigger the use of special procedures or the ability to refuse disclosure completely. In other words, what information is it truly necessary to withhold to preserve national security – given natural justice would otherwise require disclosure? Thus far, we have used a working definition of national security information in this paper. However, when considering reform, we will need a clearer and more precise definition.

6.6 Current legislation uses a range of terminology revolving around national security, foreign relations and the like. For example, the definition of "classified security information" used in the Terrorism Suppression Act 2002, the Passports Act 1992[202] and the Telecommunications Interception (Capability and Security) Act 2013[203] includes information that, if disclosed, would be likely to prejudice New Zealand's defence or international relations, or prejudice the

202 Passports Act 1992, s 29AA.

203 Telecommunications (Interception Capability and Security) Act 2013, s 102.

entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government or by any international organisation.[204]

6.7 For the purposes of this review, it would seem to be necessary to try to disaggregate some of the matters that come within broad concepts like prejudice to the security or defence of New Zealand or to New Zealand's international relations. In this context, we are concerned with the kinds of protections that justify withholding information that should otherwise be disclosed to the affected parties.

6.8 Careful consideration needs to be given to precisely what types of security interests should be sufficient to displace the normal assumption that relevant information is disclosed to the affected parties. While it may be appropriate for an official information request to be declined for fear of prejudicing trade agreements and, through them, New Zealand's foreign relations, this reason may not be sufficient to justify the invocation of a closed proceeding or completely refusing to disclose material to parties before the court. Within each type of interest, also, there might be different levels of seriousness. The degree of prejudice is therefore also relevant.

6.9 Our preliminary view is that the interests must really be of major importance to New Zealand and must truly be of a significant character to justify a limitation of such fundamental legal rights. In defining what information may not be disclosed, it ought to be remembered that, in certain circumstances, natural justice would otherwise require disclosure. In other words, there should be a strong reason not to disclose, and disclosure should remain the default position. A decision not to fully disclose must itself be limited by what is truly necessary to preserve national security. To achieve that aim, it is desirable to more closely define the concept of national security.

6.10 Not all claims to national security secrecy are the same. Under an approach that keeps the interests of all parties to mind, the greatest degree of disclosure and openness that is consistent with the national security interests at stake would be adopted. This suggests a range of pathways should be available for proceedings, depending on the sensitivity of the national security information in question and its importance. Less significant risks may be managed by the use of ordinary closed court proceedings or suppression orders rather than special advocate procedures.

QUESTION

Q16 What types of security interests should be sufficient to displace the normal assumption that relevant information is disclosed to the affected parties? (In other words, how should we define national security for the purposes of this review?)

WHO SHOULD DECIDE?

6.11 The second question we need to consider is who should decide whether national security information is disclosed to affected parties in proceedings, withheld or partially released in proceedings. Should it ultimately be for the courts or the Crown, for example, through the Prime Minister or Attorney-General, to decide what information is withheld on national security grounds?

204 Terrorism Suppression Act 2002, see s 32 for the full definition.

6.12 Currently, a number of different decision makers determine whether information should be disclosed depending on the context. As discussed in Chapter 3, it is our view that in criminal proceedings decisions should be made by the trial judge. In civil and administrative proceedings other options may have merit and we discuss these below.

Civil proceedings

6.13 If the Prime Minister determines that national security information is too prejudicial to disclose, he or she can issue a public interest immunity certificate under the Crown Proceedings Act 1950. Traditionally, these have been treated as decisive. At the same time, there has always been the ability for the court to question the certificate, and perhaps to reject it, and some uncertainty as to whether judges are entitled to see the underlying material before making their decision. There is considerable benefit in clarifying what judges may see before they accept a certificate, and in regularising the procedure through which their decisions are made.

6.14 Claims for privilege based on matters of state under section 70 of the Evidence Act 2006 are determined by judges. This is similar to public interest immunity, though it is not entirely clear what procedure judges are to adopt when determining if information that is claimed to be protected ought to be so protected.

6.15 In *Choudry v Attorney-General*, the Court of Appeal acknowledged the competing interests that exist in terms of protecting national security information while promoting open government and justice when it stated that:[205]

> ... development of those wider controls and the movement to more open government have always, of course, been accompanied by balancing factors or limits, in particular in respect of matters of national security, an area which is often associated with defence and international relations.

6.16 The Court noted that matters of national security were traditionally "non-justiciable or barely justiciable"[206] but that there is an increasing trend in the courts (nationally and internationally) as well as the legislature to contemplate a role for the judiciary in balancing the needs of national security with the proper administration of justice. In *Choudry,* the Court concluded that "the secrecy of the work of an intelligence organisation is essential to national security and the public interest in national security will seldom yield to the public interest in the administration of civil justice".[207]

6.17 In his dissenting judgment, Thomas J viewed the courts as playing a significant role in ensuring accountability of the intelligence agencies. While talking about public interest immunity, Thomas J considered that the courts had a real role in balancing the public interest in the administration of open justice standards and the public interest in preventing disclosure of information on the grounds of national security but said this role was impossible if the courts were not possessed of all the relevant information. He considered that "the court cannot and should not diminish the important judicial role of balancing the competing public interests and determining where the balance of public interest lies" just because the term "national security" is used.[208]

Administrative decisions and review

6.18 The various statutory regimes discussed in Chapter 4 have different mixes of Ministers, officials, tribunals and courts making decisions, first, in relation to what information poses a

205 *Choudry v Attorney-General*, above n 19, at [12].

206 At [12].

207 At [19].

208 At [8] per Thomas J.

risk to national security; second, in relation to what information should be subject to closed proceedings; and third, as to how those procedures should operate. In some regimes, there are different decision makers for each of these steps. A number of regimes place the initial responsibility on a government department or on the security services to make the original claim for protection, although the court still determines if the information is relevant to the proceedings.

Options for reform

6.19 We suggest that there may be three options in terms of the respective role of the Crown (through the Prime Minister or Attorney-General) and the courts.

I. The Crown could determine whether national security information is too prejudicial to release. Under this option, we would retain something like the section 27 approach of issuing a public interest immunity certificate. Some clarification would be needed to ensure that any role the courts have reviewing the issue of a certificate is restricted.

II. The courts could determine whether any claim by the Crown of national security is valid. The courts would have the power to order disclosure to the affected parties in proceedings or to partially release. The basis on which this is done would need to be clarified.

III. The courts could determine whether any claim by the Crown of national security is valid and have the power to order disclosure (as above), but the Crown would then be able to override that decision by issuing a public interest immunity certificate.

Option I – the Crown determines

6.20 The first option would require clarification of the conclusive status of a certificate under what is currently section 27 of the Crown Proceedings Act 1950. It would also require better alignment between this provision and section 70 of the Evidence Act 2006. This option would mean that the courts could not look behind the decision of the Crown and consider the merits of the decision to issue the certificate.

6.21 The information covered by the certificate would be withheld on the grounds of national security, or, if new closed processes were introduced, the information would be partially released subject to whatever protective measures were in place for using such information in court. The possible measures for using national security information in court are discussed later in the chapter. The important point here, though, is that the Crown rather than the court would determine whether the information should be introduced into any such procedures.

6.22 There are legitimate reasons in favour of the Crown retaining the function of determining whether information is prejudicial to national security interests. Questions of national security, defence and external relations are generally accepted to be matters for the executive branch of government rather than the judiciary.

6.23 New Zealand is heavily dependent on national security information being passed on by its allies, and those allies could be reluctant to pass on information in future without guarantees that it will not be released in court proceedings. The security services have to be able to assure themselves and their international information-gathering partners of the ultimate safety of some of the information that they possess. To do this, they may consider it necessary that the Prime Minister or another Minister of the Crown has ultimate control over the information. An approach that gives the final say to the courts may not provide the Crown, which has responsibility for matters of national security, with enough assurance that information will be adequately protected.

6.24 The Crown may also consider that there are circumstances in which information that risks serious prejudice to national security interests cannot even be revealed within a closed court process. In such cases, the question is whether the law should allow the Crown to ultimately make the final determination not to disclose the information or use the closed procedure or whether the courts should ultimately determine this issue.

6.25 Withholding information may have implications for how the underlying proceedings are conducted. Regardless of whether the Crown makes the decision to withhold, the court will manage the proceedings and determine whether they can fairly continue in the absence of relevant information.

Option II – the courts determine

6.26 Under the second option, the decision would ultimately be one for the courts rather than the Crown, although in the area of administrative decisions discussed in Chapter 4, Ministers and officials would retain their roles in respect of first instance decisions. However, the courts would determine at the appeal or review stage whether information should be withheld because disclosure creates a risk for national security or whether it should be partially available within a protected court process. The certification process under section 27 of the Crown Proceedings Act 1950 would be repealed.

6.27 This option emphasises the principle that the Crown should be required to act within the law. Those who exercise public power are to be held accountable, and their decisions should be able to be reviewed by an independent body. At times, accountability of the Crown requires the courts to exercise their constitutional role of supervising the use of executive power.[209] The courts exercise control under their inherent jurisdiction to review executive action through the use of judicial review. In this way, the courts function to restrain Ministers and officials from exceeding their powers.[210] This type of judicial oversight is part of the application of the checks and balances inherent in a system like ours, which divides power between different branches of government.[211]

Option III - Canada's executive override model

6.28 The third option that may be worth considering is the hybrid approach adopted in Canada. This has the court determine whether information should be withheld on the grounds of national security or whether it should be partially available within a protected court process. However, the Attorney-General is given a statutory power to override the court's decision on the grounds of prejudice to national security by issuing a certificate withholding the information.

6.29 Under the Canada Evidence Act 1985, parties in proceedings and government officials must notify the Attorney-General if it is believed that sensitive information will be disclosed in a proceeding.[212] The Attorney-General then decides whether to authorise the disclosure of the information. If the Attorney-General decides not to disclose it, the decision is submitted to the Federal Court. The Federal Court Judge, who is not the trial judge hearing the underlying substantive proceedings, applies a public interest balancing test in deciding whether the information should be disclosed. The Federal Court has the flexibility to decide that the information should be disclosed in partial or summarised form. Once the Federal Court Judge

209 Thomas J emphasised this point in his dissenting judgment in *Choudry v Attorney-General*, above n 19. He considered that because of the very nature of national security, the New Zealand Security Intelligence Service cannot be held accountable by anybody other than the courts and it is the responsibility of the courts to perform a supervisory function to ensure that they are answerable in a society that places high values on the accountability of public servants.

210 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 212.

211 At 212.

212 Canada Evidence Act RSC 1985 c C-5, s 38.

has made this decision, the proceedings go back to the court of origin, where the presiding trial judge continues to undertake an ongoing review of whether or not the non-disclosure order is compatible with fair trial protections.

6.30 If the Federal Court decides to allow disclosure, the Attorney-General has the power to nevertheless prohibit disclosure by issuing a certificate that "prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity ... or for the purpose of protecting national defence or national security".[213] The only grounds for review are whether the information in question falls within the permissible grounds for issuing a certificate.

6.31 The Federal Court decision is subject to what is effectively an override by the Attorney-General, because any final review of the certificate can only be on very narrow grounds. However, although the Crown (through the Attorney-General) can ultimately exercise a veto, the very fact it must override the Federal Court inhibits it from doing so. To date, the override has not been used. The court has, in practice, determined the issue, but the existence of the override power arguably gives the needed assurance to security agencies and international partners.[214] It is suggested that this approach may generate a degree of mutual deference between the judicial and executive branches of government.

6.32 While there are obviously many differences between the Canadian and New Zealand contexts, including of course the fact we do not have an equivalent to the Federal Court, their approach might still provide a suitable model. It could be possible to design a model under which the court determined whether the Crown's initial claim of prejudice to national security was valid, but the Crown (the Prime Minister or Attorney-General) then had the power to issue a certificate and to withhold the information. This would be a very transparent and public override of the court's decision. Such an override would only rarely be used and only where the Crown considered it had no choice but to overrule the order for disclosure. A certificate issued at the end of the process would have conclusive status, and the courts would not be able to look behind the certificate to consider the merits of the decision to issue it.

6.33 We are seeking feedback on whether this type of approach would be workable in New Zealand or whether one of the other options is preferred. There are implications in this type of override approach for the constitutional relationship between the courts and the Crown. As discussed above, the judiciary has a constitutional role of supervising the use of executive power. Legislating to empower the Crown (who would otherwise only have authority by acting through Parliament and legislating to change the law) to override a decision of the courts may not sit comfortably with this role.

Security clearance and judges

6.34 Whether or not the Crown makes the final decision, courts have to deal with cases that involve national security information from time to time, and the question arises whether there should be additional protection measures in place. For example, should cases be restricted to a small pool of judges or tribunal members who might perhaps have some specific training or support to hear these types of claims? A step further might be to consider whether some form of security clearance for such judges or tribunal members is appropriate.

6.35 The legislative schemes we discussed in Chapter 4 do not require judges, or Tribunal members in the immigration context, to have any form of security clearance. There is an implicit

213 Canada Evidence Act RSC 1985 c C-5, s 38.13.

214 McGarrity and Santow, above n 18, at 141 also argue that while the court is ostensibly required to weigh the public interests for and against disclosure, in reality, the approach taken by the court tips the scales towards deference.

assumption that such a step is not necessary. Instead, the approach taken, for example, in the Immigration Act 2009, is to restrict the pool of judges who may hear cases involving classified information. Proceedings before the Immigration and Protection Tribunal that involve classified information must be heard by the Chair of the Tribunal, who must be a District Court Judge, or by the Chair and one or two other members who must also be District Court Judges.[215] Proceedings in the courts involving classified information may only be heard by the Chief High Court Judge and up to two other judges nominated by the Chief High Court Judge.[216]

6.36 If, for a range of reasons, such as retaining proper separation between the branches of government or preserving the status of judicial officers, seeking security clearance for all judges is not an option, an alternative is to limit the pool of judges or tribunal members who deal with these cases. For example, more senior and experienced High Court Judges, or a pool of judges who have had specific training around security issues.

6.37 One way to help build the trust and confidence of New Zealand's security agencies and their international partners is to adopt robust security measures for managing and handling information in the courts. Limiting the pool of people (including judges) who might be involved, using security-cleared court staff and implementing similar measures in secure facilities are likely to assist in developing greater confidence that national security information is well protected and secure when it is used in court processes.

QUESTIONS

Q17 Who should decide whether national security information is disclosed to affected parties, withheld or partially released in proceedings? Should it be the courts or the Crown through the Attorney-General or the Prime Minister?

Q18 Would a model under which the court determines whether the Crown's claim of public interest immunity on the grounds of national security is valid, but the Prime Minister or Attorney-General has a power to ultimately and publicly override the court's decision be workable for New Zealand?

HOW IS NATIONAL SECURITY INFORMATION TO BE USED?

6.38 This is a question that needs to be resolved in stages:

(a) There needs to be a preliminary determination on whether the information is evidentially relevant to the proceedings.

(b) There needs to be a determination as to whether the information is within the scope of what is national security information.

(c) For the purposes of the actual hearing, a determination needs to be made as to how the information should be handled in the court.

6.39 At the preliminary stages, there are questions as to whether a court or tribunal ought to look at the information that is claimed to be national security information in order to assess whether it is indeed evidentially relevant to the proceedings. While, traditionally, there have been reservations as to whether judges should view classified information subject to public interest immunity claims, the time for such reluctance may have passed. We suggest that the

215 Immigration Act 2009, s 240.

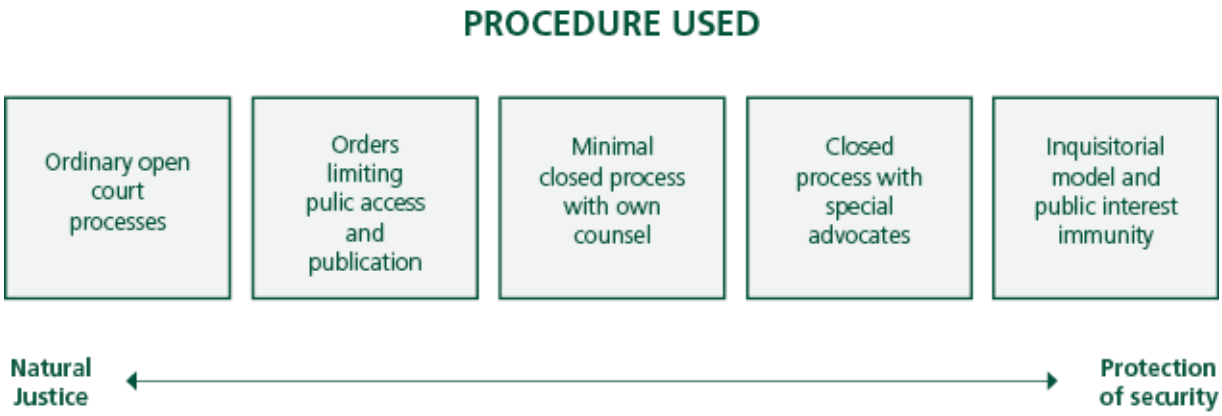
216 Immigration Act 2009, s 252.

tribunal or court concerned probably should look at the national security information before it can make a decision as to whether it is evidentially relevant. Assuming it finds the information is evidentially relevant, the court would also need to assess whether the information comes within the scope of national security information and to then determine the conditions under which it can be used in the proceedings.

6.40 Even the preliminary stages raise the question of whether judges, tribunal members and the facilities that they use will need to be security-cleared and, perhaps even more significantly, whether special advocates or even the other party's lawyers can assist the decision maker and how they might do so.

6.41 At the substantive stage, there are a range of options for handling the information. These are set out in the diagram below. One option (which, from a natural justice perspective, is perhaps the least desirable course of action) is to withhold the material completely or allow only the judge or decision maker to see the national security information. This approach ensures the protection of the information, as counsel for the affected person would not have access to the information. At the other end of the spectrum there are ordinary open court processes that address natural justice but fail to address the need for protecting national security interests. Somewhere between fully open and fully closed sits the model of partial disclosure to a special advocate that has been adopted in both the United Kingdom and Canada and for which legislative provisions have been made in New Zealand in the Immigration Act. Special advocates can see and question material as if acting for a client, but they cannot divulge the material to the affected party beyond the provision of a "gist of the material" (that is, a summary).

6.42 It is helpful to visualise the different options along a continuum depending on the relative weight each gives to values of open justice and natural justice on the one hand and security protection on the other.



Withholding national security information from the non-Crown party

6.43 There are two approaches for completely withholding relevant national security information from the non-Crown party - one where the information still forms part of the evidence but is not even partially disclosed other than to the decision maker, and one where it is withheld and cannot be used as evidence.

(a) *A closed inquisitorial model:* National security information is heard by the decision maker without the affected person being present or represented (even by a special advocate). Out of necessity, the decision maker has a more inquisitorial role and must test the security information without it being subject to challenge by the affected person or any type of adversarial process.

(b) *Excluding information from the proceedings:* An alternative to using sensitive material in proceedings is to prevent even partial disclosure to the court (the public interest immunity approach). The information would be wholly excluded and neither side would be able to use it, although the government would have the benefit of having seen the information.

6.44 Under the closed inquisitorial approach, the national security information is heard by the decision maker without the affected person being present or even represented by a special advocate. This means that the decision maker must test the security information without it being subject to challenge. The usual adversarial process cannot apply if no one is representing the affected person's interests. Although the decision maker may appoint a person as an amicus to assist in testing the evidence.

6.45 Historically, this model was used in some administrative contexts, for example in immigration. It is at the opposite end of the spectrum from open court processes and the tribunal is the sole party able to protect the affected person's rights to a fair hearing. In both Canada[217] and the United Kingdom,[218] where this model was previously used for immigration cases, its use in contexts where significant rights are at stake has now been severely criticised by the courts, and it has now largely been superseded by various forms of closed material procedures using special advocates and giving partial disclosure.

6.46 The development of special advocate closed procedures, which give greater weight to the affected person's rights to natural justice and a fair hearing without compromising security interests, means there are only limited circumstances where withholding sensitive material might be appropriate. Natural justice is an essential component of democracy in New Zealand, and denying an individual the right to present their case or argue in their own defence is an extreme measure. Any security threat used to justify setting aside this right would need to be significant.

6.47 As discussed earlier in the paper, New Zealand law allows national security sensitive evidence to be excluded in both criminal and civil proceedings. This was the position under the common law of public interest immunity and is now the position under the Criminal Disclosure Act 2008 and under section 27 of the Crown Proceedings Act 1950 and sections 69 and 70 of the Evidence Act 2006.

6.48 The question of whether the courts or the Crown should decide that information should be withheld was considered in the previous section.[219]

Use and protection of national security information under ordinary court processes

6.49 Another option is for national security information to simply be treated in the courts in the same way as other types of sensitive information and for ordinary court processes, with perhaps some modification, to be used. As discussed in Chapter 2, a fair hearing requires that the defendant, and normally also the public, knows what evidential material is being considered by the judge or jury and that both the prosecution and the defence should have a fair opportunity to address all material being considered by the decision maker when reaching a verdict.

6.50 Use in open court envisages that national security information is disclosed to the affected party, subject to protection measures that are already available to deal with other types of

217 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 at [61]. The Canadian Supreme Court said "fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case". For this to be satisfied either "the person must be given the necessary information, or a substantial substitute for that information must be found".

218 *Chahal v United Kingdom* (1996) 23 EHRR 413.

219 For more detail, see Law Commission, above n 14, at ch 7.

sensitive information, such as commercial or highly personal information. These include orders excluding the media from the court room or orders suppressing names, evidence or certain details. Under this option, there would be no additional special processes. This approach would have the following features:

- Ordinary open court processes (with no modification of standard fair hearing rights) would apply.
- Orders would be made under general provisions to clear the court, restrict public access to information or forbid publication of details (suppression) where required to protect the interests of national security.
- Witness anonymity orders might also be made where appropriate to prevent the parties from knowing the identity of a witness.[220]

6.51 In the context of criminal proceedings, the Criminal Procedure Act 2011 allows the judge to clear the court where national security or defence interests make this necessary. Public access to information can also be restricted, and the judge can make various suppression orders forbidding publication of details of cases where the interests of national security or defence require this.[221] Witness anonymity orders can be made under the Evidence Act 2006 where the judge is satisfied that preventing the defendant and his or her counsel from knowing the identity of a witness will not prejudice a fair trial.[222] In addition there is the broad discretion available to trial judges under section 54(4) of the Evidence Act 2006 to control how information is used in proceedings. The real question with this approach is whether these measures are enough to protect national security information when it is being used.

6.52 As discussed in Chapters 2 and 3, in criminal proceedings the right of the accused to a fair trial is protected by section 25(a) the New Zealand Bill of Rights Act 1990, which provides that "everyone who is charged with an offence has, in relation to the determination of the charge, the right to a fair and public hearing by an independent and impartial court". In the criminal context, the highest value is given to open justice and natural justice. Security interests have to be managed against that background. Where the risk can be managed by such measures, judges can clear the court or make use of suppression powers. Where the risk to national security is more serious, the material could be withheld and not given in evidence.

Partial disclosure options

6.53 The remaining options outlined below allow for partial disclosure. The partial disclosure procedures that we discuss address the situation where national security information is so relevant that it cannot fairly be excluded. Its presentation to the court or decision maker is essential in order to achieve an informed decision and do justice in the case at hand. These cases prompt us to ask how the information should be protected when being used. Potentially, the different procedures outlined would be more likely to protect the interests of both sides, compared with the "all or nothing" approach of non-disclosure.

Excluding the affected person but not their counsel

6.54 Under this approach, the affected person might be excluded, but the affected person's lawyer might be security-cleared to view the national security information. Counsel would also need to

220 Evidence Act 2006, ss 110 – 118.

221 Criminal Procedure Act 2011, ss 197 and 198 (powers to clear the court), ss 200, 202, 205 (powers to suppress identity of defendants, witnesses, victims, connected persons, evidence and suppression). The High Court also has inherent power to make such suppression orders as are otherwise necessary for the administration of justice and to protect the security and defence of New Zealand.

222 Evidence Act, ss 110 – 118.

issue a non-disclosure undertaking.[223] The party concerned would receive as much information as can be disclosed, including partially redacted documents. A summary of allegations or a "gist" of the allegations could also be disclosed to the affected party.

6.55 This model answers many of the criticisms relating to the special advocate model (discussed below) and has both the advantage and disadvantage of being a unique and largely un-trialled (in Commonwealth jurisdictions) system. It could therefore be adapted to the needs of New Zealand but would not bring with it the lessons learned elsewhere.[224]

6.56 It is difficult to reconcile this model with the normal understanding that lawyers will share all information with their clients so that they will be able to receive proper instructions. It will be difficult for lawyers to build an effective case if they cannot communicate with their clients and discuss the significance of security information. This risks distorting the traditional view of a lawyer/client relationship.

6.57 However, when this option is compared with a special advocate procedure (discussed further below), there are potential advantages, and it is certainly better from the perspective of natural justice than simply withholding the information while allowing the decision maker to take it into account.

6.58 This approach was used in Canada in the *Air India* criminal trial. The defence counsel, after viewing the information, negotiated with the Crown as to whether individual documents were of real importance to the defence and should be disclosed in the public interest. Some documents were released in this manner and then became available to the defendants, while other documents were withheld from the proceedings.[225]

6.59 This option might have particular merit in cases where the information is highly relevant but also sensitive, yet the nature of the proceedings does not justify the use of a special advocate. We invite submissions as to whether this could extend to some aspects of criminal cases, such as a challenge to search warrant that was obtained on the basis of sensitive evidence, or whether it is too significant an in-road on fair trial rights or the normal expectation that a lawyer must share all information that he or she receives with his or her client.

Special advocates representing the affected party in closed material proceedings

6.60 This approach goes a step further in terms of protecting national security information from inadvertent disclosure. Under a special advocate model, the affected person and their chosen counsel are excluded, and a security-cleared special advocate is appointed to represent the person's interests in respect of the protected material. The person concerned and their chosen counsel will receive partially redacted documents and summaries of allegations (known as a "gist" of the allegations) if these can be disclosed openly. The special advocate would receive full access to the relevant national security information. There are more or less restrictive options for implementing this model. One approach would be to allow the special advocate to assist in preparing the summaries and to challenge the level of redaction while receiving instructions directly from the affected party or their counsel. A more restricted option would be to prevent the special advocate from communicating with the affected party and would limit their role to advancing arguments based on the information available without ability to challenge the level of disclosure.

223 Craig Forcese and Lorne Waldman *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings* (Canadian Centre for Intelligence and Security Studies, August 2007) at 58.

224 Forcese and Waldman suggest there is scope for another option before jumping to the use of special advocates.

225 At [58].

6.61 Special advocates have developed as an important alternative to secret evidence and closed tribunals in contexts where the sensitive evidence is highly relevant but disclosure would prejudice significant national interests. The special advocate can argue for greater disclosure to the affected person and can also represent the affected person's interests in the proceedings from which the person is excluded. In a New Zealand context, John Ip describes the special advocate functions as a mechanism for mitigating the prejudice of a closed material procedure and the attendant non-disclosure of the material.[226]

6.62 The key issues to address when considering how a special advocate mechanism might work include the following, which are discussed in more detail below:

- The extent of the interaction between special advocate and the person they represent or their lawyer.
- Whether the special advocate can challenge the claim of non-disclosure and advance arguments for making more materials available to the person they represent or their lawyer.
- Whether the final decision on disclosure should be made by the judge or by the executive (see our earlier discussion on this point).
- The resourcing available to the special advocate and funding implications.
- The process for designating a lawyer as a special advocate.
- Whether individuals can choose their advocate, especially as in New Zealand there may only be a small number of special advocates.
- The processes for protecting the national security information, such as the use of secure court rooms.
- Whether the judges are security-cleared, or whether only particular specialist judges are used.

6.63 The special advocate option provides a mechanism for mitigating the prejudice of a closed procedure and the non-disclosure of relevant material to the affected person. Compared with disclosing the information to counsel chosen by the affected person, it gives greater assurance to intelligence-gathering agencies.

6.64 Special advocates would normally have security clearance. For example, the special advocate scheme under the Immigration Act 2009 requires special advocates to be security-cleared by the Chief Executive of the Ministry of Justice and also imposes a statutory duty on a special advocate not to disclose security information.[227] This is an important safeguard to protect the information. It would be essential that anyone appointed as an advocate would be a skilled lawyer of high standing. We understand from officials that the current expectation is that lawyers designated as special advocates under the Immigration Act 2009 are well respected and highly skilled members of the bar.

226 John Ip "The Rise and Spread of the Special Advocate" [2008] PL 717 at 717.

227 Immigration Act 2009, s 263.

6.65 From the perspective of the affected person, the issue is whether special advocates can, given the constraints under which they operate, adequately ameliorate the unfairness of proceedings where they do not receive full disclosure of the case against them.[228] Opinion remains divided. The next section will consider how best to resolve this issue.

QUESTION

Q19 Do you think there are benefits in developing an approach under which the affected person's own lawyer can represent them during closed proceedings (and not a special advocate)? How would this affect the lawyer's obligations to their client?

CREATING A WORKABLE SPECIAL ADVOCATE MODEL

6.66 A key question for this review is how to create a workable special advocate model that allows the affected party's interests to be properly represented when national security material is relevant to their claim but cannot be disclosed directly to them or to their chosen counsel.

What information must be provided to the affected person?

6.67 As discussed in the chapters above, rules of evidence generally require that all parties have access to information relevant to the question at hand. The special advocate model is a mechanism for partial or controlled disclosure of national security information. The question is, how much disclosure is enough?

6.68 Under the models in the United Kingdom, Canada and Australia, the Crown is able to rely on documents and material it puts into the closed system while only disclosing a summary or part of those documents to the other parties. The Canada Evidence Act 1985[229] and the National Security Information (Criminal and Civil Proceedings) Act 2004 in Australia[230] enable the court to authorise disclosure of all the information, a part or summary of the information or a written statement of facts relating to the information.[231] In the United Kingdom, the Justice and Security Act 2013 provides that the court must consider requiring a summary of the closed material to be provided to all excluded parties where it is possible to do so without damaging national security.[232]

6.69 However, in all of these regimes, the legislation gives little guidance as to the content of the summary, and this question will largely be left to the courts. In the context of reviewing a control order, the House of Lords has said that the individual affected by the decision and excluded from the proceedings:[233]

> ... must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

228 John Ip "The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill" [2009] NZL Rev 207 at 218.

229 Canada Evidence Act RSC 1985 c C-5, s 38.06(2).

230 National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s 38L.

231 McGarrity and Santow, above n 18, at 142.

232 Justice and Security Act 2013 (UK), s 8(1)(c).

233 *Secretary of State for the Home Department v AF* [2009] UKHL 28 at [59].

6.70 In the *Zaoui* litigation, Williams J stated that the right of a person charged, or subject to a security certificate, to know "at least the outline of the allegations against them and the basis on which they are made" was a basic principle of natural justice to be given effect to the fullest extent possible having regard to the restriction on disclosing classified security information.[234] The result of this ruling was that there was significant disclosure in the *Zaoui* proceedings, which allowed, among other things, the special advocates to be extensively briefed by the counsel for the represented party prior to their viewing of the classified material.[235]

6.71 How much information must be disclosed in order to ensure natural justice requirements are satisfied appears, at least partly, contextual. For example, in the context of section 242 of the Immigration Act 2009, a summary must be able to "give an appellant or affected person an opportunity to comment on potentially prejudicial information in the course of proceedings involving classified information before the Tribunal". The Tribunal will determine how this objective is to be achieved in light of the guidance given in section 242 on what information should be excluded.

The role of special advocates in arguing for greater disclosure

6.72 In their study of special advocates, Waldman and Forcese concluded that special advocates "clearly see as one of their key (and perhaps principle) roles pressing for greater disclosure".[236] Given obligations arising from intelligence-sharing relationships and the imperative to keep intelligence-gathering methods confidential, intelligence agencies are likely to err on the side of non-disclosure. A practice of over-claiming secrecy is an understandable occupational hazard.[237] There is therefore a potential role for special advocates, who have viewed the national security information, to challenge the claim for non-disclosure on the basis that the particular information could be released. On at least three occasions in Canada, security-cleared counsel has been successful in arguing for further information to be disclosed openly. As a result, the Canadian courts increasingly require the security services to ask foreign agencies whether they are willing to amend caveats to allow the disclosure of information.[238]

6.73 In *Zaoui,* the special advocates were appointed to present arguments on the question of how much secret information should even be disclosed to Mr Zaoui and his counsel. Under the Immigration Act 2009, there is some uncertainty over the extent to which the special advocate has a meaningful role in arguing for greater disclosure given that pursuant to section 242(7), "a special advocate may not be involved in the process of approving, amending, or updating a summary". The special advocate represents the affected person in proceedings if material remains classified and undisclosed to the affected person. However, the special advocate can advocate for greater disclosure at the preliminary hearing (albeit indirectly) by trying to get material declassified.

Level of judicial control over proceedings

6.74 Special advocate models are likely to better protect the interests of the affected party where the court, rather than the Crown, has the ultimate decision making role regarding what information must be disclosed to the affected party. If the court is unable to require disclosure of information or determine the adequacy of the summary of information the affected party receives, there is a risk of greater prejudice to the affected party. Conversely, if the court has a strong supervisory

234 *Zaoui v Attorney-General*, above n 132.

235 Ip, above n 228, at 222.

236 Forcese and Waldman, above n 223, at 42.

237 Roach, above n 155, at 188.

238 At 188.

role, it will be better able to strike the right balance between the competing interests and ensuring that justice is done and seen to be done.

6.75 If the court is too constrained, its independence from the Crown might even be called into question. It needs to have sufficient control over proceedings or it is simply lending legitimacy to matters determined elsewhere.

Ability of represented party to properly instruct the special advocate

6.76 The major constraint on the special advocate is the restriction on communications with the represented person after having viewed the closed material. This raises questions over the ability of a special advocate to represent interests without being able to take instructions based on the information contained in the closed material.[239]

6.77 Once a special advocate has been given access to the closed material in the case, normally no communication is permitted with the represented party or their legal counsel. Some models provide for limited communication with the permission of the tribunal or court before which they are appearing (as per the New Zealand Immigration Act 2009 model).

6.78 In Canada, once the special advocate has seen the secret evidence, he or she cannot communicate with anyone about it without judicial authorisation and subject to any judicially imposed conditions.[240] There is no absolute bar on communication rather, judges are delegated the power to determine how far the special advocate can go in the exercise of his or her duties.[241] The limitations on special advocates communicating with the represented person are part of the broader obligation on the advocate not to disclose the national security information.

6.79 The strict limitations on communications are a significant departure from conventional fair trial standards and are one of the most controversial aspects of the United Kingdom special advocate system.[242] It would appear that these rules reflect the concern that special advocates may inadvertently disclose information, for example, through the questions they ask of the affected party after viewing the information.[243]

6.80 In addition, counsel for the represented party may face problems if open court proceedings run alongside closed court proceedings but communication with the special advocate is not allowed.

6.81 In its 2012 report on secret evidence, Amnesty International quoted one lawyer who described acting in such cases as "shadow boxing" where "you are speaking into a black hole because you have no idea if your strategy and points are on the money or wide of the mark".[244] The degree of secrecy makes it difficult for lawyers to know how best to respond to the case against their client, as they are faced with the option of either providing the life story of their client, hoping that something they say may support their client's case, or self-censoring to avoid the risk that adopting a certain line of questioning might result in negative consequences in the secret part of the hearing that could be dispelled if the lawyer were aware of them.[245]

6.82 Despite such limitations, supporters believe that special advocates can still be effective. Kent Roach considers that the special advocate system has achieved some good results since its

239 Prior to viewing the sensitive information, the special advocate is not in a position to be able to ask questions about the information, so access to the represented party is of limited utility. One potential benefit could be that the special advocate can give an objective assessment of the case preparations to that point.

240 Immigration and Refugee Protection Act SC 2001 c 27, s 85.4(2).

241 Roach, above n 155, at 186.

242 At 186.

243 At 188.

244 Amnesty International *Left in the Dark: The Use of Secret Evidence in the United Kingdom* (October 2012) at 11.

245 At 11.

introduction, and in his view, this justifies preferring special advocate procedures to alternative pseudo-inquisitorial options that do not have advocates.[246]

Alternative of security clearing affected person's lawyer

6.83 As mentioned above, the alternative of security clearing the affected party's chosen counsel may address some of the concerns with the special advocate model. Kent Roach makes the obvious point that the person's own advocate is the person most familiar with the case and most likely to be able to place the information within that broader context of the narrative of the case. He is therefore critical that the option of giving security clearance to the affected person's own lawyer was discounted in Canada. He thinks that a model that allows security-cleared lawyers greater access to the affected person and his or her counsel without judicial approval would be "a more proportionate alternative that responds to some of the deficiencies". Such an approach depends on the good judgement and discretion of security-cleared counsel. He says that, in models where they are used, there have been no complaints that lawyers inadvertently (or deliberately) leak secrets.[247]

6.84 However, as is the case in Australia, the weakness of this approach is that the affected person would need to choose a counsel willing and able to gain a security clearance.[248] There may be many reasons why counsel would not be willing to undergo a security clearance, including the time taken, the process of completing the forms and the exposure of one's personal life to scrutiny. There may also be the risk that some capable lawyers would not be granted a security clearance, a process that is by its nature secret.[249]

Resources and logistical support

6.85 There are issues over the adequacy of training and resources available to special advocates in many systems and contexts where they are used. In New Zealand, in the immigration context, we understand there to be approximately five Queen's Counsel who have security clearance and are recognised as special advocates under section 264 of the Immigration Act 2009. They have had no specific training to date, but we understand further training based on overseas resources is being considered.

6.86 Given the special advocate procedure is in its infancy in New Zealand and has often arisen on an ad-hoc basis, we understand that current support structures for special advocates are limited. Issues may include a secure court space, secure storage for documents, adequate security-cleared administrative and legal support staff, security-cleared translation facilities where necessary, access to research facilities within a secure space, remuneration for the special advocate, adequate time to prepare for the case and, as already highlighted, an adequate pool of advocates willing to undergo security clearance with the relevant level of expertise.

6.87 In response to complaints about resourcing in the United Kingdom, the Special Advocate Support Office (SASO) was established in 2006. SASO is a branch of the Treasury Solicitors Department and in order to retain independence operates with strict protections to keep internal operations separate from other branches of the Treasury Solicitor's Department.[250] We are interested in feedback on what sort of resourcing and logistical support special advocates would need to have available to them if a system was established in New Zealand.

246 Roach, above n 155, at 187–188.

247 At 189.

248 At 197.

249 For example, that they are closely related to someone who has been involved in activities that raise security concerns.

250 Forcese and Waldman, above n 223, at 30. The separation measures have not prevented some civil society groups and some affected persons and their advocates criticising that the SASO cannot, by its nature as a government dependant, be independent.

Tools for providing effective advocacy

6.88 Another issue is whether special advocates have adequate powers within the closed hearing process to be effective. For example, can they call witnesses, demand extended disclosure of other material and engage experts to help them? The Canadian system specifically provides for special advocates being able to cross-examine witnesses in closed proceedings and, with the judge's authorisation, to exercise any other powers that are necessary to protect the interests of the person. Under the provision, special advocates could seek judicial approval to call their own witnesses and to demand disclosure beyond the secret evidence used by the Crown in the case.[251] There is uncertainty whether the Immigration Act 2009 allows special advocates a similar array of powers.

Could special advocates have a limited role in criminal proceedings?

6.89 We have stressed throughout this paper that the right to a fair trial must be upheld in criminal proceedings. National security interests have to be managed against this background. We consider that this generally means that risks to national security must be managed by ordinary measures, such as judges clearing the court or making use of suppression powers. We also consider that, where the risk to national security is more significant, material that cannot be presented to the court even with those protections must be withheld and not relied on as evidence. We do not think that having evidence presented to the court without either the defendant or their counsel present can be reconciled with the right to a fair trial.

6.90 However, there may be scope in criminal trials to use special advocates in the preliminary stages leading to trial to assist in determining whether information should be withheld. Special advocates could view the national security information and then, if appropriate, challenge the claim for non-disclosure.

6.91 The court could benefit from having this type of assistance from a lawyer representing the defence perspective when trying to assess the material. It would help address any risk of over-claiming on national security grounds and could lead to more information being disclosed and better evidence being available for the substantive hearing. Where non-disclosure is justified on national security grounds, the special advocate would be there to protect the defendant's interests and assist the court when assessing any prejudicial effect non-disclosure has on the defence and particularly whether a fair trial remains available.

6.92 Amendment to the Criminal Disclosure Act 2008 would be needed to give effect to this proposal.

A generic legislative framework or specific regimes?

6.93 One final issue to consider if New Zealand does enact further closed proceedings regimes is whether it would be desirable to have one broad regime that extends across all areas or whether it is better to continue to design specific regimes for specific contexts, such as the one in the Immigration Act 2009. There are, of course, advantages and disadvantages with either approach.

6.94 The main advantage of a generic model would be the commonality and ability to develop greater experience and expertise from relatively few cases. Based on experience to date, we do not expect that there will be many cases that would need to utilise special advocates and closed processes. A generic regime might be preferable given how rarely such processes are used. Also, a generic regime would promote consistency of approach when dealing with national security

251 Roach, above n 155, at 189.

information. General principles and standards would be set, and there would be less risk of deviations from these.

6.95 One disadvantage with a generic approach is that it potentially goes wider than is necessary and may limit the ability to tailor the processes to the specific situation. There is therefore some risk that it may begin to normalise such processes. To date, these issues have arisen infrequently and only in certain specific contexts. It may be better therefore to address the specific contexts where the issues arise rather than developing a broader legislative framework that is potentially wider than is needed. Specific solutions do also allow for a greater degree of tailoring to the particular context, although this does risk general principles and standards being eroded. With an incremental approach, responding to specific situations, there is more scope for unnecessary and unjustified variation.

Cautious approach to use of closed procedures

6.96 Finally, whatever we do in terms of legislative reform, we must guard against the risk that a legislative scheme will start to normalise the use of closed proceedings so that the degree of risk that triggers the use of a closed process ends up being set too low. Closed procedures should not be the default simply because there are claims to national security. To ensure the use of closed procedures is monitored and reviewed, new legislation could probably contain provisions requiring periodic reports on the use of those procedures and providing for periodic reviews of their operation.

6.97 As discussed already, not all risks to national security need the same level of protection. We think that the bar needs to be set relatively high for triggering any departure from the normal standards of natural justice. To ensure the interests of all parties are kept in mind, we consider that a range of pathways for proceedings are needed. The underpinning principle must be to facilitate the greatest degree of disclosure and openness that is consistent with the nature and magnitude of the national security interests at stake. The approach taken in any case would depend on the sensitivity of information itself and also on the importance of the rights or interests being determined. We have not reached any conclusions as to what these different pathways would involve but we would expect that closed proceedings, which impact on an affected person's access to information, would be reserved for those cases where that degree of protection of information is truly necessary. Our expectation is that less significant risks to national security can continue to be managed by using the tools for dealing with sensitive information in ordinary court proceedings. Also, in cases where significant rights or interests are at stake, such as in criminal proceedings, a high value must continue to be placed on natural justice.

QUESTIONS

Q20 Given the constraints under which they operate, do you think special advocates can adequately ameliorate the unfairness of proceedings when people are denied full disclosure of the case against them?

Q21 Should we have a special advocate regime for civil and administrative proceedings? What are the key features and protections you would want to see built into a legislative special advocate regime?

Q22 Do you consider that there is scope in criminal trials to use special advocates in the preliminary stages of the trial to assist in determining whether information that prejudices national security should be withheld? Do you agree special advocates should not be used in the substantive trial?

Q23 Do you favour a generic legislative approach that establishes one closed proceedings regime with natural justice safeguards that can be applied across all the relevant administrative and civil contexts and (possibly) aspects of criminal proceedings, or should specific regimes be retained and developed?

Appendix A
Questions for consultation

CHAPTER 3

Q1 How should national security information be protected when used as grounds for a warrant?

Q2 Should there be a role for special advocates in a pre-trial hearing on disclosure under the Criminal Disclosure Act 2008?

Q3 Do sections 69 and 70 of the Evidence Act 2006 provide sufficient guidance to a trial judge in determining whether to exclude national security information?

Q4 Should undercover security agents be able to use the same protections currently available to undercover Police officers, and give evidence anonymously?

Q5 Does the Evidence Act 2006 provide sound mechanisms for national security information to be used in a criminal trial in a controlled way that protects against risks associated with full disclosure, while still allowing for it to be properly tested, given the primacy that should be afforded to fair trial rights?

Q6 Do the current provisions allowing suppression orders provide for proper balancing of national security interests on the one hand and open justice interests on the other?

Q7 Is there a need to make explicit the expectation that criminal proceedings will be discontinued if there is no other way to protect national security evidence and avoid prejudice to the accused, for example, through giving the judge the power to order that proceedings be dismissed rather than information disclosed?

Q8 Are any further mechanisms, or any expansion of existing mechanisms, needed to enable national security information to be used as evidence in criminal trials, including for terrorist acts?

CHAPTER 4

Q9 Should elements of administrative decision making processes involving national security information be standardised at the initial decision making stage?

Q10 Should there be a single framework that applies to all reviews or appeals of administrative decisions that involve national security information?

Q11 What features should such a single framework provide for? Should it involve special advocates, summaries of national security information or any other mechanisms to help ensure a fair hearing?

Q12 Should courts or tribunals reviewing administrative decisions be able to consider information that has not been disclosed to the parties to the case?

CHAPTER 5

Q13 Should the courts be able to consider national security information that has not been disclosed to one of the parties to a claim in civil proceedings?

Q14 Should New Zealand adopt a single overarching framework that applies to all civil proceedings?

Q15 What features should such a process have? Should the process use special advocates, security-cleared lawyers, summaries of the national security information, or other mechanisms to ensure the interests of the non-Crown party are represented?

CHAPTER 6

Q16 What types of security interests should be sufficient to displace the normal assumption that relevant information is disclosed to the affected parties? (In other words, how should we define national security for the purposes of this review?)

Q17 Who should decide whether national security information is disclosed to affected parties, withheld or partially released in proceedings? Should it be the courts or the Crown through the Attorney-General or the Prime Minister?

Q18 Would a model under which the court determines whether the Crown's claim of public interest immunity on the grounds of national security is valid, but the Prime Minister or Attorney-General has a power to ultimately and publicly override the court's decision be workable for New Zealand?

Q19 Do you think there are benefits in developing an approach under which the affected person's own lawyer can represent them during closed proceedings (and not a special advocate)? How would this affect the lawyer's obligations to their client?

Q20 Given the constraints under which they operate, do you think special advocates can adequately ameliorate the unfairness of proceedings when people are denied full disclosure of the case against them?

Q21 Should we have a special advocate regime for civil and administrative proceedings? What are the key features and protections you would want to see built into a legislative special advocate regime?

Q22 Do you consider that there is scope in criminal trials to use special advocates in the preliminary stages of the trial to assist in determining whether information that prejudices national security should be withheld? Do you agree special advocates should not be used in the substantive trial?

Q23 Do you favour a generic legislative approach that establishes one closed proceedings regime with natural justice safeguards that can be applied across all the relevant administrative and civil contexts and (possibly) aspects of criminal proceedings, or should specific regimes be retained and developed?

Appendix B
Terms of reference

The Law Commission will undertake a first principles review of the protection of classified and security sensitive information in the course of criminal, civil and administrative proceedings that determine individuals' rights, and as appropriate, make recommendations for reform. The review will look at the protection, disclosure, exclusion and use of relevant classified and security sensitive information in such proceedings.

Context of the review

As part of the review the Commission should consider whether legislation is needed to provide a process by which classified and security sensitive information may be disclosed and used in court proceedings (including criminal trials) and administrative proceedings that determine individuals' rights in a way that protects the information while maintaining principles of fairness and natural justice. There are specific issues around sensitive security information being publically disclosed that the Commission will have to address. The Commission will be considering, among other things, the approaches of other jurisdictions under which security sensitive information can be admitted but not disclosed to private parties or defendants (or only disclosed to a special advocate acting on behalf of such parties). The Law Commission will need to develop a working definition of classified and security sensitive information for the purposes of such processes.

Issues to be considered

The issues to be considered by the Commission will include (but are not limited to):

(a) The law relating to claiming public interest immunity as a ground for not disclosing relevant information in civil proceedings and criminal proceedings and whether the law should be reformed so as to provide specifically for how a claim is determined;

(b) Whether current provisions for withholding classified and security sensitive information in criminal proceedings are sufficient, and if not, how they might be altered consistently with fundamental values that underpin criminal proceedings in New Zealand;

(c) Whether provision should be made for criminal trials in which classified and security sensitive information could be admitted but not disclosed publically or to the defendant (or could only be disclosed to a special advocate acting on the defendant's behalf) and whether such an approach can be reconciled with a defendant's fair trial rights;

(d) The implications of such trial processes for the law of evidence and rules of criminal procedure;

(e) Whether New Zealand should make provision for hearings in civil proceedings in which classified and security sensitive information can be admitted but not disclosed publically or to private parties (or could only be disclosed to a special advocate acting on behalf of such parties) and if so what form should these take to ensure a fair hearing consistent with natural justice;

(f) Whether New Zealand's current measures for admitting classified and security sensitive information in civil and administrative proceedings are effective, how comparative international approaches operate, and what New Zealand can learn from those experiences.

Scope of review

The issues covered by this review touch on important constitutional matters: the fundamental rights of citizens to open justice and to a fair trial, the respective roles of the judiciary and the executive, protecting national security and principles of open government and democratic accountability.

The Law Commission will conduct its review independently, but it will liaise with the independent reviewers appointed to undertake a review of security and intelligence agencies under section 22 of the Intelligence and Security Committee Act 1996 where there are common issues. Public consultation will be a key component of the Commission's processes before making any recommendations.

It is not intended that the Commission will make recommendations with respect to any purely operational matters, such as funding or other operational and administrative arrangements to institute an appropriate system for protecting classified and sensitive information in civil and criminal proceedings.